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Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and Failure of the Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space

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Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and Failure of the Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space

**RE-THINKING PRIVACY:
PEEPING TOMS, VIDEO VOYEURS, AND
THE FAILURE OF CRIMINAL LAW TO
RECOGNIZE A REASONABLE
EXPECTATION OF PRIVACY
IN THE PUBLIC SPACE**

LANCE E. ROTHENBERG*

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* Articles Editor, *American University Law Review*, J.D. Candidate, May 2001, *American University, Washington College of Law*; B.A., 1997, *The George Washington University*. I would like to dedicate this paper to the memory of Professor Peter Cicchino. He served as a genuine mentor, whose guidance was not only instrumental, but will remain with me as a model of professionalism and humanity throughout my career. In addition, I would like to thank Grace Mora, my student editor, for her support during the drafting and publication process.

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INTRODUCTION

In a society perpetually altered by human innovation, we are faced with the elementary problem of keeping the law apace with technology. In particular, the explosion of video surveillance and micro-camera technology¹ has had a profound impact upon our concept of privacy.² As video surveillance equipment has become smaller, more portable, more easily concealed, and more accessible to the general public,³ its pervasive application has contributed to today's cultural fascination with voyeurism.⁴

1. See generally Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 HARV. J.L. & TECH. 383, 405 (1997) (suggesting that the past three decades have seen dramatic advances in the field of video technology "permitting covert observation in virtually any circumstance"); Quentin Burrows, Note, *Scowl Because You're On Candid Camera: Privacy and Video Surveillance*, 31 VAL. U. L. REV. 1079, 1080 (1997) ("Video surveillance technology was first introduced in 1956, but never has the intrusion been so pervasive as today.") (citation omitted).

2. See generally Eric Brazil, *Hidden Cameras Raise Concerns As Use For Video Surveillance Grows, So Do Privacy Worries*, S.F. EXAMINER, Feb. 7, 1999, at A1 (reporting that surveillance and security cameras have become so prevalent that no one knows how many are out there, but noting estimates of about two million cameras in the United States). The article also states that, "in Manhattan alone more than 2,400 cameras record the behavior of people in public places." *Id.* See also Stacy Downs et al., *Hidden Cameras Focus On Privacy: Think You Can't Be Seen?*, SAN DIEGO UNION-TRIB., Sept. 14, 1998, at E4 (quoting a New York city traffic controller, discussing the prevalence of surveillance cameras, as stating "[i]f you can see the Empire State Building, we can see you").

3. See, e.g., *Hidden Camera Solutions* (visited Feb. 10, 2000) <<http://www.concealedcameras.com/catalogue/cameras.html>> (advertising a lipstick camera for \$199.00, a ceiling speaker camera for \$229.00, and a pager camera for \$199.00); *Spy Stuff* (visited Feb. 10, 2000) <<http://www.spystuff.com/videocam.html>> (selling a "spy pinhole video camera" for \$89.95); *Big Brother Surveillance* (visited Feb. 10, 2000) <<http://www.bigbrothersurveillance.net/wireless.htm>> (selling a wireless clock radio camera for \$375, a wireless stuffed animal camera for \$475, and a wireless coffee maker camera for \$525). See also CBS *This Morning* (CBS television broadcast, Mar. 1, 1999) (reporting on availability of hidden camera products).

4. See, e.g., Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273, 305 (1999) (describing the proliferation of voyeur based media within American society, and further analyzing voyeurism as an emerging form of expression possibly falling under the First Amendment); Doug Bedell, *It's a Webcam World; Prevalence of The Internet Live Shot Raises Privacy Issues*, STAR-LEDGER (Newark, NJ), Aug. 9, 1999, at 53 (reporting that the integration of surveillance technology and the Internet has enabled webcams to provide untold audiences with live access to the probing eyes of cameras); Lisa de Moraes, *CBS Drowns Out Competition*, WASH. POST, Aug. 30, 2000, at C7 (reporting that the final episode of CBS' voyeur-based television show "Survivor," garnered 51 million viewers). In the Bedell article, the author notes that "[w]ith today's cheap, tiny, video cameras and the connectivity of the Internet, it is possible that someone—or

Throughout the country, newspaper headlines report unsavory stories of surreptitiously concealed video cameras prying into bedrooms,⁵ bathrooms,⁶ locker rooms,⁷ changing rooms,⁸ and tanning booths⁹ in prurient attempts to film unsuspecting victims while in

everyone—may be watching at moments you consider private.” Bedell, *supra*, at 53. See also Paul Brownfield, *Are We ‘Truman’ Television: Reality-Based Shows That Allow Viewers Into People’s Personal Lives Are Raising Questions About the Increasingly Invasive Nature Of The Media*, L.A. TIMES, June 16, 1998, at F1 (suggesting that reality-based television shows, such as Fox’s “Cops,” MTV’s “The Real World,” and HBO’s “Taxicab Confessions,” have blurred the distinction between the public and private realm and have turned T.V. viewers into voyeurs); Vinay Menon, *Peekaboo Culture*, TORONTO STAR, Aug. 22, 1999 (disclosing several pertinent examples of modern voyeuristic culture, such as “Voyeur Dorm,” a web site that provides paying members access over the Internet to an inside view of a college female group house in Tampa, Florida); *Voyeurdorm.com, Guests Tour* (visited Oct. 7, 2000) <<http://www.voyeurdorm.com>> [hereinafter *Voyeurdorm*] (showcasing the Internet as a medium of modern age voyeurism).

The website boasts:

We are sexy young college girls ages 18-22 choosing to live our lives on camera 24 hours a day 7 days a week. You can watch us from hidden cameras located in each room of our house. See us slumber in our beds, sneak a peak at us in the bathroom or shower, gaze at us lounging by the pool, and get to know us in our chat room.

Voyeurdorm, supra. The Menon article further notes the tremendous growth of reality-based television programming in the United States, from 11 shows in March of 1997 to 118 shows in March of 1998. See Menon, *supra*; see also Nora Zamichow, *Spies’ Eyes and Ears Go Public*, L.A. TIMES, June 28, 1999, at A1 (reporting that modern surveillance and spy technology, once limited to the military, is now readily available to the public, and that business is booming). Zamichow notes that “[s]urveillance cameras have become so prevalent in public places that billboards advertising fashions by Kenneth Cole caution: ‘You are on a video camera an average of 10 times a day. Are you dressed for it?’” *Id.*

5. See J. Scott Orr, *Videotape Voyeurs Find Legal Loopholes: Hidden-Camera Laws Next to Nonexistent*, STAR-LEDGER (Newark, NJ), May 17, 1999, at 1 (reporting that a young woman discovered a camera no larger than a cigarette pack concealed in her apartment).

6. See, e.g., Andrea Siegel, *Secret Tape of Woman in Bathroom Recorded; After Shower, Camera Found; Man Charged with Wiretap Violation*, BALTIMORE SUN, Aug. 13, 1999, at 1B (reporting that an individual who tiles bathrooms for a living secretly installed a hidden video camera inside the shower of a longtime family friend); *Hidden Cameras in Park Showers*, L.A. TIMES, Aug. 6, 1999, at A23 (reporting on the discovery of at least two hidden cameras installed in public showers at Yosemite National Park, apparently intended to film nude images of campers as they showered).

7. See, e.g., Linda Massarella, *Nude Jocks Steamed Over Raw Footage*, N.Y. POST, Aug. 10, 1999, at 17 (stating that over 250 male college athletes nationwide have reported being videotaped by hidden cameras while undressing, urinating, or showering in their locker rooms, and that these tapes are being sold on gay pornography Internet sites); *Around the State: The Week in Brief*, TAMPA TRIB., Oct. 10, 1999, at 6 (reporting that a middle school physical education intern recently was charged with misdemeanor voyeurism for surreptitiously videotaping sixth-grade female students in their locker room).

8. See, e.g., *Davis Official Charged With Voyeurism*, SALT LAKE TRIB., Aug. 6, 1999, at B2 (reporting that a medical director of an area hospital misrepresented himself as a photographer for a modeling agency, invited several women to his home-studio to pose, and secretly recorded the women as they changed clothing in what they believed to be a private room).

9. See, e.g., Tony Rizzo, *Taping in Secret Leads to Jail Term: Hidden Cameras at*

various states of undress. Consider, however, the voyeur who intends to perpetrate these privacy intrusions specifically within the public space.¹⁰ The following excerpt of a letter written to California State Assemblyman Dick Ackerman shockingly illustrates both this newest trend in video voyeurism¹¹ and this fundamental challenge to individual privacy:

[T]he Montclair Police Department has experienced an increase in incidents involving subject's video taping the private parts of seemingly unwilling females in public places One example of this type of incident was brought to the Montclair Police Department's attention on 8-28-98. The Plaza security observed via the video surveillance system a subject carrying a shopping bag, riding the escalator up and down on several occasions. As the security observed the subject, they noticed he was entering the escalator to ride up to the second story behind women wearing skirts. The subject placed a shopping bag on the step below the female wearing a skirt, and would ride up the escalator until it reached the top floor. The subject would then ride down the escalator and wait until another female wearing a skirt would enter again. After observing the subject doing this on several occasions, the Plaza security contacted the subject and found that he had an 8mm video camera hidden in a shoebox within the shopping bag. The subject admitted to video taping the women wearing skirts in order to sell the videotape to an Internet website.¹²

Although video voyeurism may appear ridiculous or even silly at first glance,¹³ it is, in fact, a very invasive and intimidating crime.¹⁴

Tanning Salon Recorded Patrons, KAN. CITY STAR, Jan. 13, 1999, at B1 (reporting that at least 58 women in Kansas City, Kansas, were secretly videotaped through "an elaborate set-up of cameras and fake vents" as they undressed for their tanning sessions). The defendant was sentenced to 12 months in the county jail after pleading guilty to 15 misdemeanor counts of eavesdropping. *See id.*

10. The public space, as it is commonly understood, means any broad range of areas that are regularly open and accessible to the public, such as a public street, a shopping mall, a restaurant dining room, or an open field. *See generally* BLACK'S LAW DICTIONARY 1230 (6th ed. 1990) (defining a public place as being "more public than private" and usually accessible to the public).

11. For the purposes of this Comment, video voyeurism is defined generally as the use of any instrument or image-recording device for the non-consensual and surreptitious observation and/or preservation of the image of another person's naked body or intimate body parts or undergarments, with the intent to invade that other person's privacy. *See* BLACK'S LAW DICTIONARY 1578 (6th ed. 1990) (defining voyeurism as a condition where an individual derives sexual satisfaction from secretly observing sexual organs or acts of others); *see also supra* notes 5-9 and accompanying text (citing examples of video voyeurism).

12. Letter from Matthew Eaton, Sex Crime Investigator, City of Montclair, California, to Assemblyman Dick Ackerman, California State Assembly (June 7, 1999) [hereinafter Letter from Matthew Eaton] (on file with author) (expressing strong support for pending video voyeurism bill).

13. *See* John Auerbach, *We're Being Watched: Parents Point to Peeping Tom Suspect*,

The “subject” whom this letter describes, surreptitiously invaded the privacy of eighteen different individuals during this single incident¹⁵—many of whom may have unwittingly become the object of any number of “up-skirt” Internet pornography sites.¹⁶ More distressing, though, is the unpalatable truth that this man, and many others like him, could not be arrested and convicted under criminal law.¹⁷

Although several states have passed statutes prohibiting certain forms of surreptitious videotaping,¹⁸ peculiarly, it is the very audacity of perpetrating these wrongs in a public setting that provides the

BOSTON GLOBE, Apr. 30, 1995, at 1 (stating that many criminologists and law enforcement officials do not consider Peeping Toms as major offenders). This Comment will demonstrate, however, that video voyeurism yields a far greater intrusion of privacy than that committed by the simple window-peeper. *See infra* discussion Part III and Part IV (citing examples of video voyeurism and its traumatic effect on its victims and society).

14. *See* discussion *infra* Parts III, IV (demonstrating the invasive nature and negative impact of video voyeurism).

15. *See* Letter from Matthew Eaton, *supra* note 12 (describing the subject’s actions that led to the invasion of privacy).

16. *See, e.g., Voyeur Lounge, Tour* (visited Oct. 7, 2000) <<http://www.voyeurlounge.com>> (promoting “The Best Live Voyeur Action on the Net” and advertising a host of hidden camera videos including upskirt cams); *Goosebump Videos, Candid Upskirts Videos* (visited Sept. 11, 1999) <<http://www.bulletron.com/goosebump/secure.htm>> (advertising the sale of “upskirt” videos, all recorded surreptitiously within the public space, for as little as \$39); *Skip’s Voyeur Site* (visited Sept. 11, 1999) <<http://www.kandid-pics.com>> (boasting that “[y]ou’re not supposed to look up girls skirts, but we encourage it”); *Upskirt Voyeur: A Pervert’s Paradise* (visited Sept. 11, 1999) <<http://www.upskirt-voyeur.com>> (boasting over 300 “upskirt” and other voyeuristic pictures). *See also* Janice D’Arcy, *Video Voyeurs Expose Flaws In Laws: Prosecutors Across U.S. Find They Need New Stricter Legislation To Protect Privacy*, HARTFORD COURANT, Dec. 4, 1998, at A1, in which the author quotes Beth Givens, director of a California based non-profit privacy organization, as saying, “[i]t’s becoming a part of young male culture—sort of like hacking used to be. The videos have become something akin to a trophy.” It should be noted that due to the transitional nature of the Internet, specific web sites tend to come and go; however, voyeuristic and non-consensual pornographic material on the Internet is likely to have a continual presence. *See* Symposium, *Policing Obscenity and Pornography in an Online World*, 8 WM. & MARY BILL RTS. J. 693, 699 (2000) (reporting that the total revenue generated by adult content Internet sites is approaching one billion dollars). One panelist stated, “[p]ornography, unfortunately, is blindly easy to encounter on the Internet.” *Id.*

17. *See* Letter from Matthew Eaton, *supra* note 12 (stating the district attorney’s rejection of the case due to a lack of appropriate law). The letter continues:

[T]he subject was arrested, however, when the case was presented to the District Attorney it was rejected, due to the fact there was no specific law which covered this incident. At the behest of the Plaza security details, research was conducted and a dialogue established with the District Attorney’s office. Unfortunately, the vast majority of the incidents resulted in rejections for any criminal charges and none for what was investigated as lewd conduct. State law just did not specifically cover this conduct.

Id.

18. *See* discussion *infra* Part III (surveying several state statutes criminalizing certain acts of video voyeurism).

video voyeur with certain refuge from criminal prosecution.¹⁹ Simply stated, the problem is that neither criminal nor civil law acknowledges an individual's expectation of privacy in public places as reasonable.²⁰ Therefore, society is simply ill-prepared to combat fully the new-technology crime of video voyeurism.²¹ This Comment argues that criminal law must break free from fallacious distinctions between public and private space and must specifically recognize an individual's legitimate expectation of privacy in the public space.²²

Part I re-introduces the original right of privacy as envisioned by Samuel Warren and Louis Brandeis²³ and advocates an enriched and more responsive understanding of legal privacy as it relates specifically to video voyeurism. Part II surveys the role of criminal law in the history of privacy protection, and argues for an expansion of such protection due to the current inadequacy of both criminal and civil remedies. Part III expands this criticism of contemporary criminal protection of privacy and reveals, by detailed reference to recent video voyeurism statutes, a fundamental deficiency in the majority of jurisdictions' criminal prohibition of video voyeurism. Part IV discusses two model video voyeurism statutes that demonstrate an enhanced understanding of privacy within the modern age. Finally, this Comment concludes that criminal law must continue to "re-think" privacy by rejecting formalistic distinctions regarding space and must prohibit patently unreasonable invasions of privacy wherever they occur.

