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TECHNOLOGY ARMS PEEPING TOMS WITH A NEW AND DANGEROUS ARSENAL: A COMPELLING NEED FOR STATES TO ADOPT NEW LEGISLATION

I. INTRODUCTION

The act of voyeurism is becoming an increasingly prevalent and unsettling threat to human dignity and the right to privacy.¹ The “peeping Tom”² of yesterday is now armed with a new arsenal that threatens more than just the unsuspecting victim standing by an open window.³ With the development and advancement of surveillance technology,⁴ voyeurism has evolved into something an increasing number of people suspect and fear.⁵ The accessibility of small video cameras and other viewing or

1. BLACK'S LAW DICTIONARY 1578 (6th ed. 1990). Voyeurism is defined as: “the condition of one who derives sexual satisfaction from observing the sexual organs or acts of others, generally from a secret vantage point.” *Id.*

2. LA. REV. STAT. ANN. § 284 (West 1999). The statute defines a peeping Tom as “one who peeps through windows or doors, or other like places, situated on or about the premises of another for the purpose of spying upon or invading the privacy of persons spied upon without the consent of the persons spied upon.” *Id.*; see also S.C. CODE ANN. § 16-17-470 (Law. Co-op. 1998). The South Carolina statute describes a peeping Tom as someone “who peeps through windows, doors, or other like places, on or about the premises of another, for the purpose of spying upon or invading the privacy of the other persons spied upon and any other conduct of a similar nature, that tends to invade the privacy of others.” *Id.*; see also *State v. Harris*, 358 S.E.2d 713, 714 (S.C. 1987) (holding that “[p]eeping Tom’ is a crime of moral turpitude”).

3. See *infra* notes 74-79 and accompanying text (discussing the advancements in technology and how they allow voyeurs to peep while no one is looking).

4. See *infra* notes 74-88.

5. *Primetime Live: Rooms with a View — Landlords Caught on Tape Harassing Tenants* (ABC television broadcast, Apr. 1, 1998). Numerous television programs have tapped into society's fascination and paranoia with this type of invasion of privacy. *Id.* Sylvia Chase, from *Primetime Live*, also addressed the topic on a show about landlords harassing tenants. *Id.* A number of tenants of landlord Lynn Lacey described the various means that he used to view them in their separate apartments. *Id.* Some of these methods included the use of two-way mirrors, hidden rooms, peepholes, and video recorders. *Id.* The hundreds of videotapes recovered by authorities contained various pornographic scenes such as tenants engaged in sexual activity and images of children using the restroom. *Id.*

recording methods⁶ eases the barriers for perverts to observe others engaged in otherwise personal activities.⁷

The story of Susan and Gary Wilson, recent victims of video voyeurism, illustrates what these peeping perverts can do with the aid of a video camera.⁸ In 1996, the couple went looking for a home and at the suggestion of a friend and fellow church member, Steve Glover, they found a house just a few doors down from his.⁹ After some time, the couple began to feel uneasy around Steve.¹⁰ Susan began noticing that he somehow knew about certain private things that took place in her house.¹¹ In an effort to confirm her suspicions that Steve was watching her, she searched his home and found a videotape that contained scenes from her bedroom.¹² After closely inspecting their own home, the couple found "under a bulge in insulation, a kind of home entertainment center, all set up . . . by Steve."¹³ Police found various tapes with numerous scenes of the couple doing normal every day activities.¹⁴ One of the tapes, found in Steve's home, included footage taped at his residence when guests came to visit and use the sauna that he had offered to his neighbors to enjoy at their convenience.¹⁵ The police could not charge Steve with anything except burglary of the electricity used to run the video cassette recorder ("VCR") found in the couple's home.¹⁶ Steve Glover pled guilty to illegal entry as part of a plea bargain and received only three years probation.¹⁷

The introduction of the Internet¹⁸ as a medium to distribute mate-

6. See WARREN FREEDMAN, *THE RIGHT TO PRIVACY IN THE COMPUTER AGE* 107 (1987). New technology has led to the use of new devices such as "pocket recorders, portable television cameras, telescopic lenses [and] lightweight miniaturized cameras." *Id.* at 108.

7. *Id.* Due to the growth and popularity of surveillance devices, "more and more ordinary people as well as governments are engaged in surveillance, for fun or for profit." *Id.*

8. *20/20: Video Voyeurism Video Voyeur Tapes Neighbors' Private Moments* (ABC News television Broadcasting, Jan. 27, 1999) [hereinafter *20/20*]. The couple recently told their story to ABC. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* Susan described the details of one situation that made her realize something was very wrong with her neighbor Steve. *Id.* "One time I was in the bathroom fixing my hair, and it wasn't working right. I said, 'Ah, I'm having a bad hair day,' screaming like that." *Id.* Steve approached her later that day, looked her once over, and told her that her hair didn't look that bad. *Id.*

12. *Id.*

13. *Id.*

14. *20/20*, *supra* note 8.

15. *Id.*

16. *Id.* The State in which the couple lived did not have a criminal voyeurism statute that would cover the use of video cameras to spy on the victims. *Id.*

17. *Id.*

18. *American Civil Liberties Union v. Janet Reno*, 31 F. Supp.2d 473, 476 (E.D. Pa. 1999). "The Internet is a giant network that interconnects innumerable smaller groups of

rial obtained from voyeurs increases the harm of video voyeurism to an international level.¹⁹ The possibility of the dissemination of material obtained by voyeurs on the Internet escalates the fear of observation by a single pervert to complete terror at the prospect that anyone with Internet access may view what the peeping Tom records.²⁰ Anyone with a computer and a modem can gain access to the Internet and display videos of people undressing in their own home.²¹ Within seconds, these videos are available²² to millions of Internet users throughout the world.²³ Additionally, it is virtually impossible to stop the disbursement of the videos once they are available on the Internet.²⁴ Although many victims attempt to recover damages in civil suits against these voyeurs and distributors, the damage is done by the time the parties arrive in court. Therefore, the only real course of justice is to see that the voyeurs,

linked computer networks: a network of networks." *Id.* Various groups and organizations own the various computer networks that give rise to the Internet. *Id.* Private citizens and groups own some of the networks, while others are owned by non-profit organizations and governmental or public institutions. *Id.* The end product of these various networks "is a decentralized, global medium of communications, or 'cyberspace,' that links individuals, institutions, corporations, and governments around the world." *Id.*

19. *Reno*, 31 F. Supp.2d at 475. "The Internet is an international system. This communications medium allows any of the literally tens of millions of people with access to the Internet to exchange information." *Id.* Due to the speed of modems, communications "can occur almost instantaneously, and can be directed either to specific individuals, to a broader group of individuals interested in a particular subject, or to the world as a whole." *Id.*

20. *Geraldo: Video Rape* (Paramount Pictures Corp., Oct. 1, 1996). One of the guests on the show, Tracy, described how her landlord had placed a small camera in her smoke detector and recorded on his VCR Tracy engaged in various activities in her home such as undressing. *Id.* In addition, Tracy also believed that pictures of her were placed on the Internet. *Id.* She described the emotions surrounding the ordeal as feeling as though she was video raped and believed that those memories of what happened to her would always affect her in some way. *Id.*

21. See *Shea v. Reno*, 930 F. Supp. 916 (S.D. N.Y. 1996) [hereinafter *Shea*]; *aff'd Reno v. Shea*, 521 U.S. 1113 (1997). "As the growth in the Internet use and the wide availability of tools and resources to those with access to the Internet suggest, the Internet presents extremely low entry barriers to those who wish to convey Internet content or gain access to it." *Id.* at 929. The only tools one needs to access the Internet are a computer and an Internet server that can be obtained through a low monthly fee. *Id.*

22. *Reno*, 31 F. Supp.2d at 475. Videos that contain moving images, pictures, and sounds can also be transmitted along with the standard data and text that are usually transmitted between computers. *Id.*

23. *Shea*, 930 F.Supp at 926. "It is estimated that as many as forty million individuals have access to the information and tools of the Internet, and that figure is expected to grow to 200 million by the year 1999." *Id.*

24. Blake T. Bilstad, *Obscenity and Indecency in a Digital Age: The Legal and Political Implications of Cybersmut, Virtual Pornography, and the Communications Decency Act of 1996*, 13 SANTA CLARA COMPUTER & HIGH TECH L.J. 321 (1997). One "public posting" of a photograph on the Internet allows for it to be "distributed onto thousands of computers at once." *Id.*

and those who help them distribute the material, are criminally punished.

Currently, legal recourse available to victims varies from state to state.²⁵ Although a few state privacy statutes include provisions directed to new advancements in technology and methods voyeurs use to view their victims, many states fail to recognize this invasion of privacy as criminal activity.²⁶ Additionally, none of the state statutes aimed at preventing voyeurism include direct reference to the distributors of any recordings made by voyeurs.²⁷ Even federal laws fail to address the problem of silent videotaping by voyeurs.²⁸

25. See *infra* notes 117-119 and accompanying text (noting the various statutes that make voyeurism a crime).

26. See 20/20, *supra* note 8. Jones, a Louisiana District Attorney, notes that "[o]nly a handful of states have passed laws specifically outlawing videotaping in a private place." *Id.*; see also *infra* note 118 (listing the state statutes that make voyeurism or similar activities a criminal act). See, e.g., NEB. REV. STAT. § 20-203 (1998) (making the intrusion of one's privacy a civil offense). There is not a criminal statute in Nebraska aimed at voyeurism or peeping Toms. *Id.*

27. See, e.g., CAL. PENAL CODE § 647 (West 1998); DEL. CODE ANN. tit. 11, § 1335 (1998); GA. CODE ANN. § 16-11-62 (1996); 720 ILL. COMP. STAT. ANN. 5/26-4 (West 1998); IND. CODE ANN. § 35-45-4-5 (Michie 1996); KAN. CRIM. CODE ANN. § 21-4001 (West 1998); MICH. COMP. LAWS ANN. § 750.539d (West 1998); MISS. CODE ANN. § 97-29-61 (1998); MO. ANN. STAT. §§ 565.250, 565.255, 565.257 (West 1999); N.C. GEN. STAT. § 14-202 (1998); OHIO REV. CODE ANN. § 2907.08 (West 1999); S.D. CODIFIED LAWS § 22-21-1 (1988); TENN. CODE ANN. § 39-13-605 (1998); UTAH CODE ANN. § 76-9-402 (1998). *But see* HAW. REV. STAT. ANN. § 711-1111 (1) (e) (Michie 1998). A person commits a violation of privacy when the person intentionally:

[d]ivulges without the consent of the sender or the receiver the existence or contents of any message by telephone, telegraph, letter, or other means of communicating privately, if the accused knows that the message was unlawfully intercepted, or if the accused learned of the message in the course of employment with an agency engaged in transmitting it.

Id. Although it appears as though this statute may cover distributors of voyeur videos and photographs, the language is aimed at curtailing those from distributing communications that are intercepted. *Id.* This section of the statute focuses on messages that are sent as communications, and hypothetically, it would not apply to video taken of someone alone. *Id.*; *cf.* HAW. REV. STAT. ANN. § 712-110 (Michie 1998) (making it a crime to distribute pornographic material). Pornographic material is defined more broad than in any other statutes.

Any material or performance . . . (a) The average person, applying contemporary community standards would find that, taken as a whole, it appeals to the prurient interest. (b) It depicts or describes sexual conduct in a patently offensive way. (c)

Taken as a whole, it lacks serious literary, artistic, political, or scientific merit.

Id.; KY. REV. STAT. ANN. § 531.020 (Michie 1999); 720 ILL. COMP. STAT. ANN. 5/11-20 (West 1998). The more broad definitions used by these states may allow prosecution of those who distribute unauthorized material obtained from voyeurs, yet it has not been ruled on as to date.

28. *Dateline NBC: Profile License to Spy* (NBC television broadcasting, June 4, 1996). In an interview on *Dateline NBC*, Cliff Fishman, an attorney familiar with the laws of eavesdropping, spoke about the problem of silent videotapes. *Id.* He stated that as long as

This Comment will trace the development of the right to privacy from tort law to criminal law.²⁹ In examining the problems with federal privacy statutes, this Comment will advocate that States enact criminal statutes to protect the right to privacy.³⁰ Finally, this Comment proposes a model statute for states to adopt in order to protect the victims of video voyeurism and to punish those who violate another's privacy by actively being a voyeur or by providing a market for the distribution³¹ of unauthorized material.

II. BACKGROUND

A. THE RIGHT TO PRIVACY

1. *The Formulation of Privacy as a Legal Concept*

The introduction of the right to privacy³² as a legal theory and tort remedy was proposed by Samuel D. Warren and Louis D. Brandeis in their renowned *Harvard Law Review* Article.³³ To describe the importance of privacy rights, Warren and Brandeis drew a parallel between long existing property rights, such as common law copyrights, and the right to one's privacy.³⁴ Dean William Prosser built upon the foundation

one did not use audio recordings, then the voyeur has not violated federal law. *Id.*; see also *infra* notes 89-100 and accompanying text (analyzing the various federal laws that address invasion of privacy through surveillance devices).

29. See *infra* Part II.A.

30. See *infra* Part II.B-C.

31. See *infra* Part III.A-C.

32. *Olmstead v. United States*, 277 U.S. 438, 478 (1928). In his dissent in *Olmstead*, Justice Brandeis stated that the right to privacy is "the most comprehensive of rights and the right most valued by civilized men." *Id.* Nearly forty years later, *Katz v. United States* overruled *Olmstead*. See *Katz v. United States*, 389 U.S. 347, 351 (1967) (reasoning that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection").

33. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). This article by Warren and Brandeis has been referred to by many scholars as one of the most influential articles published on the subject. See, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 80 (1971) (Marshall, J., dissenting). Justice Marshall referred to it as "the most famous of all law review articles." *Id.*; Andrew J. McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1088 n.33 (citing Edward J. Bloustein, *Privacy, Tort Law, and the Constitution: Is Warren and Brandeis' Tort Petty and Unconstitutional as Well?*, 46 TEX. L. REV. 611, 611 (1968)). According to McClurg, Bloustein also referred to this article as "the very fount of our learning on the subject." *Id.*; see, e.g., Thomas M. Cooley, *Law of Torts* 29 (1980). The "right to one's person may be said to be a right to complete immunity: the right to be let alone." *Id.*

34. Warren & Brandeis, *supra* note 33, at 213. As Warren and Brandeis noted: "[t]he principle which protects personal writings and other productions of 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.*; see also Jeffrey Malkan, *Stolen Photographs: Personality, Publicity, and Privacy*, 75 TEX. L. REV. 779, 797 (1997) (quoting

that Warren and Brandeis laid and developed the right to privacy into four distinct torts: intrusion, public disclosure of private facts, false light in the public eye, and appropriation.³⁵ These definitions provided by Prosser are incorporated in Restatement (Second) of Torts³⁶ and adopted by numerous states thereafter.³⁷

Many plaintiffs attempt to use these privacy torts in voyeurism cases.³⁸ The tort of intrusion occurs when a person violates another person's solitude or private affairs.³⁹ An objective test is applied to determine whether one's privacy has been violated.⁴⁰ Intrusion was first expanded in the early 20th century to include peering through windows of a home.⁴¹ The privacy of one's home meets the element of intrusion that "the thing into which there is prying or intrusion must be, and be entitled to be, private."⁴² Because intrusion prohibition was designed to "protect an individual's sphere of privacy," it has been expanded beyond the realm of trespass and physical intrusion to protect one's mental state

Warren and Brandeis). Warren and Brandeis used the theory that the legal concept of property "had grown . . . from a proprietary interest in physically tangible objects such as land and cattle to comprise 'every form of possession intangible, as well as tangible.'" *Id.* The concept of copyright allowed the author to "control absolutely the act of publication, and in the exercise of his own discretion, to decide whether there shall be any publication at all." *Id.*

35. See William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

36. RESTATEMENT (SECOND) OF TORTS §§ 652B-652E (1986).

37. McClurg, *supra* note 33, at 998. At least 28 states have adopted Prosser's four torts as found in the Restatement of Torts. *Id.* See generally RESTATEMENT (SECOND) OF TORTS §§ 652B-652E.

38. See *infra* notes 39-62 and accompanying text.

39. RESTATEMENT (SECOND) OF TORTS § 652B. The person who "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns" commits intrusion if he meets the objective test. *Id.*; see also *Sabrina W. v. Willman*, 540 N.W.2d 364 (Neb. Ct. App. 1995). There are various forms of damages one can receive for an invasion of privacy claim. *Id.* They include general damages for harm to a plaintiff's interest, nominal damages, special damages, and damages as a result of mental suffering. *Id.*

40. RESTATEMENT (SECOND) OF TORTS § 652B. In order to determine whether someone is subject to liability of intrusion, the objective test inquires as to whether the "intrusion would be highly offensive to a reasonable person." *Id.*

41. Prosser, *supra* note 35, at 390. Intrusion is expanded to incorporate more than just voyeurs peeping through windows. See, e.g., *Miller v. Brooks*, 472 S.E.2d 350 (N.C. Ct. App. 1996) (reversing summary judgment for defendants on the theory that a wife who installs a video camera in her husband's bedroom to spy on him invades his privacy since he had a reasonable expectation not to surreptitiously videotaped in his bedroom); *Stein v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374 (Utah 1997) (expanding intrusion to include eavesdropping, peering into windows, and harassing phone calls).

42. Prosser, *supra* note 35, at 391.

and expectation of privacy.⁴³ Intrusion prohibition is also used against those who distribute material obtained from the violation of one's privacy.⁴⁴

The tort of public disclosure of private facts⁴⁵ requires that the disclosure "must be one which would be offensive to a reasonable man of ordinary sensibilities."⁴⁶ The most difficult element to prove is that the facts disclosed were originally private.⁴⁷ The introduction of the newsworthiness privilege, however, has resulted in a decline in cases applying this tort to voyeurism and other acts of privacy invasion.⁴⁸ Therefore, courts are reluctant to impose damages on newsworthy publications due to the protection of free speech under the First Amendment.⁴⁹

Although Justices Warren and Brandeis did not recognize the right to privacy tort of false light, this tort was later developed by Prosser.⁵⁰ To be liable under the false light theory, one must give publicity to an-

43. *Id.* at 392. The tort of intrusion has been useful to "fill in the gaps left by trespass, nuisance, the intentional infliction of mental distress, and whatever remedies there may be for the invasion of constitutional rights." *Id.*

44. *See* *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp.2d 823, 839 (C.D. Cal. 1998) (holding that the intrusion into private affairs does not need to be a physical one in order to qualify as offensive to a reasonable man); *see also* *Sanders v. American Broadcasting Companies, Inc.*, 978 P.2d 67 (Cal. 1999), *quoting* *Shulman v. Group W. Productions, Inc.*, 955 P.2d 469 (1998) ("The tort [of intrusion] is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.").

45. RESTATEMENT (SECOND) OF TORTS § 652D. *See* *Michaels*, 5 F. Supp.2d at 840. After assessing the videotape of the couple engaged in various sexual acts, the court concluded that "the content of the Tape . . . constitutes a set of private facts whose disclosure would be objectionable." *Id.*; *see also* *Romaine v. Kallinger*, 537 A.2d 284 (N.J. 1988) (stressing that it is important to remember the tort allows recovery for public disclosure of facts that are true).

46. Prosser, *supra* note 35, at 396. The interest protected under public disclosure of private facts is "reputation, with the same overtones of mental distress as in defamation." *Id.* at 400. *But see* *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084, 1088 (5th Cir. 1984). This privacy tort "clearly invades personality than reputation." *Id.* Privacy cases do not involve "damage to reputation but primarily emotional disturbance." *Id.* (citing *Wade, The Communicative Torts and the First Amendment*, 48 *Miss. L.J.* 671, 707-08 (1977)).

47. *See* Prosser, *supra* note 35, at 394.

48. *See, e.g.*, *Wehling v. Columbia Broadcasting*, 721 F.2d 506 (5th Cir. 1983) (upholding lower court's dismissal of an invasion of privacy claim against a news station on the grounds that showing one's residence on television is not an invasion of privacy). *But see* *Wolfson v. Lewis*, 924 F. Supp. 1413 (E.D. Penn. 1996) (granting plaintiffs an injunction to prohibit news reporters from placing the home of chief executive officer under surveillance).

49. *See* *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). In *Florida Star*, the Court held that "where a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed . . . only when narrowly tailored to a state interest of the highest order." *Id.* at 541.

50. Prosser, *supra* note 35 at 398. The theory of false light was historically raised in order to "defeat the privilege of reporting news and other matters of public interest" because falsity or fiction is evident in the material published. *Id.*

other's affairs and that publicity must place the victim in a false light.⁵¹ Although plaintiffs attempt to recover under the false light theory, it is difficult to claim an invasion of privacy because voyeurs and those who surreptitiously record what they have viewed often assert the defense of truth.⁵² Some states fail to recognize this tort at all, further limiting the possible claims available to a plaintiff.⁵³

Celebrities in right to privacy cases frequently use appropriation in specific circumstances when their image is used or distributed by others without their permission.⁵⁴ Appropriation of one's name or likeness oc-

51. RESTATEMENT (SECOND) OF TORTS § 652E. This tort can be used to recover against publishers who reproduce photographs. *See, e.g.,* *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985) (holding that an actress was entitled to recovery under false light theory against Hustler for reproducing nude photographs of her in their magazine since the readers could assume that the pictures were a means to generate interest in her new released film).

52. *See Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012 (1st Cir. 1987) (holding that schoolgirls whose picture appeared in Penthouse did not have a right to privacy claim on the theory of false light because the photograph did not imply consent or endorsement); *see also Faloon v. Hustler Magazine, Inc.*, 799 F.2d 1000 (5th Cir. 1986) (explaining that the reproduction of photographs taken from a book in Hustler Magazine did not imply that the plaintiffs consented to being photographed for the magazine because no reasonable person would interpret it that way).