I. A FRESH LOOK AT AN ANCIENT RIGHT: INVIOLATE PERSONALITY AND THE RIGHT TO PRIVACY

A. *The Origin of Legal Privacy*

Throughout history, human beings have always recognized a concept of privacy.²⁴ Nevertheless, what is meant by privacy continues

19. See discussion *infra* Parts II.C and III.D (discussing the failure of both the civil and the criminal law to recognize a reasonable expectation of privacy in the public space).

20. See discussion *infra* Parts II.C and III.D.

21. See D'Arcy, *supra* note 16, at A1 ("[T]he law has lagged behind. Over and over, prosecutors nationwide have been forced to cobble together existing laws—and, sometimes, seemingly unrelated ones—if they wish to pursue a criminal case.").

22. See discussion *infra* Part II (surveying the historical role of the criminal law and arguing for an expansion that would protect privacy in public places).

23. See Samuel D. Warren & Louis D. Brandeis, *The Right To Privacy*, 4 HARV. L. REV. 193 (1890) (articulating, for the first time, the concept of legal privacy).

24. See DECKLE McLEAN, *PRIVACY AND ITS INVASION* 3, 9 (1995) ("Anthropological and historical evidence . . . is sufficient to indicate that a demand for various kinds of privacy and an intuitive understanding of them are built into human beings.").

to defy a singular and precise definition,²⁵ beyond that of the oversimplified, yet often quoted “right to be let alone.”²⁶ It was not until 1890, when Samuel Warren and Louis Brandeis drafted the blueprints for a new tort,²⁷ that privacy first gained credibility as an interest entitled to legal protection.²⁸

Although a detailed history of the legal right of privacy is beyond the scope of this Comment,²⁹ it is critical to understand that Warren

25. See COLIN BENNETT & REBECCA GRANT, VISIONS OF PRIVACY: POLICY CHOICES FOR THE DIGITAL AGE 5 (1996) (stating that “privacy is a deeply and essentially contested concept”); PRISCILLA REGAN, LEGISLATING PRIVACY xiii (1995) (“In virtually all philosophical and legal writing about privacy, authors begin by noting the difficulty in conceptualizing their subject.”); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1340 (identifying five dominant species of legal privacy: tort privacy, Fourth Amendment privacy, First Amendment privacy, fundamental-decision privacy, and state constitutional privacy); see also MCLEAN, *supra* note 24, at 3 (stating that privacy will remain an elusive concept, similar to both liberty and freedom, because privacy is employed as a loose political term and is defined in part by subjective values). McLean states that “[t]he ability of most people to articulate the nature of privacy has not caught up with their intuitive understanding that it is important. In fact, language itself is not yet adequate to the task of communicating clearly about privacy.” *Id.* at 5.

26. See COOLEY, TORTS 29 (2d ed. 1888) (addressing the “right to be let alone” as a subject of tort law); cf. George Trubow, *The Development and Status of “Informational Privacy” Law and Policy in the United States in Symp., Invited Papers on Privacy: Law, Ethics and Technology* (Oct. 4-7, 1981) at 2 (discussing usage of the phrase “the right to be let alone” and its broad applicability to several interests). Trubow notes that:

Unfortunately that phrase [the “right to be let alone”] has been repeatedly used to describe privacy, but it does not precisely define the concept. Being let alone can also describe the interest violated by such torts as assault, battery, false imprisonment and trespass to property, which were really the context for Cooley’s use of the phrase.

Id.

27. Along with crafting a tort remedy, Warren and Brandeis also suggested that the criminal law should be employed to protect the right to privacy. See Warren & Brandeis, *supra* note 23, at 219. In making this point, Warren and Brandeis concluded that “[i]t would doubtless be desirable that the privacy of the individual should receive the added protection of the criminal law” *Id.* See also William Beaney, *The Right To Privacy and American Law*, 31 LAW & CONTEMP. PROBS. 251, 257 (1966) (“To protect man’s ‘inviolate personality’ against the intrusive behavior so increasingly evident in their time, Warren and Brandeis thought that the law should provide both a *criminal* and a private law remedy.”) (emphasis added).

28. See Warren & Brandeis, *supra* note 23 (arguing for expansion of the common law to protect against intrusions of privacy based upon a legal right to privacy). *But see* De May v. Roberts, 9 N.W. 146, 148 (Mich. 1881) (recognizing a legal right to privacy predicated upon the tort of battery prior to the publication of the Brandeis article).

29. For more discussion on the legal right of privacy, see generally James Barron, *Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890): Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875 (1979) (analyzing the traditional view of the Warren and Brandeis article and criticizing it as a “quaint example of misguided legal scholarship” of limited utility to issues of privacy protection); Fredrick Davis, *What Do We Mean By “Right To Privacy,”* 4 SAN DIEGO L. REV. 1 (1959) (rebuffing judicial recognition of privacy as derivative of the more elementary interests of infliction of mental suffering and the expropriation of some property interest); Gormley, *supra* note 25, at 1335 (surveying the development of privacy law one hundred years after the publication of the Warren and Brandeis law review

and Brandeis first embedded legal privacy in the principle of an individual's "inviolable personality."³⁰ Privacy, they argued, "must be placed upon a broader foundation" than that provided by the existing doctrines of trust and contract.³¹ Abandoning a theory of property, these forward-thinking scholars explained that privacy rights are distinct rights that exist "against the world."³² Although Warren and Brandeis never precisely defined the ideal of an inviolable personality, others have subsequently described it "as a condition and right that is essentially tied to human dignity, the principle of equal respect for persons, and the notion of personhood itself."³³ Therefore, by advocating an expansion of the common law, initially considered a radical stance,³⁴ Warren and Brandeis were merely

article); William Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960) (distilling four distinct privacy torts from the original one advocated by Warren and Brandeis); Richard Turkington, *Legacy of the Warren and Brandeis Article: The Emerging Unencumbered Constitutional Right To Informational Privacy*, 10 N. ILL. U. L. REV. 479 (1990) (examining the jurisprudential development of the right to privacy and arguing for the adoption of a right to informational privacy).

30. Warren & Brandeis, *supra* note 23, at 205. Elaborating on the concept of privacy, Warren and Brandeis stated that "[t]he principle which protects personal writings and all other personal productions, not against theft and physical appropriation, but against publication in any form, is in reality not the principle of private property, but that of an *inviolable personality*." *Id.* (emphasis added).

31. *Id.* at 211. Warren and Brandeis argued that:

[S]ince the latest advances in photographic art have rendered it possible to take pictures surreptitiously, the doctrines of contract and of trust are inadequate to support the required protection, and the law of tort must be resorted to. The right of property in its widest sense, including all possession, including all rights and privileges, and hence embracing the right to an inviolable personality, affords alone that broad basis upon which the protection which the individual demands can be rested.

Id.

32. *Id.* at 213. In rejecting the principle of private property and using the principle of the right to privacy, Warren and Brandeis stated that:

[T]he principle which has been applied to protect these rights is in reality not the principle of private property, unless that word be used in an extended and unusual sense. The principle which protects personal writings and any other productions of intellect or of the emotions, is the right to privacy, and the law has no new principle to formulate when it extends this protection to the personal appearance, sayings, acts, and to personal relation, domestic or otherwise.

Id.

33. Turkington, *supra* note 29, at 484-85; *see also* *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (describing, subsequently, inviolable personality as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men").

34. *See* *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 443 (N.Y. 1902) (rejecting the tort of invasion of privacy as lacking legal precedent and stating that "[t]here is no precedent for such an action to be found in the decisions of this court Mention of such a [privacy] right is not to be found in Blackstone, Kent or any other of the great commentators upon the law"). *But see* RICHARD C. TURKINGTON & ANITA L. ALLEN, *PRIVACY LAW: CASES AND MATERIALS* 54 (1999) (noting that the *Roberson* court was the first high state appellate court to confront the issue of whether

articulating a belief deeply ingrained in the traditions and understandings of common society: a right to privacy exists and it ought to be protected.³⁵

B. *Privacy and the Invasion of Video Voyeurism*

In order to understand the harm that results from the specific invasion committed by the video voyeur, it is necessary to give an account of that which is violated. In general terms, the video voyeur infringes upon a sense of privacy.³⁶ But what is the foundation of privacy?³⁷ In Western society, one of the most fundamental and universal expectations of privacy involves the ability to control exposure of one's body.³⁸ The human desire to limit the ability of

privacy was actionable). The court rejected the new tort, but in 1903 the New York State Legislature enacted a civil cause of action for the invasion of privacy and thus statutorily secured this right despite the court's hesitance. *See id.*

35. *See* E.L. Godkin, *The Rights of the Citizen: To His Reputation*, SCRIBNER'S MAG., July 1890, at 65-67 (describing dignity as intimately tied to privacy), *cited in* Warren & Brandeis, *supra* note 23, at 195 n.6; *see also* Elbridge L. Adams, *The Right to Privacy, and Its Relation to the Law of Libel*, 39 AM. L. REV. 37, 37 (1905) (expressing that Brandeis and Warren were influenced by the writings of Godkin, which were published the same year as the drafting of the Brandeis and Warren article). Godkin wrote, "[p]ersonal dignity is the fine flower of civilization, and the more of it there is in a community, the better off the community is But without privacy its cultivation or preservation is hardly possible." Anita Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 757 n.56 (1999) (discussing privacy issues and quoting Godkin's work).

36. *See supra* notes 5-16 and accompanying text (giving descriptions of the invasive and intimidating nature of video voyeurism).

37. *See* Andrew D. Morton, Comment, *Much Ado About Newsgathering: Personal Privacy, Law Enforcement, and the Law of Unintended Consequences for Anti-Paparazzi Legislation*, 147 U. PA. L. REV. 1435, 1443 (1999) (noting the difficulty in enumerating a satisfactory definition of privacy). Morton concludes:

Any attempt to articulate a precise definition of privacy mirrors Justice Stewart's oft-ridiculed directive for identifying obscenity—you'll "know it when you see it." Warren and Brandeis suggested that the concept of privacy embodies "the right to be let alone." Another scholar asserted that the notion of privacy is "related to solitude, secrecy and autonomy, but is not synonymous with these terms." Others have identified their conception of privacy as a "condition of inaccessibility of the person, his or her mental states, or information about the person to the senses of surveillance devices of others."

Id. (citations omitted).

38. *See* Milton R. Konvitz, *Privacy and the Law: A Philosophical Prelude*, 31 LAW & CONTEMP. PROBS. 272, 272 (1966) (arguing that nakedness has always been viewed as shameful and that a sense of privacy is linked with the basic moral code of individuals). Discussing the basic nature of this expectation of privacy, Konvitz notes that:

Almost the first page of the Bible introduces us to the feeling of shame as a violation of privacy. After Adam and Eve had eaten the fruit of the tree of knowledge, 'the eyes of both were opened, and they knew that they were naked; and they sewed fig leaves together and made themselves aprons.' Thus, mythically, we have been taught that our very knowledge of good and evil—our moral nature, our nature of men—is somehow, by divine

others to observe or to touch the naked body in the absence of consent is so universal and ingrained that to argue otherwise would simply be an affront to practical experience.³⁹ The acute degradation inherent in non-consensual disrobing that often occurs in situations of war, imprisonment,⁴⁰ and rape⁴¹ provides powerful evidence for the

ordinance, linked with a sense and realm of privacy. When, after the Flood, Noah became drunk, he 'lay uncovered in his tent,' and Ham violated his father's privacy by looking upon his father's nakedness and by telling his brothers about it. His brothers took a garment, 'laid it upon their shoulders, and walked backward and covered the nakedness of their father. Their faces were turned away, and they did not see their father's nakedness.'

Id. (citations omitted).

Although Konvitz was not directly arguing that there is an intrinsic right of privacy in the ability to control exposure of the naked body, these Biblical traditions speak directly to that issue. The zone of privacy surrounding the intimacy of the human body is so natural and instinctive a quality, that the injury resulting from an unwelcomed invasion of this right by the voyeur—video or otherwise—proves, all too clearly, the truth of its existence. *See* Allen, *supra* note 35, at 724 (claiming that privacy is associated with ownership of personal property including homes, diaries, reputations and *body parts*).

39. *See* Edward J. Bloustein, *Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 973-74 (1964) (discussing the fundamental desire for privacy with respect to one's body). Bloustein states that:

The fundamental fact is that our Western culture defines individuality as including the right to be free from certain types of intrusions. This measure of personal isolation and personal control over the conditions of its abandonment is of the very essence of personal freedom and dignity, is a part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversation may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. He who may intrude upon another at will is the master of the other and, in fact, intrusion is a primary weapon of the tyrant.

Id. An intrusion upon an individual's privacy or sense of modesty, upon the individual's naked self, is no less an intrusion than any listed above. It may be the most unreasonable and offensive intrusion because the object of the intrusion is not intimate thoughts or intimate space, but the very corpus of the individual, the naked self.

40. Courts have recognized the opposite of voluntary disrobing, the compelled strip search within the prison system, as a serious assault upon privacy and dignity even when justified by the circumstances. *See, e.g.,* Marybeth G. v. City of Chicago, 723 F.2d 1263, 1272 (7th Cir. 1983) (describing prison strip searches "involving the visual inspection of the anal and genital areas as 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, [and] signifying degradation and submission'" (citation omitted)). The Seventh Circuit concluded that "[i]n short, we can think of few exercises of authority by the state that intrude on the citizen's privacy and dignity as severely as the visual anal and genital searches practiced here." *Id.* *See also* Bell v. Wolfish, 441 U.S. 520, 576-77 (1979) (Marshall, J., dissenting) (declaring a prison's practice of subjecting inmates to mandatory body cavity searches after receiving a visitor from the outside to be "one of the most grievous offenses against personal dignity and common decency"); Daugherty v. Campbell, 33 F.3d 554, 556 (6th Cir. 1994) ("A strip search, regardless of how professionally and courteously conducted, is an embarrassing and humiliating experience Consequently, reasonable suspicion must exist before a strip search is authorized for prison visitors."); Blackburn v. Snow, 771 F.2d 556, 564 (1st Cir. 1985) (recognizing, "as have all courts that have considered the issue, the severe if not gross interference with a person's privacy that occurs when [prison] guards

truth of the proposition that privacy is linked fundamentally to the ability to control exposure of the human body.⁴²

Individuals constantly take great precautions to ensure that either certain bodily actions or specific body parts remain guarded from public view.⁴³ With flagrant disregard, the video voyeur blatantly defies this legitimate desire for privacy by utilizing technology to observe, record, and often to disseminate images of the very acts and body parts that were never intended or reasonably assumed to be open to public inspection.⁴⁴ In effect, the video voyeur disrobes the

conduct a visual inspection of body cavities”) (citations omitted). If the government may not invade individual privacy without reasonable suspicion lest it run afoul of the Fourth Amendment, then, by analogy, why should video voyeurs be at liberty to invade individual privacy without having any legal accountability, particularly when there is no legitimate justification for their actions?

41. See Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 232 (1995) (addressing the importance of a woman’s integrity in her body and noting that disregard for this integrity is an integral component of rape). McClain recites:

Today the law of sexual assault is indispensable to the system of legal rules that assures each of us the right to decide who may touch our bodies, when, and under what circumstances. The decision to engage in sexual relations with another person is one of the most private and intimate decisions a person can make. Each person has the right not only to decide whether to engage in sexual conduct with another, but also to control the circumstances and character of that contact.

Id. (quoting State *ex rel.* M.T.S., 609 A.2d 1266, 1278 (N.J. 1992) (citation omitted)).

42. See Konvitz, *supra* note 38, at 272 (demonstrating the importance to humans of concealing one’s nakedness); Karoline Jackson, *The Legitimacy of Cross-Gender Searches and Surveillance in Prisons: Defining an Appropriate and Uniform Review*, 73 IND. L.J. 959, 980-81 (1998) (“If the right to privacy secured by the penumbras of the Bill of Rights is to mean anything, it surely must protect the naked body. There is nothing more fundamentally private than the naked body and genitalia.”).

43. See *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1229-32 (7th Cir. 1993) (discussing the fear of publication of nude pictures or pictures of private acts). The court noted that:

Although it is well known that every human being defecates, no adult human being in our society wants a newspaper [or website] to show a picture of him defecating. The desire for privacy . . . is a mysterious but deep fact about human personality. It deserves and in our society receives legal protection. An individual and more pertinently perhaps the community is most offended by the publication of intimate personal facts when the community has no interest in them beyond the voyeuristic thrill of penetrating the wall of privacy that surrounds a stranger.

Id. This concept is well illustrated by the universal practice of wearing clothing while in public, yet going behind closed doors in order to change or try on different clothing. Individuals seek privacy by the very act of wearing clothing as much as they do by disrobing behind closed doors. See discussion *infra* Parts III, IV (giving examples of the desire for privacy).

44. See *20/20: Video Voyeurism: Voyeur Tapes Neighbors Private Moments* (ABC television broadcast, Jan. 27, 1999) (quoting a victim of video voyeurism expressing her horror at being exposed in her private moment: “It humbled me. Nobody is supposed to see me naked except for my husband. And for someone to take private moments from me—to tape nude videos of me, it made me very, very angry. It sickened me”); cf. Bloustein, *supra* note 39, at 973 (“The feeling of being naked before the world can be produced by having to respond to a questionnaire or

victim without knowledge or consent, and in so doing, strips the victim of both privacy and dignity.

Faced with such a violation, the law is challenged to protect the integrity of these victims.⁴⁵ To properly criminalize video voyeurism, however, the law must first adequately address both the nature of the fundamental right to privacy⁴⁶ and the scope of the invasion exacted by the video voyeur.⁴⁷ The difficulty remains that both criminal and civil law fail to recognize a reasonable expectation of privacy in the public space, and therefore fail to understand, at a very conceptual level, the privacy violation committed by the modern video voyeur.⁴⁸ For reasons that will be discussed, civil law furnishes an inadequate vehicle to combat this invasion.⁴⁹ Accordingly, criminal law becomes the most viable mechanism for protecting privacy from the humiliating intrusion wrought by such an abusive application of an otherwise socially useful technology.⁵⁰

II. CRIMINAL LAW AND THE HISTORY OF PRIVACY PROTECTION

A. *Using Criminal Law to Enforce the Privacy Rights of Victims*

Over the course of the last 100 years, American jurisprudence has come to understand privacy as a right protected both under the

psychological test as well as by having your bedroom open to prying eyes and ears.”). As discussed in this Comment, the sense of being naked before the world need not be confined to the bedroom but, due to modern technology, may be easily reproduced in any public setting. See discussion *infra* Parts III, IV (describing instances where individuals were unknowingly taped in public settings).

45. Cf. Maria Pope, *Technology Arms Peeping Toms With a New and Dangerous Arsenal: A Compelling Need for States to Adopt New Legislation*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1167, 1179-81 (1999) (noting that many plaintiffs fail to sustain a cause of action in federal courts due to the lack of state statutes properly addressing video voyeurism).

46. See *supra* notes 30-33, 38-42 and accompanying text (discussing privacy as premised upon an individual's inviolate personality and further defining the ability to control exposure of the human body as a fundamental component of privacy).

47. See *supra* notes 43-44 and accompanying text (describing the video voyeur as virtually disrobing the victim through the use of modern surveillance technology despite the victim's legitimate desire for privacy).

48. See discussion *infra* Parts III, IV (discussing how historically an expectation of privacy is not found in public places); see also Andrew McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability For Intrusions in Public Places*, 73 N.C. L. REV. 989 (1995) (arguing that tort law must be expanded to protect against invasions of privacy committed by surreptitious videotaping that occur in the public space).

49. See discussion *infra* Parts II.C, III.D (explaining the reasons for the inadequacy of the civil law in protecting the individual's rights against the video voyeur).

50. See discussion *infra* Parts II, III (discussing the relationship between criminal law and privacy and stressing the importance of creating legislation that provides criminal penalties for video voyeurs).

Constitution⁵¹ and by the law of torts.⁵² Within the context of criminal law, however, discussion of the right to privacy generally arises only under the protections guaranteed by the Fourth Amendment⁵³ and centers upon the criminal procedure issues of search and seizure.⁵⁴ Thus, scholarly debate and legal development has focused primarily upon the protection of the privacy rights afforded to criminal defendants, rather than upon the privacy rights of victims of criminal activity.⁵⁵ Consequently, the criminalization of privacy intrusions committed by non-state actors, such as video voyeurs, has received minimal attention.⁵⁶

51. See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (upholding a woman's decision to terminate her pregnancy as a privacy right grounded in the Ninth and Fourteenth Amendments); *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (holding a Connecticut statute proscribing the use of contraceptives by married couples unconstitutional, and explicitly recognizing a zone of privacy within the penumbra of rights guaranteed by the First, Third, Fourth, Fifth, and Ninth Amendments); cf. Gormley, *supra* note 25, at 1394 ("The two-step leap-frog from *Griswold* to *Roe* thus became the single most significant burst in the history of twentieth century privacy.").

52. See Prosser, *supra* note 29, at 389 (recognizing tort privacy as a complex of four legally cognizable torts: intrusion upon a person's seclusion or solitude, misappropriation of a person's name or likeness, public disclosure of embarrassing private facts, and publicity that portrays a person in a false light); see also *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 69 (Ga. 1905) ("The right of privacy has its foundation in the instincts of nature. It is recognized intuitively, consciousness being the witness that can be called to establish its existence."); cf. *Ettore v. Philco Television Broad. Co.*, 229 F.2d 481, 485 (3d Cir. 1956) (characterizing the confusion surrounding privacy law as a "haystack in a hurricane," but affirmatively recognizing the tort).

53. U.S. CONST. amend. IV.

54. See *Burrows*, *supra* note 1, at 1087 (noting that modern privacy jurisprudence stems from interpreting the Fourth Amendment in the context of criminal procedure issues); Gormley, *supra* note 25, at 1358 ("If privacy was explicitly acknowledged anywhere in the early contours of American law, it was within the folds of criminal procedure").

55. The role of the criminal law as a shield against privacy intrusions committed by non-state actors has received little attention. See generally Bloustein, *supra* note 39, at 964 ("[T]he historical development in the courts of the concept of privacy stems from and is almost exclusively devoted to the quest for such a civil remedy."); Adam J. Tutaj, Comment, *Intrusion Upon Seclusion: Bringing an "Otherwise" Valid Cause of Action Into the 21st Century*, 82 MARQ. L. REV. 665, 665 (1999) (stating that the majority of cases addressing the privacy implications of surveillance technology involve Fourth Amendment search and seizure law, while the common law of non-search and seizure privacy issues remains undeveloped). Tutaj opines that criminal defendants often raise surveillance issues as they specifically relate to their arrest, whereas potential civil plaintiffs are often unaware that they have been videotaped and, therefore, never file suit. See *id.* at 666. The implication is that non-Fourth Amendment privacy issues are rarely raised. See *id.*

56. Fourth Amendment jurisprudence provides a useful point of comparison, but is fundamentally inapplicable. This Comment specifically argues that there is a need to criminalize certain forms of surreptitious video surveillance committed by private actors, for the very reason that the protections and remedies afforded under the Fourth Amendment only apply when the intrusive conduct is committed by the state. See *Silverman v. United States*, 365 U.S. 505, 511 (1961) (asserting that the core of the Fourth Amendment is to "be free from unreasonable government intrusion")

From a theoretical perspective, criminal protection against privacy intrusions committed by private actors arises indirectly through the enforcement of crimes that infringe generally upon person and property,⁵⁷ or upon the public order.⁵⁸ Perhaps the most illustrative example is the criminal prohibition of the classic voyeur: the

(emphasis added); see also U.S. CONST. amend. IV (prohibiting unreasonable government searches and seizures); Irwin Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703, 705 (1990) ("Far from establishing a constitutional right to privacy, the fourth amendment only prevented government officials from unlawfully intruding into the home or personal property, leaving private citizens free to invade the privacies of life at will."); cf. Bloustein, *supra* note 39, at 975 (noting similarity of intrusion whether by government agent or private individual). Bloustein states that:

This is not to say, however, that intrusion is a different wrong when perpetrated by an FBI agent and when perpetrated by a next door neighbor; nor is it to say that the gist of the wrong is different in the two cases. The threat to individual liberty is undoubtedly greater when a policeman taps a telephone than when an estranged spouse does, but a similar wrong is perpetrated in both instances. Thus, the conception of privacy generated by the [F]ourth [A]mendment cases may rightly be taken, I would urge, as being applicable to any instance of intrusion even though remedies under the [F]ourth [A]mendment are not available in all such instances.

Id.

In the landmark decision *Katz v. United States*, 389 U.S. 347 (1967), the Supreme Court ruled in favor of privacy rights over the unwarranted intrusion of the use of audio surveillance technology by the government. See *id.* at 359 (refusing to insulate electronic surveillance from the unreasonable search and seizure protections of the Fourth Amendment). The Court declared that "[t]he Fourth Amendment protects people, not places." *Id.* at 351. The Court continued, "what [an individual] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* Although these protections apply only against the government, the *Katz* decision seemingly supports the recognition of a reasonable expectation of privacy in the public space against private actors. See *id.* at 361 (Harlan, J., concurring) (clarifying that privacy protection attaches when two requirements are met: "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable"). Despite the law's formalistic insistence to the contrary, it is difficult to imagine that society is not prepared to recognize some expectations of privacy in public—particularly those as are violated by the video voyeur—as objectively reasonable.

Ironically, scholars sharply criticize the *Katz* doctrine as producing the opposite effect of allowing technology to marginalize privacy rights. See William Shepard McAninch, *Unreasonable Expectations: The Supreme Court and the Fourth Amendment*, 20 STETSON L. REV. 435, 439-40 (1991) (concluding that the *Katz* "reasonable expectations" test is flawed, and that its application has undermined privacy rights in the face of technology).

57. See Gormley, *supra* note 25, at 1343 (suggesting that the "basic kernels of privacy" can be found in the early American common law crimes of trespass, assault, and battery); see also Warren & Brandeis, *supra* note 23, at 205 (comparing privacy invasion to assault and battery, and concluding that prohibition of these wrongs was "merely an instance of the enforcement of the more general right of the individual to be let alone"); Kramer, *supra* note 56, at 705-06 (suggesting that nineteenth century courts remedied some privacy invasions under trespass actions).

58. See generally 12 AM. JUR. 2D *Breach of Peace and Disorderly Conduct* § 5 (1997) (defining a breach of the peace as a violation of the public order amounting to "a disturbance of the public tranquility, by an act or conduct either directly or indirectly having this effect, or by inciting or tending to incite such a disturbance").

Peeping Tom.⁵⁹ Although originally unknown at common law,⁶⁰ the act of window peeping—the unsophisticated precursor of video voyeurism⁶¹—historically was prosecuted under the crimes of disorderly conduct or breach of the peace.⁶² Therefore, under the

59. See Bill Prewett, *Act 62: The Crimination of Peeping Toms and Other Men of Vision*, 5 ARK. L. REV. 388, 388 (1951) (defining a Peeping Tom as “one who peeps through windows or doors, or other like places, on or about the premises of another, for the purpose of spying upon or invading the privacy of the persons spied upon”). See generally Jon Auerbach, *Neighbors: We're Being Watched*, BOSTON GLOBE, Apr. 30, 1995, at West Weekly 1 (explaining that the term Peeping Tom originated in England in the year 1040 in connection with the story of Lady Godiva). As the legend is told, in the year 1040, Lady Godiva rode naked through the streets of Coventry in protest of a tax imposed by her husband, the Earle of Mercia. See *id.* The people of Coventry were instructed to stay indoors with windows covered; one man, however, defied the order. See *id.* As punishment, he was blinded and branded with the nickname “Peeping Tom.” See *id.* For a poetic rendition of this story, see Alfred Lord Tennyson, *Godiva*, in 2 THE POEMS OF TENNYSON 171, 175-76 (Christopher Ricks ed., 2d ed. 1987).

60. See Prewett, *supra* note 59, at 388 (stating that the specific crime of window peeping was unknown at common law).

61. See Menon, *supra* note 4 (discussing the boom of television and Internet voyeurism in contemporary culture and noting that sensory exposure was bound historically by a person’s geographic location). Now, however, modern technology allows people to peep without being present. See *id.* University of Illinois Professor Steve Jones stated, “[p]art of what is going on now is that [with technology] one can be a voyeur without putting one’s self at great risk. Had you been a Peeping Tom 20 years ago, you would have had to go peer over the ledge of somebody’s window.” *Id.*

62. See *Carey v. District of Columbia*, 102 A.2d 314, 315 (D.C. 1954) (convicting a defendant of disorderly conduct for peeping in the window of an occupied, lighted room during the early morning hours); *Commonwealth v. LePore*, 666 N.E.2d 152, 155-56 (Mass. Ct. App. 1996) (charting the history of voyeurism crimes prosecuted under the crime of disorderly conduct across many states, while affirming a defendant’s conviction for voyeurism); *City of Grand Rapids v. Williams*, 70 N.W. 547, 548 (Mich. 1897) (convicting a defendant of disorderly conduct for peering into the window of an occupied residence near midnight); *State v. Kitchen*, No. 16839, 1998 WL 811580, at *3 (Ohio Ct. App. Nov. 25, 1998) (unpublished opinion) (convicting a defendant of voyeurism for peering into the window of an occupied living room with a lewd intent); *cf. State v. Reynolds*, 66 N.W.2d 886, 889-91 (Minn. 1954) (explaining that disorderly conduct and breach of peace are highly interrelated). In *Williams*, the Michigan Supreme Court stated, “we cannot conceive of any conduct much more indecent and insulting than for a stranger to be peeking into the windows of an occupied, lighted residence, and especially at the hours of night when people usually retire.” 70 N.W. at 548.