53. *See Falwell v. Penthouse Int'l, Ltd.*, 521 F. Supp. 1204 (W.D. Va. 1981) (refusing to recognize a cause of action based on false light); *Elm Medical Lab, Inc. v. RKO Gen., Inc.*, 532 N.E.2d 675 (Mass. 1989) (refusing to recognize the tort of false light solely because the plaintiff asserted it as a cause of action); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231 (Minn. 1998) (holding that plaintiff could not recover under false light theory because the state did not recognize it since there is little difference between this tort and defamation); *Sullivan v. Pulitzer*, 709 S.W.2d 475 (Mo. 1986) (refusing to recognize false light in a defamation claim); *Renwick v. News & Observer Co.*, 312 S.E.2d 405 (N.C. 1984) (refusing to expand the invasion of privacy to include false light); *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tex. 1994) (refusing to recognize the false light invasion of privacy action because it duplicates other claims such as defamation and recognizing it raises tension between free speech and right to privacy); *Hoppe v. Hearst Corp.*, 770 P.2d 203 (Wash. Ct. App. 1989); *see also Prosser, supra* note 35 at 400. Although the false light does not have to be defamatory, "it very often is, and a defamation action will also lie." *Id.*

54. *Stern v. Delphi Interest Serv. Corp.*, 626 N.Y.S.2d 694 (N.Y. App. Div. 1995). Stern, a famous radio talk show host, unsuccessfully sued the Internet site that used his image for advertisement purposes. *Id.* at 696. For a claim under N.Y. law for misappropriation, the court states that the plaintiff "must show that: 1) defendant used his name, 2) for purposes of trade or advertising, and 3) without his written consent." *Id.* Although the court found that Delphi used Stern's name and picture for advertising purposes, the use of the pictures did not violate the incidental exceptions applicable for newsworthiness. *Id.* The court looked at the two factors in determining that Stern was not negatively affected by this because he would benefit from this advertising in the future since he had already done so in the past. *Id.* First, the court determined that the reproduced item was newsworthy and, second the advertised material was related to the product and use for which the reproduced material first appeared. *Id.*

curs when his or her image or name is used for the benefit of another.⁵⁵ One becomes liable for appropriation when a person's image or name is used to "advertise the defendant's business or product, or for some similar commercial purpose."⁵⁶

The growing financial interest in relation to Internet marketing⁵⁷ is resulting in an expansion of this privacy tort.⁵⁸ The number of "hits" or visits that a World Wide Web ("Web") site accumulates determines its popularity and its marketing effect on the Internet.⁵⁹ This method of determining the marketability of a Web site is comparable to the Nielson Rating system for television but far more accurate.⁶⁰ Although many states have adopted these torts of privacy, the success rate of plaintiffs winning on these theories is very low.⁶¹ Additionally, numerous defendants have prevailed on their assertion of the "public interest" defense, thus making it more difficult to recover under the theory of

55. RESTATEMENT (SECOND) OF TORTS § 652 C. The interest protected by the tort recognized as appropriation is "the interest of the individual in the exclusive use of his own identity, in so far as it is represented by his name or likeness, and in so far as the use may be of benefit to him or to others." *Id.* For liability to occur, "the defendant must have appropriated to his own use or benefit the reputation, prestige, social or commercial standing, public interest or other values of the plaintiff's name or likeness." *Id.* at cmt. c.

56. *Id.* at cmt. b. When someone's image or likeness is appropriated "for purposes other than taking advantage of his reputation, prestige, or other value associated with him, for purposes of publicity," there has not been an invasion of privacy under this tort theory. *Id.* at cmt. d.

57. Bilstad, *supra* note 24, at 328. According to a study by Morgan Stanley & Co., revenues "for the global Internet industry were \$15.9 billion for 1995." *Id.* It is estimated that this total will surpass \$79 billion by the year 2000. *Id.*

58. American Civil Liberties Union v. Reno, 31 F. Supp.2d 473, 475 (E.D. Pa. 1999). There are various forms of receiving income from advertisement. *Id.* Some of the companies sell advertising slots on their Web sites while others charge Internet speakers, such as "audio or video content creators" to post information on their sites. *Id.* Other companies may sell goods on their web sites that they have obtained from other vendors. *Id.*

59. See *infra* note 60 and accompanying text (discussing advertising on the Internet).

60. Leslie S. Gielow, *Sex Discrimination in Newscasting*, 84 MICH. L. REV. 443 (1985). A.C. Nielson Co. is a private company that measures "audience size or ratings, issuing ratings several times a year in a publication known as the 'ratings book.'" *Id.* at 474 n.8. "Advertisers place ads according to the ratings in order to reach the largest share of their desired market." *Id.* Any change in the Nielson rating will result in a variance for the station's revenue received from advertisers. *Id.*; see also *Avco Broadcasting Corp. v. Lindley*, 372 N.E.2d 350 (Ohio 1978). Advertisers rely on the reports in order to "best divide . . . [their] funds among the time positions available." *Id.* at 351.

61. Mcclurg, *supra* note 33, at 999. As of 1992, the trial courts granted summary judgment to the defendants in twenty-one of the forty-nine cases reported in state courts. *Id.* at 1000. In addition, defendants' motions to dismiss were granted in fifteen of the cases. *Id.* Only four of the cases had been reversed by the appellate courts. *Id.* at 1001. The plaintiffs did not have any greater luck in the federal courts in 1992 either. *Id.* The defendants won thirty-one of the forty-three cases at the trial level through pre-trial motions. *Id.* at 1001-1002.

appropriation.⁶²

2. *Privacy in Public Places*

In *Katz v. United States*, Supreme Court Justice Stewart recognized an expectation of privacy outside the confines of one's home.⁶³ As a result, the court held the defendant had a reasonable expectation of privacy as to telephone conversations that took place in a public telephone booth and were recorded by FBI agents.⁶⁴ The court reasoned that the Fourth Amendment's⁶⁵ protection includes both the seizure of tangible items and "the recording of oral statements overheard without any 'technical trespass under local property law.'"⁶⁶ In his concurring opinion, Justice Harlan presented a two-fold test to determine whether there is an invasion of privacy.⁶⁷ The first part of the test requires that a person have an actual expectation of privacy according to a subjective standard.⁶⁸ The second part objectively tests whether the expectation is reasonable according to society.⁶⁹

Despite this ruling, the right to privacy traditionally fails to extend to public places because there is not a reasonable expectation of privacy

62. See, e.g., *Creel v. Crown Publishers, Inc.*, 115 A.D.2d 414 (N.Y. App. Div. 1985) (reasoning that photographs taken of nude girls on the beach and published in a tour guide were used for 'public interest' and not for the purposes of trade under the Civil Rights Law); *State v. Frost*, 634 N.E.2d 272 (Ohio Ct. App. 1994) (holding that the defendant was not guilty of voyeurism when he masturbated while watching women in bikinis on a public beach). But see *Myers v. U.S. Camera Publishing Corp.*, 9 Misc.2d 765 (N.Y. Civ. Ct. 1957) (holding that professional model was entitled to an action for invasion of her right to privacy against magazine that published nude pictures of her for trade purposes without her consent); *Wood v. Hustler Magazine, Inc.*, 736 F.2d 1084 (5th Cir. 1984) (holding that magazine was liable for the publication of photographs, depicting the plaintiff in the nude, that were stolen from the plaintiff and submitted to the magazine without her consent).

63. *Katz v. United States*, 389 U.S. 347 (1967), *overruling* *Olmstead v. United States*, 277 U.S. 438 (1928); see also *Warden v. Hayden*, 387 U.S. 347 (1967) (noting that the principle protection of the fourth amendment, as it relates to privacy, is the person, not property).

64. *Katz*, 389 U.S. at 353. The protection of the Fourth Amendment to individual in a business office or friend's apartment extends to a person in a telephone booth. *Id.* at 352. The Fourth Amendment "protects people and not simply areas." *Id.* at 353.

65. U.S. CONST. amend. IV. The Fourth Amendment states that:

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

Id.

66. *Katz*, 389 U.S. at 353 (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

67. *Id.* at 361.

68. *Id.* This two-prong test was subsequently used to determine the expectation of privacy; see *California v. Ciraolo*, 476 U.S. 207 (1986) (using the two-prong test to determine whether there is an expectation of privacy in one's home).

69. *Katz*, 389 U.S. at 353.

when one leaves his or her home.⁷⁰ In numerous decisions, the United States Supreme Court has refused to extend privacy rights to public streets.⁷¹ Based on these decisions, other courts have applied the Supreme Court's reasoning and refused to extend the expectation of privacy to public places. For example, one typically does not have a right to privacy at work because it is believed to be a public area.⁷² A public bathroom has also been designated as a place where one does not have an expectation of privacy.⁷³

3. *The Effect of Technology on Privacy*

Warren and Brandeis saw late 19th century advancements in technology as a threat when they first discussed privacy rights.⁷⁴ With the recent developments in sophisticated surveillance, the effect this technology has on voyeurism and the invasion of one's privacy is met with great debate.⁷⁵ Technology determinists ("Techdets")⁷⁶ approach technology with great apprehension and believe it "has become an end in itself, that

70. Jennifer Mulhern Granholm, *Video Surveillance on Public Streets: The Constitutionality of Invisible Citizen Searches*, 64 U. DET. L. REV. 687, 694 (1987). There is no reasonable expectation of privacy "where police use CCTV (closed circuit television) to observe such public areas." *Id.*; see also Burrows, *infra* note 97, at 1087-1090 (discussing the history of a privacy rights in public places). See, e.g., ALA. CODE § 13A-11-32 (1998) (refusing to extend the expectation of privacy to areas accessible to the public).

71. See Burrows, *infra* note 97, at 1087-1090; see, e.g., *Dow Chem. Co. v. United States*, 106 S.Ct. 1819 (1986) (holding that a company did not have a reasonable expectation of privacy for its premises and could be viewed by aerial surveillance); *California v. Ciraolo*, 476 U.S. 207 (holding there is no reasonable expectation in one's backyard enclosed by a ten foot fence); *Oliver v. United States*, 466 U.S. 170 (1984) (holding that there is no reasonable expectation of privacy when one is in an open field); *United States v. Knotts*, 460 U.S. 276 (1983) (holding there is no reasonable expectation of privacy when a car is on a public highway). State statutes have also refused to recognize an expectation of privacy in public places. See, e.g., ALA. CODE § 13A-11-30 (1998). A private place is "where one may reasonably expect to be safe from casual or hostile intrusion of surveillance, but . . . does not include a place to which the public or a substantial group of the public has access." *Id.*

72. See *Vega-Rodriguez v. Puerto Rico Tel. Co.*, 110 F.3d 174 (1st Cir. 1997) (arguing that employees do not have a reasonable expectation of privacy in an open work area and can be videotaped by soundless video surveillance); but see *O'Conner v. Ortega*, 480 U.S. 709, 718 (1987) (stating that the question as to whether an employee has a reasonable expectation of privacy in the work place must be addressed on a case-by-case basis).

73. See *State v. Million*, 578 N.E.2d 869 (Ohio Ct. App. 1989) (holding that a young boy who was in a public restroom at a shopping mall did not have a reasonable expectation of privacy as to what one could see below the partition of the stall); *Young v. State*, 849 P.2d 336 (Nev. 1993) (reasoning that a person masturbating in a doorless stall of a public park restroom did not have a reasonable expectation of privacy).

74. Warren & Brandeis, *supra* note 33, at 195. As the authors noted, "[n]umerous mechanical devices threaten to make good the prediction that what is whispered in the closet shall be proclaimed from the house tops." *Id.*

75. See PRISCILLA REGAN, *LEGISLATING PRIVACY: TECHNOLOGY, SOCIAL VALUES, AND PUBLIC POLICY* 10-15 (1995).

is, an autonomous force subject to no external controls.⁷⁷ The Techdets view new surveillance devices "as the causes of privacy invasions,"⁷⁸ while others, such as technology neutralists, believe that it is human perversion as a conscious decision, not technology, which leads to an invasion of privacy.⁷⁹ Whether technology or perversion leads to an invasion of privacy, it is untenable that technology does not enhance a pervert's capability to pry into an individual's privacy. At the very least, it provides voyeurs a new, and more threatening means of peeping on their victims.

In the late 19th century, Warren and Brandeis acknowledged a threat to privacy from "[i]nstantaneous photographs and [the] newspaper enterprise."⁸⁰ The introduction of increasingly smaller camcorders⁸¹ and video surveillance⁸² in the twentieth century allows peeping Toms to view their victims without even being present at the time.⁸³ Without the victim's knowledge, small video cameras can be placed in one's home in unsuspecting items such as a coffee maker,⁸⁴ stuffed animal,⁸⁵ lamp,⁸⁶ and a picture frame.⁸⁷ Because of rapid advancement in video technology, many of the existing voyeurism statutes are not broad enough to

76. *Id.* at 11. The author introduces three "schools of thought" concerning the role of technology and its affects on social values. *Id.* They include "those of the technology determinists, the technology neutralists, and the technology realists." *Id.*

77. *Id.*

78. *Id.*

79. *Id.* Since much of the weight is placed on human judgment, neutralists believe that public policy is the driving factor that motivates an invasion of privacy. *Id.*

80. Warren and Brandeis, *supra* note 33, at 195. See, e.g., McClurg, *supra* note 33, at 1017. In the late 19th century, there were "detective cameras concealed in items such as opera-glasses, revolvers, and books" for amusement by the those who could afford it. *Id.* These cameras though were very poor in quality and did not have sound recording. *Id.*

81. McClurg, *supra* note 33, at 1020. The video camcorder was introduced in 1985. *Id.*

82. See Burrows, *infra* note 97, at 1081.

83. See *Gadgets by Design* (visited April 1, 1999) <<http://www.jeffhall.com/cgi-local/webcart.cgi>> (selling numerous spy cameras online including a camera the size of a nickel and video cameras installed in: a smoke detector, a motion detector, a wrist watch, a purse, and a clock); *Concealed Cameras* [hereinafter *Concealed Cameras*] (visited April 1, 1999) <<http://www.concealedcameras.com/catalogue/cameras1.html>> (offering video cameras installed in clocks and other household items from approximately \$250- \$850 depending on if it is a black and white or a color camera); *State v. Berber*, 740 P.2d 863 (Wash. Ct. App. 1987) (holding that a person using a public toilet that was visible upon entering the restroom did not have a reasonable expectation of privacy).

84. See *Concealed Cameras*, *supra* note 83. The camera installed in the coffee maker has a 15-mile line of site. *Id.*

85. See *id.* A camera, placed into a stuffed bunny rabbit, sells for \$495.00. *Id.*

86. See *id.* Hidden cameras can be placed in both an office and a children's room lamps. *Id.*

87. See *id.* Additional items that can be purchased with built in cameras include: wireless clock radios, wireless desk radios, wireless plant camera, boomboxes, VCRs, emergency lights, briefcases, sportbags, and pagers. *Id.*

encompass these changes.⁸⁸

B. CONGRESS AND ITS FAILURE TO MAKE VIDEO VOYEURISM A CRIME

Despite recent rulings,⁸⁹ Congress has failed to pass a statute directly aimed at curtailing and punishing video voyeurism.⁹⁰ Although the Wire and Electronic Communication Interception and Interception of Oral Communications Act ("Wire Interception Act")⁹¹ addresses intercepted oral communications,⁹² it fails to specifically refer to video, photographs, or any other silent media.⁹³ Although under the statute, it is unlawful for one to knowingly intercept another's private oral communications without proper justification, the act of videotaping those communications without the audio is not recognized as a crime.⁹⁴ Therefore, unless the videotapes contain actual oral communications, the Wire Interception Act does not apply to those tapes.⁹⁵

In addition to this statute, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act ("Safe Streets Act") of 1968⁹⁶ to address interception of certain communications by federal agents.⁹⁷ The Safe Streets Act, which regulates interception of oral communications, fails to regulate any video surveillance.⁹⁸ Despite the Safe Street Act's

88. See *infra* notes 118 and accompanying text (listing the various state statutes that do not have adequate language to include the various advancements in technology).

89. See *infra* notes 118-120 and accompanying text.

90. See Regan, *supra* note 75. "Communication privacy" was first discussed in Congress in the 1920's with the introduction of electronic eavesdropping and bugging devices. *Id.* at 8.

91. 18 U.S.C. §§ 2510(2), 2511 (1998); see H. Morley Swingle & Kevin M. Zoellner, *Criminalizing Invasion of Privacy: Taking a Big Stick to Peeping Toms*, 52 J. Mo. B. 345, 347 n.31 (1996).

92. Swingle & Zoellner, *supra* note 91, at 346.

93. *Id.*

94. 18 U.S.C. § 2510 (2) (1998).

95. *Id.*; see also Michael Hirsley & Rick Hepp, *Wrestlers Exploited by 'Hidden Camera'*, CHI. TRIB., Apr. 4, 1999, § 3, at 3. Recently, copies of videotapes of college wrestlers made by voyeurs were submitted to the Federal Bureau of Investigation ("FBI") in order to determine whether "such incidents are prosecutable offenses under statutes that cover violation of privacy, eavesdropping and the interstate distribution of pornographic material." *Id.* at 6. According to experts on federal law and sexuality issues in college athletics, "prosecution is uncertain" partly due to the lack of precedence on this issue. *Id.* Since there is some audio on the tapes, the voyeurs may be able to be prosecuted under the Wire and Interception Act. *Id.* See, e.g., *supra* note 81 (detailing the Wire and Interception Act).

96. 18 U.S.C. §§ 2510-2521 (1998).

97. See Quentin Burrows, *Scowl Because You're on Candid Camera: Privacy and Video Surveillance*, 31 VAL. U. L. REV. 1079, 1096 (1997).

98. 18 U.S.C. §§ 2516-2518 (1998); see Burrows *supra* note 97. The Acts specifically deal with the "willful interception of any wire or oral communications." *Id.*; see also Freedman, *supra* note 6, at 15.

specific aim towards federal agents,⁹⁹ it is still indicative of the lack of regulations by Congress on the use of silent videotaping and surveillance.¹⁰⁰

C. ATTEMPTS TO ADDRESS VIDEO VOYEURISM BY THE FEDERAL BENCH

In analyzing alleged invasion of privacy violations resulting from the use of video surveillance and voyeurism, numerous federal courts conclude that being recorded on video is more invasive than having your conversation overheard.¹⁰¹ Because there is no federal criminal statute that punishes video voyeurs,¹⁰² the federal courts, with no other course of action available to them, apply state statutes to cases involving video recording and photographing by voyeurs.¹⁰³ In addition, the lack of state statutes specifically addressing this kind of video voyeurism¹⁰⁴ leads to federal court decisions where the plaintiff's pleadings fail because of an unrecognized cause of action against these voyeurs.¹⁰⁵

In *United States v. Torres*,¹⁰⁶ the court held that the use of video surveillance and electronic bugging devices to monitor known terrorists was justifiable and not unconstitutional *per se*.¹⁰⁷ The FBI installed video surveillance cameras in apartments of suspected terrorists to monitor activities that were taking place.¹⁰⁸ Although the court held that the use of this type of surveillance was constitutional, Judge Posner exclaimed that this case and others like it concerning video surveillance

99. See Burrows *supra* note 97, at 1097-1098. Another statute, the Federal Intelligence Surveillance Act ("FISA"), provides some regulation of video surveillance by foreign agents, yet does not specify any regulations for Americans. 50 U.S.C. §1801 (1998).

100. See *infra* notes 106-109 and accompanying text (addressing Judge Posner's suggestion that there needs to be attention placed on silent videotaping).

101. Burrows, *supra* note 97, at 1097. "As federal courts have stated, 'video surveillance is more invasive of privacy than audio surveillance, just as a strip search is more invasive than a patdown search.'" *Id.* (quoting Thomas M. Messana, *Ricks v. State: Big Brother Has Arrived in Maryland*, 48 MD. L. REV. 435, 452 (1989)).

102. See sources cited *supra* notes 90-99.

103. See *Wood v. Hustler Magazine*, 736 F.2d 1084 (5th Cir.1984) (holding that Texas law applied to the publication of pictures by the magazine without proper consent of the plaintiff and thus the defendants were liable for negligently placing plaintiff in an offensive false light).

104. See *infra* notes 118-120 and accompanying text.

105. See *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012 (1st Cir. 1987) (holding that schoolgirls whose picture appeared in Penthouse did not have a right to privacy claim on the theory of false light because the photograph did not imply consent or endorsement).

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

107. *Id.* at 877; see also *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977) (allotting for government intrusion by applying balancing test to determine that limited disclosure of President's papers was not a violation of right to privacy); *Paul v. Davis*, 424 U.S. 693 (1976) (holding that the right to privacy extended only to family matters or intimate concerns and government could intrude to disclose the police record of an individual).

108. *Torres*, 751 F.2d at 877.

needed attention from Congress.¹⁰⁹ As to date, however, Congress has failed to respond.

The continuous refusal of Congress to address Judge Posner's suggestion that video voyeurism is an area ripe for legislation leaves each state to determine the criminality of video taping. As recognized by a long line of Supreme Court cases, the power to police its citizens¹¹⁰ lies not with the federal government, but with state governments.¹¹¹ As long as state statutes do not interfere with the Supremacy Clause of the United States Constitution,¹¹² each state may create and enforce such statutes.¹¹³ If the statutes passed by each state do not infringe upon the Constitution of the United States and those powers enumerated to the federal government within the Constitution, then each state may exercise its police power to ensure that its citizens' privacy rights will be protected.¹¹⁴

109. *Id.* at 883; *see Burrows supra* note 97, at 1095.

110. *Lochner v. New York*, 198 U.S. 45 (1905). "There are, however, certain powers, existing in the sovereignty of each state in the Union . . . vaguely termed police powers." *Id.* These police powers given to the each state "relate to the safety, health, morals, and general welfare of the public. *Id.* "Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of those powers, and with such conditions the 14th Amendment was not designated to interfere." *Id.*

111. *See Muller v. Oregon*, 208 U.S. 412 (1908) (upholding a state statute that forbade women to work in laundry facilities for more than 10 hours a day); *Wilson v. Black-Bird Creek Marsh Co.*, 27 U.S. (2 Pet.) 245 (1829) (holding that Delaware's decision to authorize the building of a dam to protect its citizens did not constitute an infringement on the Commerce Clause of the Constitution).