Breach of the peace was a crime at common law, but disorderly conduct is a statutory offense that lacks a precise definition. See *State v. Boyer*, 198 A.2d 222, 224-25 (Conn. Cir. Ct. 1963) (clarifying that disorderly conduct was not a crime at common law and is punishable only by statute); *Heard v. Rizzo*, 281 F. Supp. 720, 742 (E.D. Pa. 1968) (observing that the offense of breach of the peace had its origin in the common law); *Tessier v. La Nois*, 198 A.2d 142, 144 (R.I. 1964) (insisting that disorderly conduct was not recognized at common law). Disorderly conduct, however, tends to breach the peace, incite a public disturbance, disrupt the public order, or endanger the safety or welfare of a community. See *Biddle v. Martin*, 992 F.2d 673, 677 (7th Cir. 1993) (establishing that under Illinois statutory law a person commits disorderly conduct when she unreasonably performs any act to breach the peace); *Currier v. Baldrige*, 914 F.2d 993, 996 (7th Cir. 1990) (holding that behavior provoking a disturbance constitutes disorderly conduct under Wisconsin law); *City of Pineville v. Marshall*, 299 S.W. 1072, 1074 (Ky. Ct. App. 1927) (declaring

rubric of maintaining the public order, criminal law undertook, at least collaterally, to vindicate voyeuristic intrusions premised upon a right to privacy.

More recently, this conduct has been prosecuted under specific Peeping Tom statutes,⁶³ thus evidencing a more specific attempt to prohibit voyeuristic conduct and by corollary, to protect individual privacy. Today, the criminalization of privacy intrusion is firmly established in many state penal codes, falling under a wide variety of crimes: trespass,⁶⁴ window peeping,⁶⁵ secret peeping,⁶⁶ eavesdropping,⁶⁷ indecent viewing or photography,⁶⁸ violation of

that conduct is disorderly if it jeopardizes public safety); *Oak Creek v. King*, 436 N.W.2d 285, 290 (Wis. 1989) (ruling that action "having the tendency to disrupt good order" is disorderly conduct in Wisconsin).

63. *See, e.g.*, DEL. CODE ANN. tit. 11, § 820 (1995) (defining a Peeping Tom as a trespasser who "knowingly enters upon the occupied property or premises of another . . . with intent to peer or peep into the window or door of such property or premises"); GA. CODE ANN. § 16-11-61 (1999) (defining a Peeping Tom as "one who peeps through windows or doors, or other like places, on or about the premises of another for the purpose of spying upon or invading the privacy of the persons spied upon and the doing of any other acts of a similar nature"); LA. REV. STAT. ANN. § 14:284 (West 1986) (defining a Peeping Tom as "one who peeps through windows or doors, or other like places, situated on or about the premises of another for the purpose of spying upon or invading the privacy of persons spied upon without the consent of the persons spied upon"); OKLA. STAT. ANN. tit. 21, § 1171 (West 1983 & Supp. 2000) (defining a Peeping Tom as a "person who hides, waits or otherwise loiters in the vicinity of any . . . place of residence with the unlawful and willful intent to watch, gaze, or look upon the occupants therein in a clandestine manner"); S.C. CODE ANN. § 16-17-470 (Law. Co-op. 1985) (defining a Peeping Tom in the same manner as the Georgia statute).

64. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1504 (West 1989) (defining "criminal trespass" as the illegal entering of a residential structure or yard, and the looking into a residence with "reckless disregard of infringing on the inhabitant's right of privacy"); DEL. CODE ANN. tit. 11, § 820 (1995 & Supp. 1998) (defining "trespassing with intent to peer or peep" as when a person "knowingly enters upon the occupied property or premises of another utilized as a dwelling, with intent to peer or peep into the window or door of such property or premises and who . . . otherwise acts in a manner commonly referred to as 'Peeping Tom'").

65. *See, e.g.*, S.D. CODIFIED LAWS § 22-21-3 (Michie 1998) (describing "window peeping" as the entry onto the private property to "peek in the door or window of any inhabited building or structure located thereon").

66. *See, e.g.*, N.C. GEN. STAT. § 14-202 (1999) (defining "peeping" as when any individual looks secretly into a room occupied by a female person); VA. CODE ANN. § 18.2-130 (Michie 1996 & Supp. 1999) (defining "[p]eeping" as when a person "secretly or furtively peep[s], sp[ies] or attempt[s] to peep or spy into or through a window, door or other aperture").

67. *See, e.g.*, ALA. CODE § 13A-11-31 (1975) (describing "[c]riminal eavesdropping" as when a person intentionally uses a device to eavesdrop); CAL. PENAL CODE § 632 (West 1999 & Supp. 2000) (defining "[e]avesdropping" as when a person "intentionally and without . . . consent . . . eavesdrops upon or records the confidential communication"); COLO. REV. STAT. § 18-9-304 (1999) (defining "[e]avesdropping" as when a person not present for a conversation "[k]nowingly overhears or records such conversation or discussion without the consent . . . [or] for the purpose of committing, aiding, or abetting the commission of an unlawful act; or knowingly . . . attempts to use or disclose . . . the contents of any such conversation or discussion"); GA. CODE ANN. § 16-11-62 (2000) (defining "[e]avesdropping" as any

privacy,⁶⁹ voyeurism,⁷⁰ unlawful photographing,⁷¹ as well as

attempt "in a clandestine manner intentionally to overhear, transmit, or record . . . the private conversation of another which shall originate in any private place"); KAN. STAT. ANN. § 21-4001 (1995) (defining "eavesdropping" as the intentional entry into a private place for the purpose of surreptitiously listening to private communications or observing private conduct); KY. REV. STAT. ANN. § 526.010 (Banks-Baldwin 1999) (describing "eavesdropping" as the intentional use of any device to "overhear, record, amplify or transmit any part of a wire or oral communication of others without the consent of at least one (1) party thereto"); MICH. STAT. ANN. § 28.807(1)-(4) (Law Co-op. 1990 & Supp. 1999) (defining "eavesdropping" as the intentional trespass onto another's property or use of any device to "overhear, record, amplify or transmit any part of the private discourse of others without the permission of all persons engaged in the discourse"); N.Y. PENAL LAW § 250.05 (McKinney 2000) (describing "eavesdropping" as the unlawful "wiretapping, mechanical overhearing of a conversation, or interception or accessing an electronic communication"); N.D. CENT. CODE § 12.1-15-02 (1997) (defining "felony eavesdropping" as the intentional interception of any communication "by use of any electronic, mechanical, or other device," and "misdemeanor eavesdropping" as the secret lingering about a private place with "intent to overhear discourse or conversation therein"); OKLA. STAT. tit. 21, § 1202 (1983) (describing eavesdropping as "secretly loitering about any building, with intent to overhear discourse therein, and to repeat or publish the same to vex, annoy, or injure others"); S.D. CODIFIED LAWS § 22-21-1 (Michie 1998) (defining "eavesdropping" as a trespass with intent to eavesdrop in a private place, or an installation of any device for "observing, photographing, recording, amplifying or broadcasting sounds or events in such place").

68. See, e.g., ALASKA STAT. § 11.61.123 (Lexis 1998) (defining "indecent viewing or photography" as when a person "knowingly views, or produces a picture of, the private exposure of the genitals, anus, or female breast of another person . . . without the knowledge or consent" of that person).

69. See, e.g., DEL. CODE ANN. tit. 11, § 1335 (1995) (defining a misdemeanor invasion of privacy as a trespass on property for the purpose of eavesdropping or other surveillance; or the installation of any device for observing, photographing, recording, amplifying, or broadcasting in a private place without consent; or the installation of any device outside a private place for hearing recording, amplifying or broadcasting ordinarily inaudible sounds without consent); HAW. REV. STAT. ANN. § 711-1111 (Michie 1993) (using the same definition for invasion of privacy as the Delaware code); MINN. STAT. ANN. § 609.746 (West 1997) (defining "interference with property" as when a person (1) enters upon another's property; (2) surreptitiously gazes, stares, or peeps in the window or any other aperture of a house or place of dwelling of another; and (3) does so with intent to intrude upon or interfere with the privacy of a member of the household"); N.H. REV. STAT. ANN. § 644:9 (1996 & Supp. 1999) (defining a violation of privacy as when a person installs in a private place without consent any device for "observing, photographing, recording, amplifying or broadcasting sounds or events," or installs outside a private place any similar device that records or transmits sounds not normally audible); UTAH CODE ANN. § 76-9-402 (Lexis 1999) (defining a "privacy violation" in the same way as the Delaware and Hawaii statutes).

70. See, e.g., FLA. STAT. ANN. § 810.14 (West 1999) (defining voyeurism as when a person "with lewd, lascivious, or indecent intent, secretly observes, photographs, films, videotapes, or records another person when such other person is located in a dwelling, structure, or conveyance and such location provides a reasonable expectation of privacy"); IND. CODE ANN. § 35-45-4-5 (Michie 1994 & Supp. 1998) (describing a voyeur as someone who peeps or enters upon another's property with intent to peep, or who peeps into a place where an occupant can reasonably expect to undress); MISS. CODE ANN. § 97-29-61 (1972) (defining "voyeurism" as a trespass by a Peeping Tom); OHIO REV. CODE ANN. § 2907.08 (Anderson 1996) (defining the crime of voyeurism as when a person "for the purpose of sexually arousing or gratifying the person's self . . . trespass[es] or otherwise surreptitiously invade[s] the

unauthorized videotaping.⁷² Each of these statutes aims not only to protect persons, property, or the public order, but equally each seeks the protection of individual privacy.⁷³ Accordingly, courts actively employ the lexicon of privacy rights in the prosecution of these crimes.⁷⁴ Therefore, it is clear that criminal law serves as a vehicle for the substantive protection of individual privacy.⁷⁵

B. Using Criminal Law to Prohibit Video Voyeurism

Although criminal law acknowledges the concept of privacy rights as a legitimate object of state protection, the extent and scope of this protection varies from jurisdiction to jurisdiction.⁷⁶ Overwhelmingly, however, this protection does not extend to the public space and at

privacy of another, to spy or eavesdrop . . . [or] to photograph the other person in a state of nudity"); WASH. REV. CODE § 9A.44.115 (West Supp. 2000) (defining "voyeurism" as when "for the purpose of arousing or gratifying the sexual desire of any person, [a person] knowingly views, photographs, or films another person . . . while the person being viewed, photographed or filmed is in a place where he or she would have a reasonable expectation of privacy").

71. See MISS. CODE ANN. § 97-29-63 (Supp. 1999) (prohibiting the secret photography of non-consenting persons in a place where those persons would be in a "state of undress and have a reasonable expectation of privacy").

72. See 720 ILL. COMP. STAT. ANN. 5/26-4 (West Supp. 1999) (defining "unauthorized videotaping" as the unlawful photographing, videotaping, or filming of another person in a "restroom, tanning bed, or tanning salon" without that person's consent).

73. See sources cited *supra* notes 69-72 (listing state criminal codes, including Georgia, South Carolina, and Washington, that protect individual privacy under the guise of broader statutory offenses).

74. See *Commonwealth v. De Wan*, 124 A.2d 139, 141 (Pa. Super. Ct. 1956) (affirming the conviction of a defendant who engaged in "malicious prowling and loitering"). The *De Wan* court held that "[t]he mischief prohibited is that intentional act, without legal justification or excuse, which has as its purpose injury to the privacy, person or property of another." *Id.*; *Copeland v. Commonwealth*, 525 S.E.2d 9, 11 (Va. Ct. App. 2000) (affirming a conviction of window peeping where the criminal statute forbids "surreptitious peeping with the intent to invade the privacy of another"); *In re James Shelton Banks*, 244 S.E.2d 386, 391 (N.C. 1978) (upholding the constitutionality of state Peeping Tom statute as not overly vague, because "the act condemned must be a spying for the wrongful purpose of invading the privacy of the female occupant of the room"). But see *Yoeckel v. Samonig*, 75 N.W.2d 925, 926-27 (Wis. 1956) (refusing to recognize the right of privacy by affirming the dismissal of a complaint alleging that a tavern keeper photographed the plaintiff while she was undressed in the tavern's restroom).

75. However, the protection of individual privacy is limited to the extent that the voyeuristic conduct causing the privacy intrusion actually can be prosecuted under an existing crime, either statutory or common law. See *CBS Public Eye* (CBS television broadcast, Sept. 9, 1998) ("Although most states don't have specific laws against video voyeurism, that doesn't mean these video violators can't be arrested; they can. But in many cases, the maximum charge they face is disorderly conduct or trespassing, crimes for which the penalties are usually light."); discussion *infra* Part III (describing privacy invasions that were not actionable under existing statutes and that spurred new legislation).

76. See discussion *infra* Parts III, IV (describing various state legal schemes to protect individual privacy against intrusions from private actors).

most serves only as a minimal deterrent to video voyeurism.⁷⁷ Even though Peeping Tom and other privacy legislation provide a foundation for the prohibition of video voyeurism, they are of limited utility as a conceptual model.

Today's video voyeur may be little more than the next generation of yesterday's Peeping Tom. Video voyeurism, however, is a far more intrusive and disturbing wrong than mere window peeping.⁷⁸ Modern electronics have transformed the deviant, usually solitary, act of peeping⁷⁹ into a booming and perverse online-industry,⁸⁰ built specifically upon the exploitation of non-consensual pornography.⁸¹

77. See discussion *infra* Parts III, IV (explaining the flaws inherent in existing state codes that seek to prevent and criminalize voyeurism).

78. See, e.g., McClurg, *supra* note 48, at 1021 (quoting Justice Douglas, dissenting in *United States v. White*, 401 U.S. 745, 756 (1971), as describing the impact of the video camera as "the greatest leveler of human privacy ever"); Eric Fidler, *Creepy Peepers Lurk Anywhere*, DAYTON DAILY NEWS, Aug. 13, 1999, at 8A (quoting a victim who was videotaped while changing in the locker room as stating, "I think it's ridiculous that it's so easy to just put this on the Internet. It's obviously a violation of privacy, and they use us to sell videos—of us—for their monetary gain."); *States Cracking Down on 'Peeping Tom' Cameras*, FLA. TIMES-UNION (Jacksonville, Fla.), Nov. 26, 1998, at A34 (quoting a Louisiana prosecutor handling a video voyeurism case as stating, "If I'm a Peeping Tom and look into your bedroom, I can be prosecuted. If I put a video camera to do the same thing, and I do not record sound, I am committing no crime."); *CBS This Morning* (CBS television broadcast, Mar. 2, 1999) (quoting a victim whose bedroom and bathrooms were under video surveillance by her neighbor as stating, "I need the darkness to protect me. I've—it's as if my skin's been ripped off, and so everything hurts . . ."); *Montel Williams Show* (NBC television broadcast, Mar. 4, 1999) (quoting an audience member watching a show dedicated to video voyeurism as stating, "[t]his makes me so angry. After seeing this show, I feel like I have to go back to my home, shut my windows and be careful if—if I wear skirts in the mall or not. That is sick.").

79. See AMERICAN HERITAGE COLLEGE DICTIONARY 1008 (3d ed. 1993) (defining peeping as: "To peek furtively; steal a quick glance").