112. U.S. CONST. art. VI.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and of Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id.; *see Burrows supra* note 97, at 1113. "State court rulings may only effectively serve to expand individual rights, because if a ruling under the state constitution affords less protection than the United State Supreme Court precedents, the rulings are subject to being voided and should be essentially considered meaningless." *Id.* at 1139 n.263 (citing WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* § 2.10 (b), at 96 (2d ed. 1992)).

113. *See Gibbons v. Ogden*, 22 U.S. 1 (1824) (holding that a state mandated injunction violated the Supremacy Clause of the Constitution). The Supreme Court stated that "the states have no power . . . to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress . . ." *See also McCullock v. Maryland*, 17 U.S. 316 (1819).

114. *See U.S. CONST.* art. I, § 8. The powers given to the federal government include the right to: collect taxes, borrow money, regulate Commerce, establish rules concerning naturalization and bankruptcy, coin money, punishing counterfeiters, establishing post offices, promoting the progress of science, establishing Tribunals inferior to the U.S. Supreme Court, exercise power over the high Seas, declare war, support Armies and a Navy, support

III. ANALYSIS

A. PROPOSED UNIFORM STATE LEGISLATION

States must move quickly to adopt privacy statutes that force violators to face criminal prosecution.¹¹⁵ Only then will victims of video voyeurism be assured that these voyeurs are prohibited from terrorizing them and others in the future.¹¹⁶ Furthermore, the adoption of state criminal statutes will prevent others from participating in video voyeurism or other similar behavior. Unfortunately, the number of states with criminal statutes aimed at curtailing voyeurism of any kind is surprisingly low.¹¹⁷ Presently, only 24 states specifically address the act of voyeurism, or similar behavior, as a criminal offense in a specific statute.¹¹⁸ A few states include peeping Tom activities under other statutes such as disorderly conduct, yet do not have a specific statute aimed directly at voyeurism.¹¹⁹ However, many of these statutes do not include

and call forth the Militia, exercise legislation, and make any laws necessary to help carry out the powers listed above. *Id.*

115. See Warren and Brandeis, *supra* note 33, at 220. If states do not take responsibility for their citizens and help protect their privacy, then they will take man's castle and "open wide the back door to idle or prurient curiosity." *Id.*

116. See *supra* notes 81-85 and accompanying text for examples of how individuals can be victimized at the hands of voyeurs.

117. See *infra* note 118 (listing statutes that aimed at peeping Tom activities such voyeurism and surveillance).

118. See Swingle, *supra* note 92, at 346; see, e.g., ALA. CODE §§ 13A-11-30, 13A-11-32 (1998); ALASKA STAT. § 11.61.123 (Michie 1999); CAL. PENAL CODE § 647 (West 1998); DEL. CODE ANN. tit. 11, § 1335 (1998); FLA. STAT. ANN. § 810.14 (West 1998); GA. CODE ANN. § 16-11-62 (1998); HAW. REV. STAT. ANN. § 711-111 (Michie 1998); 720 ILL. COMP. STAT. ANN. 5/26-4 (West 1998); IND. CODE ANN. § 35-45-4-5 (Michie 1998); LA REV. STAT. ANN. § 284 (West 1999); MICH. COMP. LAWS ANN. § 750.539d (West 1998); MINN. ANN. STAT. § 609.746 (West 1998); MISS. CODE ANN. § 97-29-61 (1998); MO. STAT. ANN. §§ 565.250, 565.255, 565.257 (West 1999); N.H. REV. STAT. ANN. § 644:9 (1998); OHIO REV. CODE ANN. § 2907.08 (Banks-Baldwin 1999); N.C. GEN. STAT. § 14-202 (1998); N.D. CENT. CODE § 12.1-22 (1997); OKLA. STAT. ANN. tit. 21, § 1171 (West 1999); S.C. CODE ANN. § 16-17-470 (Law. Co-op. 1998); S.D. CODIFIED LAWS § 22-21-1 (Michie 1998); TENN. CODE ANN. § 39-13-605 (1998); V.A. CODE ANN. § 18.2-130 (Mite 1998); WASH. REV. CODE ANN. § 9A.4.115 (West 1998).

119. See ARIZ. REV. STAT. ANN. § 13-1504 (West 1998) (including entering onto one's residential property with reckless disregard for that person's privacy under the criminal trespass statute); COLO. REV. STAT. ANN. § 18-6-403 (West 1999) (prohibiting the sexual exploitation of children, including the production of material that is made of them without their consent); D.C. CODE ANN. § 22-1121 (1998). A person commits disorderly conduct if he "acts in such manner as to annoy, disturb, interfere with, obstruct, or be offensive to others." *Id.*; KAN. CRIM. CODE ANN. § 21-4001 (West 1998) (incorporating observation of another person after entering a private place in the eavesdropping statute); N.J. STAT. ANN. § 2c:18-3 (West 1999) (including peeping into windows under the criminal trespass statute); 18 PA. CONS. STAT. ANN. § 5506 (West 1999) (prowling around a dwelling at night is part of the loitering at night statute); UTAH CODE ANN. § 76-9-402 (1998) (including trespassory voyeurism in a lewdness statute). See, e.g., *District of Columbia v. Jordan*, 232

the various devices and instrumentalities used to violate one's privacy.¹²⁰ Additionally, many statutes fail to account for the other reasons people engage in voyeurism aside from sexual gratification.¹²¹ The states without specific voyeurism legislation simply rely on civil tort law to serve as a remedy for the victims of video voyeurism.¹²² To properly account for the advancement of technology and properly penalize the perpetrators of video voyeurism, states need to enact legislation such as the one proposed in the following sections.¹²³

B. PROPOSED VIDEO VOYEURISM ACT ("VOYEURISM ACT")¹²⁴

- § 1 It shall be unlawful for any person to knowingly¹²⁵ view, photograph, or film,¹²⁶ or attempt¹²⁷ to view, photograph, or film, another person, without that person's knowledge and authorization, while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy.¹²⁸
- § 2 A person who violates section 1 of this Act commits the crime of voyeurism.¹²⁹ The crime of voyeurism is a Class C felony;¹³⁰ unless one of the following conditions is met:

A.2d 298 (D.C. Cir. 1967) (holding that charging the defendant with peeping Tom violation properly fell within a breach of the peace); *Carey v. District of Columbia*, 102 A.2d 314 (D.C. Cir. 1953) (holding that peeping into the apartment of another through a window is disorderly conduct under the statute); *Commonwealth v. LePore*, 666 N.E.2d 152, 156 (Mass. App. Ct. 1996) (holding that the disorderly person statute could apply to peeping Tom because it brings about a breach in the public peace).

120. See, e.g., OKLA. STAT. ANN. tit. 21, § 1171 (West 1999) (referring only to watch or gaze at another person).

121. See sources cited *supra* notes 111-119.

122. Swingle, *supra* note 92, at 346.

123. See Burrows *supra* note 97, at 1132 (discussing the format that was used in presenting this proposed legislature through the use of commentary).

124. This is the author's own statute constructed from research of other various state statutes that address crimes such as voyeurism, disorderly conduct, and distribution of pornography.

125. See OHIO REV. CODE ANN. § 2907.08 (Banks-Baldwin 1999). The term knowingly shall refer to the awareness that a person's "conduct will probably cause a certain result or will probably be of a certain nature" "regardless of his purpose." *Id.*

126. See MO. ANN. STAT. §§ 565.253, 565.255, 565.257 (West 1999).

127. See *McBride v. State*, 396 S.E.2d 78, 79 (Ga. Ct. App. 1990) (stating that it is not an element of the crime of being a peeping Tom, under the statute, for someone to actually have been peeped at in order to qualify the defendant's activities as criminal); *Chance v. State*, 268 S.E.2d 737 (Ga. Ct. App. 1980) (noting that the defendant's purpose of looking through another's window was enough for him to be guilty of violating voyeurism statute and the state did not need to prove that anyone was in the room at the time).

128. See MO. ANN. STAT. §§ 565.253, 565.255, 565.257; see also WASH. REV. CODE ANN. § 9A. 4. 115 (West 1998); FLA. STAT. ANN. § 810.14 (West 1998).

129. See WASH. REV. CODE ANN. § 9A. 4. 115 (West 1998).

130. See *id.*

- (1) a person is viewed, photographed, or filmed a) in full or partial nudity or b) while engaging in sexual conduct; or
 - (2) the person being viewed, photographed, or filmed is a minor;¹³¹ or
 - (3) the image has been recorded with the use of electronic device.¹³² If one of the conditions in section 2.1 or 2.2 is satisfied, then the crime of voyeurism is a Class D felony. Trespassing onto the property of another or attempting to trespass onto the property of another, whether it is a physical trespass by the voyeur or through the installation of a viewing device on another's property, shall also be a Class D felony.
- § 3 (1) Any person who knowingly or by criminal negligence¹³³ engages in or intends to engage¹³⁴ in the reproduction, distribution, sale, dissemination of, or any person who allows others to view, the photographs, videos, or other recordings resulting from conduct described in section 1 shall be guilty of distributing unauthorized material.
- (2) The crime of distributing unauthorized material is a Class C felony, unless the subject matter of the unauthorized material is a type recognized by section 2(a)-(c) of this Act, in which case the crime of voyeurism is a Class D felony.¹³⁵
 - (3) Each separate copy of material described in section 1 that is distributed for exhibition within the state shall constitute a separate offense.¹³⁶

131. See MO. ANN. STAT. §§ 565.253, 565.2555, 565.257 (West 1999).

132. See IND. CODE ANN. § 35-45-4-5 (Michie 1998) (making it a Class D felony for anyone to use a camera or other recording device while peeping).

133. See UTAH CODE ANN. § 76-10-1222(1) (1998).

Any person who knowingly or by criminal negligence distributes for exhibition within this state a film which is pornographic as that term is defined in the Utah criminal code shall be guilty of a class A misdemeanor and shall, for each separate offense, be fined not less than \$1,000 or imprisoned, without suspension of sentence in any way for a term of not less than 60 days.

Id.

134. See KY. REV. STAT. ANN. § 531.340 (Banks-Baldwin 1999). "A person is guilty of distribution of matter portraying a sexual performance by a minor when . . . he . . . has in his possession with intent to distribute, exhibit for profit or gain or offer to distribute, any matter portraying a sexual performance by a minor." KY. REV. STAT. ANN. § 531.340(1)(4).

135. A Class D felony includes imprisonment for 1 to 15 years, or a fine up to \$20,000, or both imprisonment and a fine. See, e.g., NEV. REV. STAT. § 200.725 (1997) (sentencing those guilty of distributing child pornography to a maximum of 15 years imprisonment and a \$15,000 fine).

136. See UTAH CODE ANN. § 76-10-1222(2). "Each copy of a pornographic film distributed for exhibition within this state in violation of this section shall constitute a separate offense. *Id.*; see also LA. REV. STAT. ANN. § 81.1(F) (West 1999).

C. STATUTORY COMMENTS

The following statutory comments are included to provide a model legislative history for the development of this statute. The comments include definitions of many of the terms used in order to explain the importance of using the specific language proposed in the statute, and how failure to do so results in voyeurs escaping incarceration or fines. In addition, the comments serve as a means of comparison to other state statutes. Through analyzing other State privacy statutes, the following comments acknowledge problems with existing statutes and explain the need to adopt the language provided.

§ 1 It shall be unlawful for any person to knowingly view, photograph, or film, or attempt to view, photograph, or film, another person, without that person's knowledge and authorization, while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy.

1. *Commentary*

The first element this statute addresses is the intent needed to commit the crime of voyeurism.¹³⁷ The use of "knowingly" prevents from prosecution anyone who accidentally glances in the direction of someone's window or accidentally opens a door to a room in which someone is changing clothes.¹³⁸ Some present day state statutes use "lewd, lascivious, or indecent intent" to describe the requisite intent needed for the crime of voyeurism.¹³⁹ Other statutes refer to the intent required as having a "purpose of gratifying the person's self"¹⁴⁰ or any others.¹⁴¹ This reference to some kind of sexual motivation behind the act of voyeurism limits the application of the statute. By limiting the intent needed to that of an "indecent"¹⁴² nature, one who views or videotapes another for the purpose of a business transaction involving the sale or advertisement of voyeur recordings may not meet the requisite intent called for by the statute. The growing number of "candid camera" television programs is just one example of how the non-consensual recording

137. See *supra* note 125 and accompanying text.

138. See Swingle, *supra* note 92, at 346 (citing *Brown v. State*, 140 So.2d 565, 566 (Miss. 1962)). In discussing the elements of the Missouri statute for invasion of privacy, the use of "purpose" is an element of the crime in order to ensure that "an accidental glimpse by the ice man or laundryman would not be criminal under the statute." *Id.*

139. FLA. STAT. ANN. § 810.14 (West 1998); see also MISS. CODE ANN. § 97-29-61 (1998). The statute requires that the person peep through a window or other opening with a "lewd, lascivious, or indecent purpose." *Id.*

140. OHIO REV. CODE ANN. § 2907.08 (Banks-Baldwin 1999); see also N.D. CENT. CODE § 12.1-22 (1997) (requiring that the person's intent must be that of gratifying one's lusts, passions, or sexual desires).

141. See WASH. REV. CODE ANN. § 9A. 4. 115 (West 1998).

142. *Id.*

of images are used for financial gain.¹⁴³ In addition, the use of recordings to promote an Internet site is another example of seeking financial gain not necessarily motivated by sexual gratification or arousal.¹⁴⁴ Therefore, it is not enough to simply use sexual gratification as an element of the crime of voyeurism, because the motivation of financial gain is, in some cases, more threatening.

By comparing the Missouri statute¹⁴⁵ for invasion of privacy with the one presented in this comment, it is evident that the language concerning nudity or partial nudity is omitted from section 1 of the proposed Voyeurism Act. This intentional omission allows for the prosecution of a wider range of types of voyeurism under the proposed statute. For example, if Susan and Gary Wilson¹⁴⁶ were only taped in their homes during private moments when they were not "nude" under the statute, should they be denied the use of this statute to prosecute the voyeur who invaded their home? The Missouri statute¹⁴⁷ defines "full or partial nudity" as the "showing of all or any part of the human genitals or pubic area or buttock, or any part of the nipple of the breast of any female person, with less than a fully opaque covering."¹⁴⁸ What if Susan Wilson had been watched or videotaped while she was wearing opaque lingerie? Would this constitute "voyeurism" since opaque covering does not meet the requirements of partial nudity?

To avoid scenarios where invasive acts are excluded from prosecution by a statute because of vaguely permissible language, references to any type of nudity are omitted from this section.¹⁴⁹ The issue of nudity is later addressed in determining the penalty if one is guilty of violating

143. Burrows, *supra* note 97, at 1107. There has been an "abundance of 'reality' television shows that appeared in the 1990s such as Cops, I-Witness Video, Firefighters, Real Stories of the Highway Patrol, Emergency Response, and Rescue 911." *Id.* There have also been numerous specials on television such as *Caught on Tape* that show scenes of employees having intercourse or engaged in other "private" activity while they were being recorded. *Id.*

144. See, e.g., *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp.2d 823, 839 (C.D. Cal. 1998). In the *Michaels* case, the videotape of the plaintiff and then girlfriend Pamela Anderson Lee engaging in sexual intercourse was made available for the users of a web site to view and purchase. *Id.*

145. See MO. ANN. STAT. §§ 565.253 (West 1999). The statute reads:

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

Id.

146. See *supra* notes 8-17 and accompanying text (discussing the story of Susan and Gary Wilson).

147. See MO. ANN. STAT. § 565.250 (West 1999).

148. *Id.*

149. See *supra* notes 125-128 and accompanying text.

section 1.¹⁵⁰

The use of "view, photograph, or film" is expanded to include various types of methods used to view and record an unsuspecting individual.¹⁵¹ The Washington State statute defines photographs or films as the "making of a photograph, motion picture, film, videotape or any other recording or transmission of the image of a person."¹⁵² This language is broad enough to encompass the new forms of technology that allow someone to view another without his or her knowledge.¹⁵³ The "transmission of the image" element covers the new wave of video voyeurism that allows for voyeurs to transmit the images via the Internet through cameras that are connected to their computers.¹⁵⁴ States that do not expand their definitions to include this type of technology leave their victims with little, if any, criminal action against technologically sophisticated voyeurs.¹⁵⁵ Simply referring to the act of voyeurism as looking through a window does not take into account the new and more intrusive methods used to invade one's privacy.¹⁵⁶

The final element in the Voyeurism Act, and most inconsistent among other states, refers to a person present in a place where he or she reasonably expects privacy.¹⁵⁷ This element is purposely expanded beyond the limitations of one's residence because of the reasonable expectation of privacy people have when they venture outside of the safety of their own home.¹⁵⁸ People should not feel as though the only "safe place" for them is in their house with the blinds drawn.¹⁵⁹ Otherwise, victims and those fearful of the possibility of voyeurism are relegated to being

150. See sources cited *infra* notes 169-181.

151. *Dateline NBC: Profile License to Spy*, *supra* note 28.

152. WASH. REV. CODE ANN. § 9A. 4. 115 (West 1998); see also MO. ANN. STAT. § 565.250 (West 1999). The identical language is used to refer to "photograph or film." *Id.*

153. See WASH. REV. CODE ANN. § 9A. 4. 115 (West 1998).

154. *Id.*

155. See GA. CODE ANN. § 16- 11-62 (1998). The statute defines a "peeping Tom" as someone 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." *Id.*

156. *Id.* Louisiana also fails to expand its definition of voyeurism to include such intrusive technology. See LA. REV. STAT. ANN. § 284 (West 1999). The statute limits the act of a peeping Tom to peeping "through windows or doors, or other like places, situated on or about the premises of another." *Id.*

157. See cases cited *supra* notes 67-69 and accompanying text (discussing Justice Harlan's two-part test to determine when someone has a reasonable expectation of privacy); see also Prosser, *supra* note 35.

158. See sources cited *supra* notes 63-73.

159. Even drawing one's window shades is found not to be good enough to protect one's self. See, e.g., *State v. Serrano*, 702 P.2d 1343, 1344 (Ariz. Ct. App. 1985) (noting how the defendant was able to observe the plaintiff by watching her through small cracks in the blinds and hide from cars who could see him from the street by hiding in bushes).

prisoners in their homes. There should be a reasonable expectation of privacy in places like public restrooms, changing rooms, and locker rooms.¹⁶⁰ Because many people engage in typical activities such as changing and undressing in restrooms and locker rooms, areas such as these are more enticing to voyeurs looking for their next victims.¹⁶¹

Certain states limit this element to the "premises of another."¹⁶² This narrow definition allows for people to invade the privacy of their guests without facing criminal prosecution. For example, in *McCauley v. Estes*,¹⁶³ Clara Aristizabal McCauley sued Carl Estes, her boss, for vide-

160. See N.Y. GEN. BUS. LAW § 395-b (McKinney 1999). The statute is only limited to businesses "installing or maintaining a two-way mirror or other viewing device." *Id.* The list of places where a viewing device cannot be installed includes fitting rooms, restrooms, showers, or "any room assigned to guests or patrons in a motel, hotel, or inn." *Id.* It specifically states that it will not apply to private dwellings. *Id.* See, e.g., *Topor v. State*, 176 Misc.2d 177 (N.Y. Ct. Cl. 1997) (holding that the state breached its duty to abide by the statute by not removing the peepholes from in the showering facilities located in a state park).

161. See Hirsley & Hepp, *supra* note 95 (referring to the recent discovery of videotapes of wrestlers in the nude made by voyeurs). The wrestlers were filmed while in the locker rooms and weigh-in areas at athletic competition sites by a hidden camera in a gym bag. *Id.* This poses a problem in attempting to prosecute the voyeurs under Illinois law, because the tapes were not made in a "restroom, tanning bed or tanning salon." *Id.* It is undetermined whether "restroom" will include shower areas or locker rooms, and if it does not, then the voyeurs did not commit the crime of voyeurism. *Id.* But cf. N.D. CENT. CODE § 12.1-22 (1997). The statute expands the definition of reasonable expectation of privacy to "a sleeping room in a hotel, a tanning booth, or other place where a reasonable individual would have an expectation of privacy and has exposed or is likely to expose that individual's intimate parts, or has removed the clothing covering the immediate area of the intimate parts." *Id.* See, e.g., 720 ILL. COMP. STAT. ANN. 5/26-4 (West 1998) (limiting a place of reasonable expectation of privacy to tanning salons, tanning beds, and restrooms).

162. LA. REV. STAT. ANN. § 284 (West 1999); accord GA. CODE ANN. § 16-11-62 (1998) (requiring that the activity must take place on the premises of another); see also MINN. STAT. ANN. § 609.746 (West 1998) (requiring that the peeping must take place at the house or place of dwelling of another but viewing with the use of devices can take place in place where one has a reasonable expectation of privacy); see N.J. STAT. ANN. § 2c:18-3 (West 1999) (limiting criminal peeping Tom activities to those that require the entering of a structure); N.C. GEN. STAT. § 14-202 (1998) (strictly limiting the statute to a room occupied by a female at the time a person engages in peeping); see also OKLA. STAT. ANN. tit. 21, § 1171 (West 1999) (limiting the place to the vicinity of one's private dwelling, house, or apartment building); see also VA. CODE ANN. § 18.2-130 (Michie 1998) (requiring that the act take place in an enclosure of nature or other building intended for occupancy whether it is a portable structure or permanent). See, e.g., *State v. Zarin*, 531 A.2d 411 (N.J. Super. Ct. Law Div. 1987) (arguing that the statute must be construed strictly against the State thus holding that the defendant did not commit criminal trespass because he did not enter into the building in order to spy on the victim).