80. See, e.g., *1 Hidden Voyeur Camera* (visited Feb. 14, 2000) <<http://www.1hiddenvoyeurcamera.com/page1.html>> (bragging about the riskiest voyeur footage in the world and the best hidden cameras in bathrooms and locker rooms); *Undies and Upskirts* (visited Feb. 14, 2000) <<http://www.undiesandupskirts.com>> (claiming to have hundreds of the best 'panty pics' and upskirt images); *Upskirts.com* (visited Feb. 14, 2000) <<http://www.upskirts.com/index.html>> (advertising to be the original web site for "upskirts" photography); *Upskirts Sex Voyeur* (visited Feb. 14, 2000) <<http://www.upskirtssexvoyeur.com/home.html>> (claiming to have the largest and most sophisticated collection of "upskirts" pictures and live cameras on the internet); see also, e.g., Bill Rams, *Cyber-Peeping: It's Growing, It's Frustrating, and It's Legal*, ORANGE COUNTY REG. (Cal.), June 26, 1998, at A1 (discussing video voyeurism, specifically "up-skirting," as a new form of urban hunting, and quoting Robert Roy, a worker for the parent company of an Internet site that publishes voyeuristic photos, as explaining that, "[m]en use to bring down a head of an animal as a trophy. Now it's panties."); Interview by Montel Williams with Raymond Zane, New Jersey State Senator, *Montel Williams Show* (NBC television broadcast, Mar. 4, 1999) (decrying the changes in contemporary society that allow video voyeurs to profit from an extensive market for illicit pictures). Senator Zane stated, "[o]ur entire society is changing . . . there are people like the [voyeurs] of the world that are making a fortune on this and there is a market for it." *Id.*

81. See Fidler, *supra* note 78, at 8A (describing the widespread practice of using hidden cameras to videotape people in the nude without their consent and the vast

Furthermore, when committed in the public space, the invasion of video voyeurism becomes manifestly unjust because an adequate legal remedy is unavailable to victims.⁸² In effect, the failure of criminal law to recognize a legitimate expectation of privacy in the public space tacitly grants the video voyeur a license to act with impunity, and leaves victims with little or no recourse.⁸³

C. *The Failure of the Civil Law's Privacy Tort of Intrusion*

Absent a criminal sanction, victims of video voyeurism must rely upon civil remedies to find any semblance of restitution or vindication.⁸⁴ As noted above, however, civil law's understanding of privacy suffers from the same lethal deficiency as criminal law: as a general matter, no right to privacy exists in the public space.⁸⁵ "Tort law clings stubbornly to the principle that privacy cannot be invaded in or from a public place."⁸⁶ Therefore, individuals who are

Internet market for those pictures). One former college athlete who was victimized by hidden cameras while undressing in the locker room said: "Anyone's son or daughter can be on the Internet; anyone's brother or sister can be on the Internet. That's rather disgusting when you think about it." *Id.*

82. See discussion *infra* Part III.D (criticizing the distinction between public and private space, and particularly the lack of legal protections for individual privacy in public places).

83. See discussion *infra* Part III.D (asserting that the present conceptual understanding of privacy in the legal community fails to provide sufficient safeguards to victims).

84. See *supra* Parts II.A, II.B (discussing various criminal remedies that may be available to combat video voyeurism, but noting the remedies are not available for intrusions occurring in public places); see also Gloria Gonzales & Laura Trujillo, *Privacy Comes with No Guarantees*, PORTLAND OREGONIAN, Oct. 25, 1996, at A1 (reporting on a secret videotaping incident and noting that "[secretly videotaping people was] no crime. There is no state law against videotaping adults without their knowledge . . . [and] [a]dults who are taped without their consent have little recourse other than filing a civil suit against the person who taped them"); cf. RESTATEMENT (SECOND) OF TORTS § 652B (1977) (defining the privacy tort of intrusion upon seclusion—a possible civil remedy). According to section 652B, "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs and concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B.

85. RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (explaining that liability arises only when individuals violate private space or private seclusion). Comment C states:

The defendant is subject to liability under the rule stated in this Section only when he has intruded into a private place, or has otherwise invaded a private seclusion that the plaintiff has thrown about his person or affairs. Thus there is no liability . . . for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye.

Id.; see McClurg, *supra* note 48, at 991-92 (asserting that tort law offers only limited security against "intrusive videotaping, photography or surveillance" when an individual ventures into the public domain).

86. McClurg, *supra* note 48, at 990. Professor McClurg continues: "[H]owever

surreptitiously captured on film or video in an exposed state, despite their reasonable efforts to remain fully clothed while in the public space, face a similar conceptual challenge in raising a civil cause of action as confronts criminal law.⁸⁷

As with all staunch rules, there are exceptions that follow.⁸⁸ Peculiarly, the few cases that have deviated from this canonical principle have apparently secured little value as lasting legal precedent.⁸⁹ At least two prominent cases amid the relatively select progeny of privacy case law, bearing strong factual resemblance to the actual intrusion here analyzed, appear to have recognized an actionable invasion of privacy in the public setting. An 1890s New York case⁹⁰ involving a Broadway actress, Marion Manola, at least ostensibly recognized the actress's privacy rights, whose "appearance in tights . . . was, by means of a flashlight, photographed surreptitiously and without her consent."⁹¹ Of seemingly even greater significance, a 1964 Alabama case, *Daily Times Democrat v. Graham*,⁹² explicitly found the taking of a photograph of a woman, whose skirt was blown up unexpectedly by an air vent as she exited a funhouse, to

sound this rule once may have been, it is flawed in a modern technological society where the camcorder has become a permanent fixture." *Id.* at 990-91.

87. See Morton, *supra* note 37, at 1444 (maintaining that because tort law "generally supports the proposition that an individual in public implicitly has consented to being photographed," it fails to guard against "intrusive photography, videotaping, or surveillance of subjects located in, or in plain view from, a public space").

88. See RESTATEMENT (SECOND) OF TORTS § 652B cmt. c ("Even in a public place, however, there may be some matters about the plaintiff, such as his underwear or lack of it, that are not exhibited to the public gaze; and there may still be invasion of privacy when there is intrusion upon these matters.").

89. See McClurg, *supra* note 48, at 1044-45 (claiming that courts are reluctant to recognize actions for violations of privacy rights while in public). McClurg states:

In disposing of claims arising in public intrusion contexts, courts are generally content to recite the rule that a person in public has no cognizable privacy claim. However, in several cases courts have intuitively recognized a right to recover for invasion of privacy under circumstances amounting to a public intrusion. *The opinions in these cases are radically underwritten and recognition of the right is usually by implication only.*

Id. (emphasis added).

90. See Warren & Brandeis, *supra* note 23, at 195 n.7 (citing *Marion Manola v. Stevens & Myers*, (N.Y. Sup. Ct. 1890) (unpublished opinion), N.Y. TIMES of June 15, 18, 21, 1890); see also Dorothy Glancy, *Privacy and the Other Miss M*, 10 N. ILL. U. L. REV. 401, 402-19 (1990) (extensively discussing the case of Marion Manola and further positing that the concept of "inviolable personality" is comprised of two inter-related aspects: emotional integrity as well as proprietary rights).

91. Warren & Brandeis, *supra* note 23, at 195 n.7. Cited by Warren and Brandeis in their historic article, the case of Marion Manola resulted in the issuance of a preliminary injunction issued *ex parte* and has been recognized as one of the first cases to articulate an actionable concept of privacy. See *id.*

92. 162 So. 2d 474 (Ala. 1964).

be an invasion of privacy.⁹³

Both cases involved the surreptitious photographing, by a stranger, of another individual within the public space whose image was, by virtue of the recording, forcibly preserved while in a state of compromised modesty.⁹⁴ The prevailing rule, denying the existence of legally protected privacy in the public space, however, continues to remain unscathed and unaffected.⁹⁵ In fact, not only does civil law generally refuse to recognize an expectation of privacy in public space, there is persuasive sentiment that “the right of privacy in tort law is shrinking.”⁹⁶ Therefore, despite some exceptions to the contrary, the administration of privacy protection through the civil law continues not only to be suspect, but outright hostile to the privacy tort of intrusion.⁹⁷

93. *See id.* at 478 (affirming judgment for plaintiff in a tort action against a newspaper for the invasion of privacy in public place for publication, without consent, of a photograph of the plaintiff while her dress had been blown above her waist by an air vent as she exited a funhouse during a county fair). In fact, this case became the exact fact pattern for the exception to the general rule as articulated by the RESTATEMENT (SECOND) OF TORTS § 652B cmt. c, illus. 7 (1977). The Restatement illustration poses:

A, a young woman, attends a “Fun House,” a public place of amusement where various tricks are played upon visitors. While she is there a concealed jet of compressed air blows her skirts over her head, and reveals her underwear. B takes a photograph of her in that position. B has invaded A’s privacy.

Id. This exception seemingly provides the necessary legal profile to make actionable precisely the public invasion of privacy exacted by video voyeurs. As a practical matter, however, it appears to remain in near obscurity.

94. *See Graham*, 162 So. 2d at 476 (noting that the plaintiff was photographed when her dress was blown by air jets, exposing her body from the waist down); Warren & Brandeis, *supra* note 23, at 195 (noting that Manola was photographed while playing a role that required that she wear tights).

95. *See, e.g., Muratore*, 656 F. Supp. at 483 (denying a passenger on a cruise ship an action for invasion of privacy for harassing photographs because the pictures were all taken in public areas of the ship); *Hartman v. Meredith Corp.*, 638 F. Supp. 1015, 1018 (D. Kan. 1986) (“The plaintiffs must show that there has been some aspect of their private affairs which has been intruded upon and does not apply to matters which occur in a public place or place otherwise open to the public eye.”); *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081, 1087 (E.D. Pa. 1980) (“[T]his tort does not apply to matters which occur in a public place or a place otherwise open to the public eye.”); *Berg v. Minneapolis Star & Tribune Co.*, 79 F. Supp. 957, 961-62 (D. Minn. 1948) (holding that a litigant in a court proceeding did not have an action for invasion of privacy when a newspaper photographer took his picture against his wishes while in the courtroom).

96. McClurg comments:

Indeed, it is not hyperbole to suggest that the right may be approaching extinction, at least in some of its variants. Judges have been the engineers of the tort’s destruction, both by the rules of positive law they have fashioned and, just as significantly, in the way they administer the tort.

McClurg, *supra* note 48, at 996 (citations omitted).

97. *See id.* at 1000 (“Of the forty-nine invasion of privacy cases reported by state courts in 1992, trial courts granted summary judgment to the defendant in twenty-one of the cases, and granted the defendant’s motion to dismiss the complaint in

Besides the general inapplicability of civil law to privacy intrusions occurring in the public space, other factors contribute to the inadequacy of tort privacy. To begin with, as a practical matter, monetary relief will likely prove woefully inadequate.⁹⁸ Even plaintiffs who prevail in a civil suit are unlikely to receive adequate compensation, because the majority of video voyeurism defendants likely lack sufficient wealth to pay a sizeable damage award.⁹⁹

Perhaps the greatest reason why civil law is an inadequate vehicle to redress the anti-social behavior manifest in video voyeurism is the simple fact that the majority of victims are never likely to realize that they, in fact, have been victimized.¹⁰⁰ Video voyeurism, and particularly public video voyeurism, is intentionally clandestine and by its very nature is committed surreptitiously. Therefore, many potential plaintiffs may never realize their privacy has been violated, and consequently may never initiate a civil suit.¹⁰¹ When viewed in this light, the argument has been made that, "in many cases, if the criminal law does not provide a cloak of protection for the victim, nothing will."¹⁰²

Therefore, despite the increasingly invasive nature of privacy violations, civil law is neither an adequate catalyst for the substantive protection of privacy, nor an effective deterrent against the

fifteen of the cases.") (citations omitted).

98. See H. Morley Swingle & Kevin Zoellner, *Criminalizing Invasion of Privacy: Taking a Big Stick to Peeping Toms*, 52 J. Mo. B. 345, 346 (1996) (suggesting that civil actions are inadequate because most defendants do not have the resources to pay large damage awards and most insurance policies do not cover intentional torts); see also *Snakenberg v. Hartford Cas. Ins. Co.*, 383 S.E.2d 2, 8 (S.C. 1989) (holding that the defendant's insurance policy did not cover a judgment rendered in a civil suit for intentional invasion of privacy, where the defendant surreptitiously filmed swimsuit models as they changed clothing).

99. To illustrate this point, Swingle and Zoellner discuss the 1990 allegations that entertainer Chuck Berry surreptitiously filmed multiple women while they used the restroom of a restaurant that he owned, resulting in a million-dollar settlement. See Swingle & Zoellner, *supra* note 98, at 346. Unlike Chuck Berry, most defendants convicted of video voyeurism are not likely to have sufficient wealth to pay such a large award of damages. See *id.*

100. See Rams, *supra* note 80, at A1 ("A civil invasion-of-privacy suit probably isn't plausible, because identifying the victims is virtually impossible. The women don't know they are being filmed. Their faces are rarely shown.").

101. See Letter from Matthew Eaton, *supra* note 12 (alluding to the fact that the women being filmed in the shopping mall were unaware of the action). As the letter indicates, none of the 18 victims realized that they had been videotaped, and it is unlikely that any of them could have been located subsequently in order to inform them of the videotaping. See *id.* Mall security, however, was able to intervene on behalf of these individuals under the suspicion that the perpetrator had broken a criminal law. See *id.* Had public video voyeurism been a criminalized activity, then the mall would have been able to press charges, and the perpetrator would have been brought to justice. See *id.* (stating that the District Attorney rejected the case because there was no specific law that covered the case).

102. Swingle & Zoellner, *supra* note 98, at 346.

deleterious behavior manifest in video voyeurism.¹⁰³ The tort of privacy, itself long considered the “problem child” of civil law,¹⁰⁴ requires a fully developed counterpart within criminal law. In order to effect the necessary change, the law must re-conceptualize the right of privacy to acknowledge and encompass an aspect of privacy that is universal and fundamental—the right to control exposure of one’s body.¹⁰⁵ To this end, lawmakers must recognize that a legitimate expectation of privacy can and does exist in the public space.

III. CRITICIZING THE DOMINANT RATIONALE OF VIDEO VOYEURISM PROHIBITION: REVEALING AN ESSENTIAL FLAW IN CRIMINAL LAW’S CONCEPTUALIZATION OF THE RIGHT TO PRIVACY

The following examples represent the current state of the law regarding an individual’s privacy interests in controlling exposure to his or her intimate body. The majority of states may have begun to address the issue of video voyeurism, however these attempts all too clearly demonstrate that advances in today’s technology have rendered yesterday’s conception of privacy flawed and outdated.

A. Case Study: Missouri

In 1994, the people of the state of Missouri were shocked to learn that a tanning salon proprietor surreptitiously videotaped more than 100 women while they tanned in the nude.¹⁰⁶ The real injustice,

103. See John Jurata, *The Tort that Refuses to Go Away: The Subtle Reemergence of Public Disclosure of Private Facts*, 36 SAN DIEGO L. REV. 489, 531-32 (1999) (explaining why plaintiffs are likely to lose in court even when their pictures are published on the Internet). Jurata explains:

Using hidden video cameras, participants in “cyber peeping” sneak pictures down the blouses and up the skirts of unsuspecting women in public places, then publish such pictures on Internet Web sites for profit. Although the secret film taking is currently legal because it occurs in public, the publication of such pictures on the Internet most likely falls within the domain of the private facts tort. However, as a practical matter, it would be extremely difficult, if not impossible, for plaintiffs to win in court for two reasons. First, it is unlikely that a woman would even know that she had been photographed and placed on the Web. Second, even if a woman suspected she had been photographed, the limited nature of the Internet pictures make determining or proving the victim’s identity nearly impossible.