163. *McCauley v. Estes*, 726 So.2d 719 (Ala. Civ. App. 1998). A young woman was unsuccessful in her attempt to sue the insurance company of the homeowner who videotaped her undressing in his home without her consent because the policy excluded coverage of "willful or malicious acts." *Id.*

otaping her while she took a shower in his home.¹⁶⁴ Without her knowledge, he placed a video camera in his shower and taped her.¹⁶⁵ He then hid the videotape underneath his bed. Because his acts were considered "willful," his insurance company excluded this invasion of privacy from coverage.¹⁶⁶ As a result, he was neither guilty of criminal behavior nor liable under civil law.¹⁶⁷ This privacy invasion in *McCauley* is just one example of how social hosts have the unrestricted ability to observe their guests.¹⁶⁸ In light of this, criminal penalty is required to ensure that social hosts are subject to criminal prosecution for taking advantage of their guests' trust.

§ 2 A person who violates section 1 of this Act commits the crime of voyeurism. The crime of voyeurism is a Class C felony; unless one of the following conditions is met:

- (1) a person is viewed, photographed, or filmed a) in full or partial nudity or b) while engaging in sexual conduct; or
- (2) the person being viewed, photographed, or filmed is a minor; or
- (3) the image has been recorded with the use of electronic device. If one of the conditions in §2.1 or 2.2 is satisfied, then the crime of voyeurism is a Class D felony. Trespassing onto the property of another or attempting to trespass onto the property of another, whether it is a physical trespass by the voyeur or through the installation of a viewing device on another's property, shall also be a Class D felony.

2. Commentary

In order to penalize those who violate one's privacy rights, the crime of voyeurism, in the proposed statute, is punishable as a Class C felony or an equivalent thereof.¹⁶⁹ This entails both a fine and incarceration in a State penitentiary.¹⁷⁰ Some states do not make a single act of voyeurism a felony until the person is convicted of violating the same statute on more than one occasion; yet this minimizes the initial act of voyeurism

164. *Id.* at 721.

165. *Id.*

166. *Id.*

167. *Id.* at 722.

168. *Id.* at 721. In addressing whether one has an expectation of privacy in a another's home, the Supreme Court held that an overnight guest in a home had an expectation of privacy protected by the Fourth Amendment. *Minnesota v. Olson*, 495 U.S. 91, 98-99 (1990). The court reasoned that "[s]taying overnight in another's home is a long-standing social custom that serves functions recognized as valuable by society." *Id.* Therefore, "[t]o hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the every day expectations of privacy that we all share." *Id.*

169. See WASH. REV. CODE ANN. § 9A. 4. 115 (West 1998).

170. See MISS. CODE ANN. § 97-29-61 (1998). The statute states that someone who violates the "peeping Tom" statute "shall be guilty of a felonious trespass . . . and shall be imprisoned in the state penitentiary not more than five (5) years." *Id.*

and dilutes its force to deter first time offenders.¹⁷¹ The purpose of the Voyeurism Act is not only to penalize an offender, but also to serve as a deterrent to would-be voyeurs.

Additionally, an act of voyeurism is more severe when the victims are minors under state law.¹⁷² Laws are historically more strict when it comes to penalizing child pornographers.¹⁷³ Under the proposed statute, the act of viewing minors in the nude or recording them is punishable to a higher degree, similar to penalties for pornographers.¹⁷⁴ Furthermore, the distribution of child pornography is on the rise.¹⁷⁵ The privacy of children requires protection to the utmost degree because of children's insufficient ability to protect themselves against invasions of privacy.¹⁷⁶ The demand for footage of children in the nude or minors engaging in sexual activity needs to be discouraged in order to prevent financially driven voyeurs from profiting from the sale of child pornography.¹⁷⁷

Viewing an act of people engaged in intimate behavior, which is likely to occur with "more than one person," is also highly protected under the proposed statute because intimate behavior is historically con-

171. See MO. STAT. ANN., § 565.250 (West 1999). The statute states that the "invasion of privacy is a class C felony" if the act is "committed by a prior invasion of privacy of offender." *Id.*

172. See *id.* Missouri's statute states that if "more than one person is viewed, photographed or filmed in full or partial nudity" the crime of "invasion of privacy is a class D felony." *Id.*

173. See 18 U.S.C.A. § 2256 (West 1998). Child pornography is defined as:

any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where . . . such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

Id.; see also 28 U.S.C.A. § 2256(8)(D); MO. ANN. STAT. § 573.010 (West 1999).

174. See LA. REV. STAT. ANN. § 81.1 (West 1999) (imprisoning child pornographers at hard labor from two to ten years and fining them up to ten thousand dollars).

175. See, e.g., *United States v. Lamb*, 945 F. Supp. 441 (N.D.N.Y. 1996) (noting how the introduction of the floppy disk has made it easier for child pornographers to store and trade images).

176. See Wash. Rev. Code Ann. § 9A.4.115 (West 1998); see also McClurg, *supra* note 33, at 1022. Famous singer and entertainer Chuck Barry was sued for allegedly installing a video camera in the bathroom of a friend's restroom where he taped over 250 women naked. *Id.* Some of the girls taped were as young as six years old. *Id.* Another popular figure and teen idol, Rob Lowe, was also sued for videotaping a sixteen year old girl engaging in a "sexual encounter" with him and another woman. *Id.*; see, e.g., *United States v. Boos*, 127 F.3d 1207, 1210 (9th Cir. 1997) (arguing that the real victims of child pornography are the children themselves, not just society), *cert. denied*, 522 U.S. 1096 (1998).

177. See N.J. STAT. ANN. § 2A:30B-1(a) (West 1999). The legislature "finds and declare that . . . [c]hild pornography is a lucrative business which sexually exploits children and preys on their vulnerability." *Id.*

sidered a private act between two people.¹⁷⁸ Confidentiality requirements adopted by many states concerning communications between husbands and wives also helps further the concept that great importance is placed on the private moments between couples.¹⁷⁹ Additionally, many states enforce criminal laws forbidding the display of such acts in public.¹⁸⁰ Thus this behavior is recognized as a private moment and in turn requires protection against others intentionally viewing it.¹⁸¹

The penalty for trespassing onto another's home to engage in voyeurism is also penalized harsher in this proposed statute. It is important to keep in mind the sanctity of one's home and the high degree of expectation of privacy one has in his or her own domicile.¹⁸² It is common for people to do things in the privacy of their own that they would never conceive of doing in a motel, guestroom, or other areas that are off their premises. The reference to physical trespass or trespass by other mechanical devices is aimed specifically at incidents such as a landlord placing a hidden camera to view an unsuspecting tenant or a host sur-

178. See *Griswold v. Connecticut*, 381 U.S. 479, 499 (1965) (Goldberg, J., concurring) ("[T]he intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected." (quoting *Poe v. Ullman*, 367 U.S. 497, 553 (1934) (Harlan, J., dissenting))); see also Mark John Kappelhoff, *Bowers v. Hardwick: Is there a Right to Privacy*, 37 AM. U. L. REV. 487, 494 (1988). In his concurrence in *Poe*, Harlan "explained that the right to marital privacy is one of the fundamental rights embodied in the fourteenth amendment's due process clause." *Id.* See generally FERDINAND DAVID SCHOEMAN, *PRIVACY AND SOCIAL FREEDOM* 127-130 (1992) (tracing the role and influence of privacy in marriage through the centuries).

179. See, e.g., MICH. COMP. LAWS ANN. § 27A.2162 (West 1998). The statute states that neither the husband nor the wife, "during the marriage or afterwards, without the consent of both, [can] be examined as to any communications made by one to the other during the marriage . . ." *Id.*

180. See, e.g., CAL. PENAL CODE § 647 (West 1998) (including lewd conduct in public in the definition of disorderly conduct); FLA. STAT. ANN. § 798.02 (West 1998) (making it a misdemeanor of the second degree for a person to engage in lewdness in public); KAN. CRIM. CODE ANN. § 21-3508. (West 1998) (making it a crime to engage in sexual intercourse with the knowledge that one is being viewed); MASS. GEN. LAWS ANN. ch. 272, § 53 (West 1999) (punishing someone engaged in lewd behavior in public by imprisonment or fine or both); MINN. STAT. ANN. § 617.23 (West 1998) (punishing violations of this act as a misdemeanor); N.Y. PENAL LAW § 245.00 (McKinney 1999) (making public lewdness a class B misdemeanor); WIS. STAT. ANN. § 944.20 (West 1999) (defining lewd and lascivious behavior as engaging in sexual gratification through an indecent act and knowing that someone is watching).

181. See *Lovisi v. Slayton*, 539 F.2d 349 (4th Cir. 1975) (arguing that the marital intimacies between a couple when alone in their bedroom falls within the protected right to privacy). "State laws protect them from unwelcome intruders, and the federal constitution protects them from the state in the guise of an unwelcome intruder." *Id.* at 351.

182. See Warren & Brandeis, *supra* note 33, at 220. "The common law has always recognized a man's house as his castle." *Id.*

reptitiously recording his or her guest.¹⁸³ Viewing personal behavior conducted behind the closed doors of another's home is just as invasive, if not more so, than someone who hides behind a tree while viewing them through a window. Additionally, it is much easier to catch a person observing from a bush outside a victim's home than it is to catch a landlord who has installed a video camera in a bedroom.¹⁸⁴ This provision of the Voyeurism Act reemphasizes the need to punish first time perpetrators because the first incident of voyeurism can go on for months without anyone knowing, as was the case with Susan and Gary Wilson.¹⁸⁵ Therefore, there is a need to punish violators to prevent them from engaging in these types of invasions of privacy.

- § 3 (1) Any person who knowingly or by criminal negligence engages in or intends to engage in the reproduction, distribution, sale, dissemination or any person who allows others to view the photographs, videos, or other recordings resulting from conduct described in section 1 shall be guilty of distributing unauthorized material.
- (2) The crime of distributing unauthorized material is a Class C felony, unless the subject matter of the unauthorized material is a type recognized by section 2(a)-(c) of this Act, in which case the crime of voyeurism is a Class D felony.
- (3) Each separate copy of material described in section 1 that is distributed for exhibition within the state shall constitute a separate offense.

3. Commentary

The policy behind implementing this section in a voyeurism statute originates in an application of copyright laws to right to privacy.¹⁸⁶ This 19th century idea is revived in right to privacy suits today that deal with copyright.¹⁸⁷ The person with exclusive right to copyrighted works shall

183. See sources cited *supra* notes 163-168 (discussing examples of how one is viewed outside the privacy of his or her own home).

184. Compare 20/20, *supra* note 8 (describing how the Wilson's did not detect the video camera for months), with *Honeycutt v. State*, 755 P.2d 112 (Okla. Crim. App. 1988) (describing how the peeping Tom was discovered due to the barking of the plaintiffs dogs), and *Commonwealth v. De Wan*, 124 A.2d 139 (Pa. 1956) (describing how plaintiffs were able to hear the cracking of twigs outside their window to discover that they were being viewed by a peeping Tom), and *Commonwealth v. Belz*, 441 A.2d 410, 411 (Pa. Super. Ct. 1982) (noting how the plaintiff heard the peeping Tom walking and coughing outside her home).

185. See *supra* note 8 and accompanying text.

186. See Warren & Brandeis, *supra* note 33 and accompanying text.

187. See *Michaels v. Internet Entertainment Group, Inc.*, 5 F. Supp.2d 823 (C.D. Cal. 1998). Pamela Anderson and Bret Michaels sued the distributors of a video they had taken together in the privacy of their own home under the theory of copyright infringement. *Id.* at 842. The video was disseminated on the Internet for others to view. *Id.*; see also *Playboy*

have the right to display the copyrighted work publicly.¹⁸⁸ The same high regard for one's work should be applied to the unauthorized material obtained by voyeurs. As the victims, and "stars of the show," the subjects of a voyeur's camera should be conveyed the same rights as those who have copyrighted material. Therefore, by making the distribution of voyeur recordings a crime, the victims are given back some control over their right to privacy.

Additionally, the importance of curtailing voyeuristic behavior by taking criminal actions against the distributors of such material takes its roots in the common law approach towards distributors of child pornography.¹⁸⁹ The Internet,¹⁹⁰ as a means of distributing material from voyeurs, increases this demand for unauthorized recordings.¹⁹¹ In response, many courts have extended the definition of distribution of child pornography to include Internet activities.¹⁹² Currently, there are thousands of Web sites that contain sexually explicit material.¹⁹³ Many of the sites are directly aimed towards Internet users interested in voyeur or hidden camera images.¹⁹⁴ This market for pornography needs

Enter., Inc. v. Webbworld, Inc., 991 F. Supp. 543 (N.D. Tex. 1997), *aff'd* 168 F.3d 486 (5th Cir. 1999). Playboy sued the defendant under the theory of copyright infringement for reproducing pictures that bore the Playboy symbol on its Web site without Playboy's consent. *Id.* at 548-549. The plaintiff does not need direct proof of copying because it's "rarely available to a copyright owner. *Id.* at 551. Additionally, as long as the images show a "striking similarity" to the copyrighted works, copyright infringement can be proved. *Id.* (citing *Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978)).

188. See 17 U.S.C.A. § 106 (West 1998). The owner of a copyright has the exclusive rights to do or to authorize "in case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly." 17 U.S.C.A. § 106(5); see also *Michaels*, 5 F. Supp.2d 823. Bret Michaels was able to obtain a copyright to the videotape even after it had been taken and displayed on the Internet. *Id.* at 842.

189. See statute cited *supra* notes 174-179.

190. See *supra* notes 18-24, 57-61 and accompanying text.

191. See *Bilstad*, *supra* note 24, at 332. Pornographers are attracted to "these new forms of technology" because of the "restraints on their speech" in other forms of communication such as books and magazines. *Id.*

192. See, e.g., *United States v. Hibbler*, 159 F.2d 233 (6th Cir. 1998) (holding that trading child pornography on the Internet justified distribution enhancement).

193. See *Excite Search* (visited Apr. 5, 1999) <<http://www.search.excite.com/search.gw?search=sex%2C+sexually+explicit>> (generating over 900,000 sites related to sex and sexually explicit). But see *Bilstad*, *supra* note 24, at 341 (indicating that as of 1997 there were only approximately 4000 web sites that contained sexually orientated material).

194. See *Excite Search* (visited Apr. 5, 1999) <http://webcrawler.com/cgibin/webQuery?text=voyeurism+and+hidden+cameras+peeping&sic+wresults&showsummary=false> (displaying over 21,000 sites containing subject matter relating to voyeurism and hidden cameras). See, e.g., *Ultimate Upskirts Nothing Like the Flash of White Panties* (visited Mar. 30, 1999) <<http://www.ultimateupskirts.com/main/main.html>> (displaying pictures obtained from video cameras aimed up women's skirts); (visited Mar. 30, 1999) <

to be curtailed by punishing the distributors that supply the material for the users of the Internet.

In order to expand the breadth of the proposed statute to encompass the various means of distribution, the first part of the statute is aimed at anyone "who distributes, sells, or allows others to view" the unauthorized material. This is important because many distributors of unauthorized material obtained from voyeurs receive income in various forms. For example, one distributor of peeping Tom videos receives money solely from the membership he charges for one to visit his web site.¹⁹⁵ It is estimated that his site receives over a million hits a month.¹⁹⁶ Most often, the distributors are not necessarily the ones who take the photographs or videos.¹⁹⁷ Therefore, the language used in section 3 is broad enough to encompass both voyeurs who distribute what they record and those who receive it and distribute it to others.¹⁹⁸ Section 3 of the proposed statute specifically refers to "recordings resulting from conduct described in section 1."¹⁹⁹ There is no specification as to who must have

www.allvoyeur.com/main.html> (featuring pictures of young ladies caught naked while undressing, showering, using the washroom, and watching television in the nude); *Voyeurs Corner the Peepers Playhouse* (visited Mar. 30, 1999) <<http://www.voyeurscorner.com/main.html>> (advertising to browsers who like to watch video cameras secretly taping women showering, changing, and using the restroom); *Voyeur Website* (visited Mar. 30, 1999) <<http://www.voyeurmovies.com/main.html>> (containing free live video footage of women secretly taped masturbating in the privacy of their bedrooms); *Raw Voyeur A Peeper's Paradise* (visited Mar. 30, 1999) <<http://www.raw-voyeur.com/guest.html>> (offering free pictures of women taken while they unsuspectingly cross their legs, bend over, or go to the bathroom behind a bush); *Upskirt Free Pictures* (visited Mar. 30, 1999) <<http://www.upskirt.com/html/index.html>> (containing pictures of women taken by hidden video cameras in bathroom stalls, bedrooms, and fitting rooms); *Spy Pics* (visited Apr. 5, 1999) <<http://www.spypics.com/main.html>> (inviting users to send in homemade voyeur videos and pictures).

195. *Montel Show: An Inside Look at Voyeurs* (Paramount Pictures Corp., Mar. 4, 1999) [hereinafter *Montel*]. Andrew is a director of sales for Upskirt.com, a voyeur Web site. *Id.* at 13. Originally, the site was offered to the general public for free. *Id.* With the rapid increase of hits the site received, they were "forced" to begin charging a \$6.95-a-month fee. *Id.*; see *Upskirt Free Pictures*, *supra* note 196; see also Bilstad, *supra* note 24, at 339. Many sites that display pornographic material are accessed by subscribers "who usually must pay a fee by credit card and receive a password." *Id.*

196. *Montel*, *supra* note 197. The voyeur Web site receives multimillion hits a month and is still growing. *Id.* See, e.g. *Upskirt Free Pictures* (visited Mar. 30, 1999) <<http://www.upskirt.com/html/index.html>> (reporting that the site had 4,130,242 hits at present time of visit).

197. *Montel*, *supra* note 197. The videos and pictures received by Upskirt.com are sent in by voyeurs and "no money ever changes hands for these videos." *Id.* Many of the voyeurs who submit material are more interested in seeing it displayed on the Internet as a "trophy" and do not want any money in return. *Id.*; see also *Wood v. Hustler Magazine*, 736 F.2d 1084 (5th Cir. 1984) (describing how nude photographs of the plaintiff were stolen from her home and submitted to Hustler Magazine without her knowledge and consent).

198. See sources cited *supra* notes 133 - 136.

199. See sources cited *supra* notes 125 - 136.

made the recordings, only that they were made in violation of section 1. Therefore, both voyeurs and those who distribute the perverted material they record will be penalized.

The final element makes the possession of one copy a crime in and of itself.²⁰⁰ Although other states make it a requirement that more than one copy must be found in order to be guilty of distribution, the proposed statute limits it to only one copy.²⁰¹ This is crucial due to the threat the Internet poses.²⁰² Just one copy can be sent to millions of Internet users throughout the world.²⁰³ Furthermore, since one can also be found guilty of distributing unauthorized material under section 3 by showing the unauthorized material to one other person, it is only logical to reduce the number of copies required to be guilty of distribution to one.²⁰⁴

IV. CONCLUSION

No compensation can redeem the humiliation and fear experienced from having one's privacy invaded and recorded. With a lack of congressional attention to video voyeurism, the only recourse available to victims of voyeurism is proposing legislation within their own state government. Lawyers, legislators, and the general public need to come together to push for a new approach towards voyeurism. It is crucial that states adopt proper legislation to ensure that voyeurs are not allowed to go unpunished. Ideal legislation includes a liberal application of the right to privacy actions in tort law, in addition to criminal prosecution of offenders of new legislation similar to that proposed. Even if states enforce existing voyeurism statutes, current legislation requires revisions to include such advances in technology like secretly hidden video recorders.²⁰⁵ In addition, the penalties for violating these laws should mirror the harm caused by the perpetrators.²⁰⁶ Violators of these laws should be subjected to prison time, just as the victims of voyeurism are made to feel as prisoners under watch in their own homes. By passing legislation aimed at punishing these perverts such as the video voyeur, States protect the "safety, health, morals, and general welfare of

200. See Utah Code Ann. § 76 - 10 - 1222 (2) (1998); La. Rev. Stat. Ann. § 81.1 (F) (West 1999).

201. See, e.g., ALASKA STAT. § 11. 61. 125(c) (Michie 1999). In order to be found guilty of distribution, one must be in the "possession of 100 or more films . . . totaling 100 or more, is prima facie evidence of distribution and intent to distribute under (a) of this section." *Id.*

202. See sources cited *supra* notes 18-24, 57-61 and accompanying text.

203. See *American Civil Liberties Union v. Janet Reno*, 31 F. Supp.2d 473, 476 (E.D. Pa. 1999).

204. See Utah Code Ann. § 76 - 10 - 1222 (2) (1998); La. Rev. Stat. Ann. § 81.1 (F) (West 1999).

205. See *supra* notes 74-87 and accompanying text.

206. See sources cited *supra* notes 90-109 and accompanying text.

the public."²⁰⁷

In addition, a need exists for legislation aimed at curtailing the distribution of these unauthorized recordings. Due to the accessibility of various forms of international media, such as the Internet, distributors of material recorded by video voyeurs circulates throughout every nation in a matter of seconds.²⁰⁸ To prevent people from profiting from this type of mass distribution, legislation must be enacted to make the distribution of material obtained from video voyeurs a crime. Furthermore, the victims who are further humiliated by these distributors should have some form of tort claim against the distributors leading to some sort of compensation. By exposing distributors of material obtained by voyeurs to tort action, States prevent further injury to the victims of video voyeurism.²⁰⁹ Because images are spread to every Internet user throughout the world, an injunction against these distributors will not suffice. States must adopt harsh enough laws that will make distributors hesitate before they disburse materials revealing to the public the private moments of those victimized by video voyeurism.

Maria Pope

207. *See generally* *Lochner v. New York*, 198 U.S. 45 (1905).

208. *See American Civil Liberties Union v. Janet Reno*, 31 F. Supp.2d 473, 476 (E.D. Pa. 1999).

209. *See supra* notes 32-62 and accompanying text (discussing right to privacy tort claims).