Id. (citations omitted).

104. See Tutaj, *supra* note 55, at 666 (noting that courts have struggled with striking a balance between protecting an individual’s right to seclusion and protecting freedom of action).

105. See *supra* notes 37-42 and accompanying text (offering various descriptions of the concept of privacy in an attempt to create a tangible definition).

106. See Swingle & Zoellner, *supra* note 98, at 345 (discussing this incidence of video voyeurism).

however, is that the owner could not be held criminally liable for video voyeurism.¹⁰⁷ Missouri law simply did not prohibit this conduct, or anything like it.¹⁰⁸ The state responded rapidly by passing new legislation that criminalized the nonconsensual filming of any individual who is in a “state of full or partial nudity and is in a place where he would have a reasonable expectation of privacy.”¹⁰⁹ The Missouri privacy statute was quickly lauded as “model legislation.”¹¹⁰

Although the statute advanced the protection of victims’ privacy rights, it continues to limit legitimate privacy expectation to “non-public” places.¹¹¹ The statute fails to recognize that today’s voyeur, equipped with modern surveillance technology, can violate the privacy of a fully-clothed individual in a public setting almost as easily as it can be to intrude upon the privacy of a naked individual behind the traditionally understood closed door.¹¹²

The Missouri statute expressly protects privacy in any place that justifies what the statute’s language labels as the victim’s “reasonable

107. See *Tanning Salon Worker Charged With Taping Naked Teen-Agers*, ST. LOUIS POST-DISPATCH, Aug. 10, 1994, at 10A (reporting that prosecutors were able to charge defendant with five counts of felony child abuse due to the fact that a few of the videotaped women were under the age of 18).

108. See *Scores of Women Taped By Hidden Camera In Tanning Booth; Authorities Say*, ASSOCIATED PRESS, May 25, 1994, available in 1994 WL 10128020 (reporting that although both the sheriff’s and prosecutor’s daughters were among those who were videotaped, no legal action could be taken against the suspect because Missouri law did not prohibit surreptitious videotaping).

109. 1995 Mo. Legis. Serv. 160 (West) (codified at MO. ANN. STAT. § 565.253 (West 1999)).

110. Swingle & Zoellner, *supra* note 98, at 345 (“The [Missouri] law may serve as model legislation.”).

111. See MO. ANN. STAT. § 565.250(3) (West 1999) (limiting privacy expectations to places where a person would believe that she could disrobe “without being concerned that the person’s undressing was being viewed, photographed or filmed by another”).

112. Compare, e.g., Letter from Matthew Eaton, *supra* note 12 and accompanying text (describing a video voyeur surreptitiously filming up the skirts of 18 women on an escalator in a public shopping mall), and Bedell, *supra* note 4, at 53 (describing the influx of webcams as tools for the modern voyeur), with Harry Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326, 331-32 (1966) (rejecting tort privacy as advocated by Brandeis and Warren and as expanded by Prosser). Kalven notes that some instances of voyeurism that otherwise lack the traditional elements of trespass may constitute an actionable offense worthy of legal entitlement, but ultimately dismisses these cases as too few to be of concern. See *id.* In his 1966 article, Kalven noted: “It is an interesting challenge to fit in these cases [non-trespassory peeping crimes] conceptually, but the problem appears to be *de minimis*. It seems dubious doctrine, therefore, to dignify this cluster as a major subcategory.” *Id.* at 331-32. With the proliferation of modern electronics, however, not only has it become quite easy to commit acts of voyeurism without the commission of a trespass, but, apparently, it is also becoming quite commonplace. Therefore, it can no longer be sufficient, if it ever was, to merely dismiss the injury wrought by such invasions as *de minimis*. To the contrary, it is time to adopt an expectation of privacy in the public space in order, specifically, to criminalize these intrusions.

expectation of privacy.”¹¹³ The statute further defines such a place as, “any place where a reasonable person would believe that a person could disrobe in privacy, without being concerned that the person’s undressing was being viewed, photographed or filmed by another.”¹¹⁴ In other words, the statute specifically exempts public places.¹¹⁵ Therefore, the statute embodies a fundamental flaw: it fails to recognize the critical relationship between the nature of the right of privacy and the scope of the prohibited intrusion. Current technology effectively enables the video voyeur to pierce the privacy protections traditionally enjoyed by fully clothed individuals;¹¹⁶ thus, the distinction between public and private space is all but irrelevant.

B. Case Study: New Jersey

Four years after the Missouri tanning parlor incident, a New Jersey building superintendent was arrested for secretly installing “an elaborate system of tiny cameras, microphones, and video-recording equipment” in the apartment units of two female tenants.¹¹⁷ These hidden cameras, each equipped with a wide-angle lens about the size of a postage stamp,¹¹⁸ provided the building manager with five months of unadulterated access into the bedrooms of the unsuspecting victims.¹¹⁹

In a scenario disturbingly similar to the Missouri case, the building

113. MO. ANN. STAT. § 565.253(1).

114. MO. ANN. STAT. § 565.250(3).

115. See Swingle & Zoellner, *supra* note 98, at 346-47 (interpreting the statute to include “private homes, dressing rooms, tanning booths, college dormitory rooms, and restrooms” as “the sorts of places protected,” while excluding “[p]ublic beaches, parks and swimming pools”). However, video voyeurs do not just lurk around swimming pools and beaches. These crimes may be committed in any public setting, and, thus, the statute’s reach falls far short of its intended goal.

116. See *In Brief*, TAMPA TRIB., Mar. 30, 1999 (reporting the story of a man who obtained voyeuristic images by placing a bag with a hidden camera concealed under the legs of a female shopper at an area mall); see also *Surreptitious Visual Recording For Sexual Gratification: Hearing on A.B. 182 Before the Senate Comm. on Pub. Safety*, 1999-2000 Legis. Sess. (Cal. June 8, 1999) [hereinafter *Hearing on A.B. 182*] (discussing advanced infra-red technology capable of allowing the user to virtually see through the clothing of another), available in WL, CCA Database, Comm. Rep. A.B. 182 File.

117. See Wayne Parry, *Female Tenants Filmed in the Nude: Hidden Cameras Found in Apartments*, THE STAR-LEDGER (Newark, N.J.), Apr. 9, 1998, at 56 (describing the arrest of a man who had wired miniature cameras that enabled him to see through an aperture no larger than a nail hole inside the apartments of two female residents in a building of which he was the superintendent).

118. See *Manager Imprisoned for Spying on Tenants: Hidden Cameras Videotaped Women*, THE RECORD (Northern N.J.), Apr. 18, 1999, at A8 [hereinafter *Manager Imprisoned*] (describing the technology, including cameras and microphones, used to tape the women’s bedrooms).

119. See *id.* (noting that the defendant was only caught when one of the women being taped overheard him describing his videotaping).

manager could not be prosecuted for video voyeurism.¹²⁰ He was convicted, rather, on two counts of illegal wiretapping, because in addition to the visual image, the videotape also recorded an audio signal.¹²¹ In response to this loophole in the state's privacy laws,¹²² the New Jersey legislature has considered legislation designed to confront the increasing crime of video voyeurism.¹²³ The 1999 New Jersey bill, A.B. 3441,¹²⁴ is designed to prohibit the use or installation of video surveillance equipment within "a private place for the purpose of surreptitiously observing or recording the image of another person."¹²⁵ The bill further defines a private place as "a place where a person may reasonably expect to be safe from intrusion or surveillance but does not include a place to which the public or a substantial group of the public has access."¹²⁶ There is little doubt that this bill would protect New Jersey residents from becoming victims of video voyeurism while inside their apartments.¹²⁷ This bill would also likely protect individuals who are surreptitiously filmed in retail dressing rooms or restaurant bathrooms.¹²⁸

120. See Parry, *supra* note 117, at 56 (stating that if the defendant had not used microphones to record sound than he could not have been charged with a serious offense, because it was not illegal to videotape just the visual images).

121. See *Manager Imprisoned*, *supra* note 118, at A08 (reporting that the defendant is now serving a four-year prison sentence after pleading guilty to the following two wiretap violations: (1) interception, disclosure or use of wire, electronic or oral communications; and (2) possession, manufacture, or assembly of a device for interception of wire, electronic or oral communications).

122. See Fred Aun, *Carpenter Charged in 'Peeping Tom' Case*, THE STAR-LEDGER (Newark, N.J.), Feb. 3, 1999, at 38 (reporting a similar incident of video voyeurism, and reiterating that the creation of voyeuristic videotape absent audio signal is not illegal).

123. See A.B. 3441, 208th Legis. Sess. (N.J. 1999) (making the act of installing or using a video surveillance device a third-degree crime). As of the time of publication of this Comment, the New Jersey legislature has not yet passed this bill, and A.B. 3441 reportedly died in committee in 1999; it has not been re-introduced to date. See Mary Ann Marshall, *A Stranger is Watching . . . (Peeping Toms)*, COSMOPOLITAN, Feb. 1, 2000, at 212 (reporting on the growing incidence of video voyeurism and discussing the pending New Jersey bill); Telephone Interview with Legislative Correspondent, Office of New Jersey State Senator Raymond Zane (Oct. 20, 2000).

124. See A.B. 3441.

125. *Id.*

126. *Id.*

127. A reasonable person would not expect to be observed or videotaped while in their own home or apartment, as it is considered to be a "private place." *Cf.* Commonwealth v. Carlton, 701 A.2d 143, 147 (Pa. 1997) (stressing that homes are private places, the sanctity of which should be protected).

128. A reasonable person generally would expect to be "free from surveillance" when in a retail dressing room with the door closed. See *People v. Abate*, 306 N.W.2d 476, 479 (Mich. Ct. App. 1981) (indicating that a person has a reasonable expectation of privacy in a changing booth). *But see* *Lewis v. Dayton Hudson Corp.*, 339 N.W.2d 857, 859 (Mich. Ct. App. 1983) (holding that a retail customer did not have a reasonable expectation of privacy when signs were posted informing customers that the fitting room was under security surveillance).

Yet, this bill, like the Missouri statute, fails to address expressly the nature and scope of the privacy invasion that it seeks to prohibit. It will not deter a stranger from aiming a video camera directly underneath an individual's skirt or baggy shorts, or down an individual's shirt or blouse while in the public space.¹²⁹ It will provide no protection for a patron who waits in line at an amusement park concession stand,¹³⁰ for a sales clerk assisting a would-be customer in a retail store,¹³¹ or for a commuter who rides the subway during rush hour.¹³² Yet, these intrusions are no less demeaning, humiliating, or invasive than if any unsuspecting consumer was secretly filmed while trying on a pair of pants in a retail dressing room.¹³³

C. Case Study: Connecticut

In late 1998, a similar incident of video voyeurism inflamed the residents of the state of Connecticut.¹³⁴ John Humphreville, an enterprising sixteen-year-old, was arrested after he secretly

129. See *supra* text accompanying note 125 (explaining that the pending bill would apply to using and installing equipment only in private places and not in public places). This is precisely why the California legislature realized that their existing statute, which is very similar to the New Jersey bill, is inadequate. See CAL. PENAL CODE § 647(k) (West 1994) (affirmatively providing protection of private places, but silent on protection in public settings). Thus, the California legislature recently enacted a new law that affirmatively creates an expectation of privacy in public settings. See discussion *infra* Part IV.A (describing the promulgation of an amendment to the California Penal Code).

130. See, e.g., Bill Ainsworth, *Proposal Seeks End to "Cyber Peeping": It May Be Bad, But It Isn't Illegal Yet*, SAN DIEGO UNION-TRIB., July 9, 1998, at A3 (discussing several instances of public invasions of privacy that occurred in California).

131. See Lisa Sink & Linda Spice, *Man Accused of Videotaping Under Skirts*, MILWAUKEE J. SENT. (Milwaukee, Wis.), July 11, 1998, at 1 (reporting the story of a man who secretly aimed a hidden video camera underneath the skirts of several seated female store clerks by concealing a camcorder in a backpack in which he had cut a special hole designed to expose the lens). The article reports that upon inspection of the man's house, police discovered evidence relating to at least 35 different Internet sites devoted to video voyeurism. See *id.* With titles, such as "Skip's Voyeur Pictures" and "Upskirts Pictures," several of these sites instructed viewers how to conceal cameras hidden within gym bags, water bottles and pagers in order to spy on others. See *id.*

132. This example of video voyeurism also takes place in a public setting, where no reasonable expectation of privacy attaches and, therefore, the New Jersey bill would not prohibit such an occurrence. See A.B. 3411, 208th Legis. Sess. (N.J. 1999) (offering protection only in settings where a person has a reasonable expectation of privacy).

133. If these video images are disseminated across the Internet, the victim's privacy is subject to countless and repeated violations. Furthermore, if the victim's likeness is, in fact, identifiable from the video, then the potential for significant mental anguish is magnified dramatically. Yet, when the incident occurs in a public space, in contrast to a private space, the victim would have no recourse at all under this bill.

134. See Janice D'Arcy, *Teen Named in Warrant in Cheshire Voyeur Case*, HARTFORD COURANT, Jan. 8, 1999, at A3 (noting that a Connecticut teenager videotaped four of his female classmates while changing clothes at two pool parties).

videotaped several of his female classmates as they changed into swimsuits at a high school pool party.¹³⁵ Subsequently, Humphreville displayed and distributed several copies of the illicit video to his male classmates.¹³⁶ Despite the highly invasive nature of his actions, prosecutors were only able to charge this student with three counts of breach of the peace.¹³⁷

In league with the Missouri statute and the debated New Jersey bill, the Connecticut legislature responded by passing a video voyeurism statute of its own.¹³⁸ The Connecticut law prohibits any person from recording the image of another person, "while such other person is not in plain view, and . . . under circumstances where such other person has a reasonable expectation of privacy," when the recording is made knowingly, without consent, and for lascivious purposes.¹³⁹ By its own terms, the statute explicitly excludes public settings.¹⁴⁰ Therefore, it denies an individual, under any circumstances, a legitimate expectation of privacy while not specifically behind something equivalent to closed doors.

D. Bodies in Motion: Re-Conceptualizing Public and Private Space

The three legislative attempts to combat video voyeurism discussed above represent the necessary and initial step of acknowledging video invasions of privacy as a legally cognizable injury under criminal law. In a very real sense, however, all three laws are inadequate to address

135. *See id.* (stating that the defendant, with the help of a teenage friend, "tricked" the victims into changing in front of hidden cameras).

136. *See id.* (reporting that Humphreville's accomplice will likely escape charges, because unlike Humphreville, he did not participate in playing or duplicating the videotapes which constituted the actual basis of the charge of breach of the peace).

137. *See id.* (noting that in addition to the criminal charges filed against Humphreville, both students were suspended from school). The article further reports that the school provided the victims with counseling, because they were so upset by the incident. *See id.*

138. *See* An Act Concerning Voyeurism, 1999 Conn. Legis. Serv. P.A. 99-143 (S.S.B. 1078) (West) (addressing voyeurism); *see also* Stephen Ohlemacher, *Senate Approves Legislation to Punish Video Voyeurs*, HARTFORD COURANT, May 21, 1999, at A3 (describing two other incidents of voyeurism in Connecticut, which further prompted passage of the new legislation). An 18-year-old female resident of New Haven testified at a public hearing that she had been videotaped through her bedroom window by a fellow student. *See id.* Additionally, a 21-year-old male was charged with disorderly conduct for videotaping a female college student as she showered in her college dormitory at the University of Connecticut. *See id.*

139. *See* An Act Concerning Voyeurism, 1999 Conn. Legis. Serv. (West) (stipulating that enforcement of the statute not only is contingent upon a determination of the existence of a reasonable expectation of privacy, but that the statute further mandates that the person protected specifically not be "in plain view").

140. *See id.* (explaining that a person has committed voyeurism when he videotapes someone not in "plain view," and only when the individual taped has a reasonable expectation of privacy).

the crime of video voyeurism. The inadequacy is rooted in the way the law divides space into private and public¹⁴¹ and apportions reasonable expectations of privacy such that the expectation of privacy exists in the former, but not the latter.¹⁴²

This delineation is grounded in the following flawed but seemingly canonical tort principle: “[o]n the public street, or in any other public place, the plaintiff has no legal right to be alone.”¹⁴³ Accordingly, courts have upheld a photographer’s right to photograph another in a public place, regardless of consent.¹⁴⁴ The law, it seems, simply ignores the reality that some expectations of privacy remain reasonable even when they are held while in the public domain.

The failure of both criminal and civil law to recognize a legitimate expectation of privacy in public settings, however, results from more

141. See *supra* notes 109, 124, 138 and accompanying text (highlighting statutory language that specifically excludes enforceability of the crime when the intrusion occurs in the public space).

142. See *supra* notes 127-32 and accompanying text (providing examples of the seemingly irrelevant distinction between expectations of privacy in private versus public places). Professor McClurg has argued:

[P]rivacy is not an all or nothing concept. While a person necessarily surrenders a great deal of privacy when she ventures from a place of physical solitude into the light of public view, it does not follow that she forfeits all legitimate expectations of privacy. . . . [T]here are important components of privacy that have nothing to do with physical solitude. When these components are invaded in a highly offensive manner, even in a public place, tort law, [as well as criminal law], should recognize a remedy.

McClurg, *supra* note 48, at 1044.

143. Prosser, *supra* note 29, at 391; see also RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977) (“Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye.”). The narrow exceptions to this rule have failed to provide an adequate framework to support a legally cognizable violation of tort privacy in the public space. See *supra* Part II.C (discussing the failure of tort law to recognize a reasonable expectation of privacy despite some authority to the contrary).

144. See, e.g., *Muratore v. M/S Scotia Prince*, 656 F. Supp. 471, 483 (D. Me. 1987) (stating that a passenger on a cruise ship did not have a valid cause of action despite the fact that the photographer had harassed her, because the photographs were taken in public areas open to all passengers); *Berg v. Minneapolis Star & Trib. Co.*, 79 F. Supp. 957, 961-62 (D. Minn. 1948) (holding that a photographer did not invade the privacy of a litigant by taking his picture against his wishes while in the courtroom); *Forster v. Manchester*, 189 A.2d 147, 150 (Pa. 1963) (concluding that a private detective who was hired by an insurer to investigate personal injury claims relating to an automobile accident did not invade plaintiff’s privacy by filming the plaintiff while on public thoroughfares). The *Forster* court stated that because the plaintiff had exposed herself to public observation, she could not expect the same degree of privacy as would be expected within her own home. *Id.* Cf. *United States v. Gugel*, 119 F. Supp. 897, 898 (E.D. Ky. 1954) (“The operation of a camera is a lawful act and a citizen’s privilege to take pictures, unless made specifically unlawful by statute, is such a civil right as is protected by the Constitution of the United States.”).

than just an inadequate understanding of public and private space. Exacerbating this dilemma is the insistence, embodied in the law of privacy, that the act of observing an individual with the unaided eye is indistinguishable from the act of making a permanent written or photographic record of the same.¹⁴⁵ If this rationale was ever at one time accurate—a dubious proposition—then today’s surveillance technology, particularly when used surreptitiously and with voyeuristic intent, has made this distinction not only obsolete, but preposterous.¹⁴⁶

Video voyeurism is a crime engineered to strip its victims of privacy. It creates a permanent record memorializing the intrusion and facilitating repeated dissemination to a practically unlimited Internet audience.¹⁴⁷ Most importantly, its victims are not safe behind the sanctity of an enclosure nor underneath the protection traditionally afforded by clothing.¹⁴⁸

145. See Prosser, *supra* note 29, at 391-92 (asserting that photographing an individual in public is not an invasion of privacy “since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see”). Prosser relied on *Gill v. Hearst Pub. Co.*, 253 P.2d 441, 443-44 (Cal. 1953), which held that a man and woman who were embracing while sitting on a public bench did not have an actionable claim for invasion of privacy when their photograph was taken and subsequently published as an advertisement. See Prosser, *supra* note 29, at 405-06 (“[I]t has been held that the mere incidental mention of the plaintiff’s name in a . . . commentary upon news which is part of an advertisement, is not an invasion of his privacy; *nor is the publication of a photograph . . . in which he . . . appears.*”) (emphasis added). But see Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 790 (1997) (“The photograph, moreover, although not quite identical to a picture’s subject, nevertheless seems to correspond to the subject in a way that words, which signify through the arbitrary conventions of language, do not.”); McClurg, *supra* note 48, at 1040-41 (arguing that treating privacy as “an all or nothing concept is too rigid”). McClurg states:

Privacy is a matter of degree. Although persons surrender much privacy when they venture to a public place, it does not follow that they automatically forfeit all privacy. There is a difference, which the law should recognize, between being ‘seen’ in public and being closely scrutinized or . . . recorded on film or videotape.

McClurg, *supra* note 48, at 1040-41.

146. See Burrows, *supra* note 1, at 1129 (arguing that the law should recognize the difference between being seen by someone and producing a permanent record through photography). Burrows further states that videotaping is more egregious than photography because “much of the person’s personality is captured by the tape.” *Id.* Pointedly, Burrows continues, “[s]imply because a woman is wearing a skirt and prefers not to wear underwear in public does not give a videographer or surveillance technician the right to capture and exploit her image.” *Id.* (citations omitted).

147. Cf. McClurg, *supra* note 48, at 1041-43 (detailing three specific differences between the unaided observation and the photographic intrusion: (1) the creation of a permanent record, (2) the conveyance of information otherwise not noticeable by transitory observations, and (3) a potential exaggeration of the impact of the intrusion through wide dissemination).

148. See Letter from Matthew Eaton, *supra* note 12 and accompanying text

Accordingly, lawmakers must develop a new jurisprudential understanding of the privacy interest inherent in the human body in order to deal effectively with video voyeurism. Rather than viewing bodies as discrete particles moving from public to private spaces, the law must recognize that the surface of the body is, itself, a private space.¹⁴⁹ In fact, the body is the locus of our most powerful expectation of privacy. The ability to determine when, to what degree, to whom, and under what circumstances the body is exposed, as argued above, is among the most fundamental aspects of the right to privacy and deeply tied to the concept of human dignity.¹⁵⁰ Therefore, in response to the crime of video voyeurism, the law must expressly reject the prevailing understanding of privacy as overly constrictive and inadequate. In its place, the law must recognize a limited, but fundamentally reasonable, expectation of privacy that is sensitive to an individual's desire to control exposure to both intimate acts and intimate body parts regardless of setting.

IV. RECOGNITION OF A LEGITIMATE EXPECTATION OF PRIVACY IN PUBLIC: ACKNOWLEDGING AN ENHANCED UNDERSTANDING OF HUMAN PRIVACY WITHIN THE DIGITAL AGE

At least two states, California and Louisiana, have confronted the issue of video voyeurism head-on and have expanded some modicum of legal protection to the public space. These two states deserve

(providing an example of video voyeurism occurring in a public shopping mall where none of the 18 different victims realized that they had been filmed). The Montclair Police Department's experience with perpetrators who use hidden cameras to film underneath the skirts of female shoppers clearly indicates that the legal right to privacy should not depend upon the distinction between public and private space. *See id.* (detailing examples of surreptitious videotaping deemed inactionable because they took place in the public setting of a mall). Such a distinction is not only facially arbitrary, but it patently confuses both the harm caused by the intrusion of video voyeurism as well as the nature of the right of privacy that this rule purports to serve. *See Morton, supra* note 37, at 1444 (explaining that there are no adequate legal remedies to protect against intrusive acts of voyeurism when the subject is located in plain view or a public space, and tort law generally incorrectly assumes that an individual in public consents to being photographed). Had these shoppers been surreptitiously filmed while changing clothing behind the closed doors of a retail dressing room, their injury would be identical, but their claim suddenly would be actionable. *See supra* Part III.A-C (discussing three recent laws that would prohibit video voyeurism in dressing rooms but not in the public space).

149. *Cf. McClurg, supra* note 48, at 1040-41 (arguing that a person does not forfeit all privacy when in public); Malkan, *supra* note 145, at 779 ("The right of privacy, which protects personality from unwanted public exposure, presumes that an individual possesses a deeper identity, distinct from his or her socially defined personality.").

150. *See Bloustein, supra* note 39 and accompanying text (suggesting that human dignity is fundamentally linked to an individual's right to be free from certain types of intrusions).

credit for taking steps to “re-think” the ancient right of privacy in accordance with the principle of an individual’s “inviolate personality,”¹⁵¹ particularly when juxtaposed against the technological challenges of our electronic age.

A. Case Study: California

In 1998, the people of Orange County, California witnessed a rash of three separate incidents of video voyeurism within a single month.¹⁵² Although California already criminalized the use of hidden cameras to invade surreptitiously the privacy of another in any enclosed area that provides a reasonable expectation of privacy,¹⁵³ all three incidents proved to be immune from criminal prosecution.¹⁵⁴ The reason: they all occurred in public settings.¹⁵⁵

To the unease of residents and tourists alike, these particular video voyeurs trained their camera lenses on unsuspecting individuals visiting the beach, enjoying a Memorial Day festival, and touring Disneyland.¹⁵⁶ In one case, confiscated tapes revealed the perpetrator followed several dozen women for up to ten minutes while he attempted to position a gym bag containing a hidden camera directly between the women’s legs as they waited in lines or shopped in crowded stores.¹⁵⁷ To no avail, prosecutors combed the California Penal Code for more than a week attempting to find any law that was violated.¹⁵⁸

151. See Warren & Brandeis, *supra* note 23, at 205 (discussing privacy as premised upon an inviolate personality).

152. See Rams, *supra* note 80, at A1 (discussing the growing trend of video voyeurism within public settings in California). “Men armed with video cameras are secretly filming up women’s skirts and down their blouses in growing numbers, and police say they can’t do anything about it.” *Id.*

153. See CAL. PENAL CODE § 647(k)(1) (West 1994 & Supp. 2000) (prohibiting some invasions of privacy as disorderly conduct). The statute prohibits:

Any person who looks through a hole or opening, into, or otherwise views, by means of any instrumentality . . . the *interior of a bathroom, changing room . . . or the interior of any other area* in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside.

Id. (emphasis added).

154. See Rams, *supra* note 80, at A1 (quoting a police official as stating, “We would have liked to charge [them] with a crime, but there was nothing we could do”).

155. See *id.* (“It is a crime to illegally tape in restrooms, changing rooms or tanning salons. Anywhere there is an expectation of privacy. But not in public.”).

156. See *id.* (reporting three taping incidents, including one perpetrator who filmed down multiple women’s shirts as they exited carnival rides during the Garden Grove Memorial Day festival).

157. See *id.* (quoting the investigatng officer as stating, “[n]o one should have to feel that they need to be careful because someone might stick a camera up her dress”).

158. See *id.* (“The filming is not a battery because nobody was touched. Or

In response to these incidents, the California legislature undertook to amend and update the existing ban on video voyeurism in private enclosures.¹⁵⁹ The new statute criminalizes the secret, non-consensual filming “under or through the clothing”¹⁶⁰ of another identifiable person for the purposes of sexual gratification, provided the circumstances were such that the victim formed a reasonable expectation of privacy.¹⁶¹ As described in its legislative history, the statute is designed “to apply to the sexually motivated invasion of another’s privacy through [a video] device.”¹⁶²

Unlike the statutes discussed thus far,¹⁶³ this legislation premises the protection of individual privacy on the invasion committed, rather than on the location where that invasion occurred.¹⁶⁴ By prohibiting the act of recording “under or through the clothing” of the victim, the statute underscores that such a privacy violation may occur in either the public or private space.¹⁶⁵ In other words, this statute abandons the traditional distinctions between public and

eavesdropping. Or aiding and abetting an indecent exposure.”). An Anaheim police officer stated, “This man should be in jail. We’ve done everything we could to put him there. But we can’t come up with anything.” *Id.*

159. See CAL. PENAL CODE § 647(k)(2) (West 1994 & Supp. 2000) (establishing criminal protection of privacy in public spaces under limited circumstances). The statute prohibits:

Any person who uses a concealed camcorder . . . or photographic camera of any type, to secretly videotape . . . or record by electronic means, another, identifiable person under or through the clothing being worn by that other person, for the purpose of viewing the body of, or the undergarments worn by, that other person, without the consent or knowledge of that other person, with the intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person and invade the privacy of that other person, under circumstances in which the other person has a reasonable expectation of privacy.

Id.; see *Hearing on A.B. 182*, *supra* note 116 (detailing the purposes behind the amendment). See generally Nancy Hill-Holtzman, *New Law Takes Aim at Video Voyeurism*, L.A. TIMES, Aug. 27, 1999, at A3 (reporting that the governor of California signed the bill into law on August 26, 1999); Daniel M. Weintraub, *Bill Banning Video-Peeping Passes Legislature Assembly*, ORANGE COUNTY REG. (Cal.), Aug. 17, 1999, at 1 (reporting that the state Assembly passed the legislation by a vote of 64-0).

160. CAL. PENAL CODE § 647(k)(2).

161. See CAL. PENAL CODE § 647(k)(2) (requiring that the circumstances be such that entitle the victim to a reasonable expectation of privacy); see also *Hearing on A.B. 182*, *supra* note 116 (stating that California statute is narrowly drafted to prohibit the purposeful invasion of privacy of the victim but not to infringe upon the First Amendment rights of the voyeur).

162. *Hearing on A.B. 182*, *supra* note 116.

163. See *supra* Part III (discussing several recent video voyeurism statutes that fail to provide protection in the public space).

164. See *Hearing on A.B. 182*, *supra* note 116 (stating that it is unlawful to “electronically record—under or through the clothing—the intimate body parts or clothing of another”).

165. See *Hearing on A.B. 182*, *supra* note 116 (“The conduct prohibited by this bill would occur in a public place where the defendant would have a right to be. Further, one generally has a right to take photographs in a public place.”).

private space and, instead, harmonizes both the nature of the right to privacy entitled to protection and the scope of the privacy invasion affected by the video voyeur.¹⁶⁶

Reminiscent of the notion of an individual's inviolate personality, the California statute preserves the right of privacy irrespective of outdated conceptions of space and in step with the march of technology.¹⁶⁷ The scope of protection afforded by the statute, however, will likely remain an issue due to several technical limitations. First, the statute appears to require that the victim be identifiable.¹⁶⁸ This poses a significant question as to the effectiveness of the statute, because often there is no way to identify individual victims from images of their undergarments or lack-there-of.¹⁶⁹ Second, the statute continues to employ the problematic language a "reasonable expectation of privacy."¹⁷⁰ This language is burdened with vestiges of the outmoded distinction between public and private space and is likely to generate ambiguity.¹⁷¹ Rather, the statute would

166. See *Hearing on A.B. 182, supra* note 116 ("This bill narrowly defines the privacy interest as the right to be free from surreptitious visual recording for purposes of sexual gratification.")

167. See Hill-Holtzman, *supra* note 159, at A3 (quoting Governor Davis' Press Secretary as stating: "The bill addresses the need to punish a despicable act of behavior: filming innocent women without their knowledge in a lewd manner. It is necessary that we protect the privacy of those targeted individuals").

168. See CAL. PENAL CODE § 647(k)(2) (West 1994 & Supp. 2000) (prohibiting the filming of another, "identifiable person"). *But see Hearing on A.B. 182, supra* note 116 (discussing the potential for ambiguity over the issue of whether the victim need be identifiable). The committee notes read:

The language of the bill may not clearly state whether or not the victim must be identifiable from the prohibited image to allow conviction under the new crime. However, it appears from the background information that the intent of the author of the bill is that the law could be applied in cases where there is no identifiable victim.

Id.

169. The difficulties with requiring that the victim be identifiable are twofold. First, as discussed throughout this Comment, many victims do not know that they have been victimized, and, therefore, will not press charges or contact the police. See Tutaj, *supra* note 55, at 665 (stating that potential civil plaintiffs often are unaware that they have been videotaped and never file suit). Second, many of these voyeuristic pictures do not reveal the victims' faces, and, therefore, it is often difficult to identify a specific victim from a specific video. See *Hearing on A.B. 182, supra* note 116 ("Thus, the bill raises the issue of whether a defendant can be found guilty of criminal violation of privacy where it cannot be determined whose privacy was invaded.")

170. See CAL. PENAL CODE § 647(k)(2) (requiring "circumstances in which the [victim] has a reasonable expectation of privacy").

171. See *Hearing on A.B. 182, supra* note 116 (addressing issues likely to arise including whether the victim was videotaped or photographed while in a state of exposure that was already within public view of the unaided eye, such as when a woman wears a short skirt and her undergarments are observable without any extraordinary effort). The committee notes indicate, "the issue of whether an alleged 'up-skirt' victim had a reasonable expectation of privacy where her undergarments could be observed by the naked eye and during normal activity

likely be more effective if it abandoned this language and instead, premised culpability upon a bad-faith intent standard.¹⁷² Last, this statute does not address the dissemination of these videos onto the Internet.¹⁷³ Although this statute is a clear step forward,¹⁷⁴ it may cast a smaller net than is necessary in order to combat the harm inflicted by the crime of video voyeurism.¹⁷⁵

B. Case Study: Louisiana

In 1998, the state of Louisiana discovered that it too was not immune from video voyeurism.¹⁷⁶ Two neighboring families traded keys in order to watch each other's houses, water the plants, and gather mail when one of them was away.¹⁷⁷ This typical suburban arrangement came to a shocking close, however, when one family discovered that its neighbor, a local church deacon, secretly had installed hidden video equipment in the attic above its bedrooms and bathrooms.¹⁷⁸

would likely arise often in court." *Id.*

172. See *infra* Part IV.B (discussing the Louisiana video voyeurism statute, which does not include a reasonable expectation of privacy requirement, but instead premises culpability upon a lack of consent and a lewd intent). Cf. *Hearing on A.B. 182, supra* note 116 (pointing out another possible weakness in the California statute regarding the intent requirement). The legislative history states:

This bill requires that a defendant have surreptitiously visually recorded the underclothing or body of another for purposes of sexual gratification. Thus, a person who operates an Internet 'up-skirts' site *for commercial purposes, and not for sexual gratification, would not be subject to prosecution* under this bill.

Id. (emphasis added).

173. See Margaret Kane, *California Bans Video Peeping*, ZDNET NEWS, Aug. 27, 1999, at 1 (reporting that the new law does not address Internet distribution, despite the fact that there are "dozens of Web sites that specialize in displaying such videos"). The California statute does not address the issue of dissemination of these videos once they are recorded. See *id.* (expressing an opinion that there is not much one can do about distribution of videos, but one can strip the source). Publication of these pictures on the Internet is the second half of the crime of video voyeurism that must be addressed. See *id.* (stating that "videopeeping" is a new forum of video voyeurism).

174. See Ainsworth, *supra* note 130, at A3 (quoting the bill's sponsors as proclaiming that "[t]his is common-sense legislation to protect women from cyber predators and to assure their likeness is not used in a way contrary to their wishes").

175. See *Hearing on A.B. 182, supra* note 116 (noting that prosecution may prove difficult under the new crime).

176. See Randy McClain, *Lawmaker Proposes Video-Voyeurism Law*, BATON ROUGE ADVOC., Nov. 27, 1998, at 13B (reporting on proposed video voyeurism legislation that would prohibit video voyeurism when the victim has not consented and the taping is committed with a lewd intent).

177. See Joanna Weiss, *Voyeur Prompts DA to Propose Peeping Tom Law*, NEW ORLEANS TIMES-PICAYUNE, Jan. 10, 1999, at A1 (describing the relationship between the two neighbors as friendly before the video incidents occurred).

178. See *id.* (reporting that the neighbor drilled holes in the ceilings of the master bedroom and bathroom as well as the teenage daughter's bathroom and installed a video camera and television monitor hidden underneath the attic insulation). The article further reports that the victims initially paid no attention to the small holes in

Unfortunately for the victims, the Louisiana Penal Code did not specifically criminalize video voyeurism.¹⁷⁹ Thus, the church deacon eventually entered a plea of unlawful entry, and currently is serving only three years of probation.¹⁸⁰ After months of vigorous debate within the legislature,¹⁸¹ Louisiana recently passed a statute that directly addresses the intrusive nature of video voyeurism.¹⁸² The statute prohibits, “[t]he use of a camera . . . or any other image recording device for the purpose of observing, viewing, photographing, filming or videotaping a person where that person has not consented to the observing . . . or videotaping and it is for a lewd or lascivious purpose.”¹⁸³

In other words, the new law protects individual privacy in both enclosed and public settings.¹⁸⁴ It does not rely on the vague test of the reasonable expectations of the victim, and instead focuses directly on the unreasonable and offensive nature of the conduct committed by the video voyeur.¹⁸⁵ Furthermore, the statute also prohibits the dissemination of voyeuristic images by “live or recorded telephone message, electronic mail, the Internet, or a commercial online service.”¹⁸⁶ The Louisiana statute represents a delicate compromise

the ceiling and assumed that the previous homeowner had hung decorative baskets. *See id.* (“You never think, ‘Oh, I’ll bet somebody has a surveillance camera.’ You think, ‘Oh, our house is falling apart.’”).

179. *See id.* (“Entering her house was illegal. Using her electricity was illegal. Damaging her property was illegal. Videotaping her was not.”).

180. *See id.* (reporting that the defendant’s prison term was suspended, and he is now serving three years of probation after paying restitution of \$2,000); *see also* Ed Anderson, *House OKs Ban on Video Voyeurs*, NEW ORLEANS TIMES-PICAYUNE, Apr. 10, 1999, at A1 (contrasting the lenient sentence with the fact that the primary victim, Susan Wilson, now suffers from an eating disorder, fears taking a bath with the lights on and sometimes bathes with her clothes on).

181. *See* Marsha Shuler, *Video Voyeurism Measure Has House, Senate at Odds*, BATON ROUGE ADVOC., Apr. 14, 1999, at 6A (“The dispute is over just how much protection an individual should have from secret videotaping in their home or anywhere else privacy is expected.”).

182. *See* 1999 La. Sess. Law. Serv. 14:283(A)(1) (West) (codified at LA. REV. STAT. ANN. § 283 (West Supp. 2000)) (addressing video voyeurism).

183. LA. REV. STAT. ANN. § 283(A)(1).

184. *See id.* (prohibiting video voyeurism in such a manner that the location of the intrusion is not an element of the crime); Telephone Interview with Rep. Willie Hunter (D-Monroe, La.), sponsor of H.B. 67 (July 29, 1999) [hereinafter Hunter Interview] (confirming that this legislation creates an affirmative expectation of privacy in the public space in order to protect against video voyeurism so long as it is committed with a lewd and lascivious intent).

185. *See* Hunter Interview, *supra* note 184 (revealing that the legislators eventually removed the “reasonable expectation of privacy” language because it could create a loophole which could frustrate the intent of the legislation as well as potentially cause difficulties for legitimate instances of surreptitious video recording such as police investigations).

186. LA. REV. STAT. ANN. § 283(A)(2); *see also* Weiss, *supra* note 177, at A1 (reporting that the perpetrator learned of the idea to videotape his neighbor from the Internet). Weiss also highlights the timeliness of the Louisiana statute, which

between the legitimate concerns that the new statute would be overly broad and the equally legitimate interest in deterring and punishing conduct that ought to be criminal.¹⁸⁷

In contrast to the prevailing criminal protection of privacy rights,¹⁸⁸ this legislation addresses, recognizes and affirms the right of an individual to control the ability of others to observe and preserve images of intimate moments, intimate acts, and intimate body parts, regardless of arbitrary distinctions between public and private space.¹⁸⁹ A voyeur who seeks to videotape under or through the clothing of an unsuspecting and non-consenting victim, whether behind closed doors or while riding an escalator in the local shopping mall, will fall within the scope of this law.¹⁹⁰

In prosecutions under the Louisiana statute, however, questions will still remain as to whether the requisite lewd or lascivious intent can be proven or whether the victim, through some conduct, can be found to have implicitly consented to the recording.¹⁹¹ Despite this

prohibits the transfer of images obtained by video voyeurism over the Internet. *See id.* However, the statute is narrowly drafted not to prohibit the legitimate activities in image transmission of businesses such as phone and cable companies and Internet services providers. *See* LA. REV. STAT. ANN. § 283(C) (providing that the provisions of Section 283 prohibiting the transfer of video voyeurism images do not apply to legitimate business).

187. *See* Randy McClain, *Changes Could Kill Video-Voyeurism Bill*, BATON ROUGE ADVOC., June 9, 1999, at 6A (quoting a lobbyist for the Louisiana District Attorneys Association as stating that “[i]t’s hard to envision how courts will rule on where people have a reasonable expectation of privacy”); *see also* Ed Anderson, *Video-Voyeur Measure Sets Criminal Penalties*, NEW ORLEANS TIMES-PICAYUNE, June 22, 1999, at A6 (reporting that different versions of the bill included certain exceptions that would have allowed video monitoring of prisoners as well as video monitoring of individuals during pending civil and worker’s compensation suits, but that legislators could not find a workable bill that included the “reasonable expectation” language while adequately including sufficient exceptions so as not to interfere with legitimate instances of video monitoring). The article reported:

The House and Senate never could agree on which exceptions to keep and which ones to delete from the bill, so [the sponsor] asked the conference committee to rewrite the bill to make it apply to anyone who tapes another without the person’s knowledge and for ‘lewd and lascivious reasons.’

Anderson, *supra*, at A6.

188. *See supra* Part III (criticizing the majority of jurisdictions criminal protection of privacy by referencing three recent video voyeurism laws).

189. *See* LA. REV. STAT. ANN. § 283(A)(1), (B) (defining and prohibiting video voyeurism regardless of whether the violation occurs in public or in private places, but, instead, predicating the application of the statute on whether the observed or taped person has consented to the taping, and on the intent of the perpetrator).

190. *See* Hunter Interview, *supra* note 184 (confirming that this legislation was intended to prevent all forms of surreptitious video voyeurism, provided that it was committed with the requisite lewd intent and therefore lacks any legitimate countervailing interest).

191. *See id.* (“You can’t write a perfect bill, but you can write a bill that becomes a law that can curb these types of activities. Besides, the bill can be amended. That is the legislative process.”).

imprecision, the statute expressly recognizes that the right of privacy, and the fundamental dignity associated with the ability to control the exposure of one's body, is not so ephemeral a right as to be reasonably expected when in the house, but not in the backyard. Rather, the Louisiana statute provides victims with a legitimate opportunity for redress where there was none, and provides a forum to litigate these issues where previously there was only frustration and silence.

CONCLUSION

Even within a world so consumed by voyeuristic tendencies,¹⁹² depictions of the modern day Peeping Tom are somehow innately disturbing to the sensibilities. Nevertheless, video voyeurism has thus far proven to be a lucrative pursuit for anyone inclined to engage in this shameful trade of privacy invasion. Law, and in particular criminal law, must expressly undertake to protect the privacy rights of individuals. This protection requires a re-conceptualization of public and private space as well as an abandonment of the prevailing, but flawed, understanding of human privacy that currently underpins the majority of jurisdictions' attempts to criminalize video voyeurism.¹⁹³

Only when new laws recognize the right to protect the human body from unreasonable and obscene intrusion by video technology, regardless of location, forum and space, will individual privacy be adequately protected from the crime of video voyeurism. Therefore, all of the remaining states would do well to follow in the footsteps of both California and Louisiana. Yet, it should remain the task of all lawmakers to continue to refine the delicate interaction between law, technology and the fundamental rights we enjoy as humans. Ultimately, the law must recognize the body, itself, as a kind of private space, the most private space that a human being will ever inhabit.

192. See, e.g., Jim Carlton, *Video Links Bears, Cubs to Fans*, CHI. SUN-TIMES, Aug. 10, 1999, at 30 (reporting the use of a hidden camera to bring live video feed of bears in the wild at a state park to the Internet); Patrick O'Driscoll, *At Columbine High, Deterrent Factors Await*, USA TODAY, Aug. 3, 1999, at 4A (reporting the installation of 16 new surveillance cameras in Columbine High School); Alan Sipress, *'Big Brother' Could Soon Ride Along in Back Seat*, WASH. POST, Oct. 8, 2000, at A1 (discussing plans to implement hidden cameras at traffic intersections to capture images of drivers running red lights); John Thor-Dahlburg, *Sobering News at Jim Morrison's Grave*, L.A. TIMES, Oct. 7, 2000, at A2 (reporting on the use of hidden surveillance cameras to monitor and control crowds gathering at the famous singer's gravesite); *CBS The Early Show* (CBS television broadcast, Oct. 5, 2000) (reporting the use of hidden cameras by journalists to investigate the recent Ford-Firestone defective sport utility vehicle tire story).

193. See *supra* notes 141-50 and accompanying text (tracing the meaning of privacy and explaining differences in the concepts surrounding privacy).