Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of Death

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INTRODUCTION

In 1999, the author of this article first proposed for scholarly critique and criticism a new rationale for protecting freedom of expression that seemed to capture the tell-all, show-all spirit of the "post-modern, mediated visual age of television, the Internet and the hidden camera."[1] It was dubbed the "voyeurism value"[2] and was premised on the idea that "[t]he First Amendment[3] increasingly safeguards, or is called upon to safeguard, our right to peer and to gaze into places from which we are typically forbidden, and to facilitate our ability to see and to hear the innermost details of others' lives without fear of legal repercussion."[4]

The concept of a voyeurism value in First Amendment jurisprudence soon found its way into a leading constitutional law casebook[5] and more than a dozen different law journal articles.[6] And

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1. Clay Calvert, *The Voyeurism Value in First Amendment Jurisprudence*, 17 CARDOZO ARTS & ENT. L.J. 273, 274 (1999).

2. *Id.* at 274–75.

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

4. Calvert, *supra* note 1, at 274.

5. *See* JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 645 (9th ed. 2001) (citing the article in which the voyeurism value was first proposed and querying whether "voyeuristic desires deserve substantial first amendment protection?").

in the five years that now have passed since the proposal of a voyeurism value, the United States has witnessed an explosion in so-called reality television shows that pander to our voyeuristic tendencies.[7] The proliferation of those shows has "exacerbated the notion that everyone has something to come forward to tell"[8] and eroded notions of privacy.[9] And when there is no expectation of privacy, the result is legal voyeurism.[10] As the author wrote in 1999, an "individual's loss of privacy, of course, is the voyeur's gain"[11] and "[t]he question of the moment, of course, is whether the First Amendment freedom of the press will protect our desire to watch against claims of invasion of privacy and other intrusive newsgathering practices."[12]

This article takes a fresh look at that question and the fundamental tension between maintaining privacy and accelerating

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6. For examples of such articles written by law professors and attorneys, see Anita L. Allen, *Gender and Privacy in Cyberspace*, 52 STAN. L. REV. 1175, 1195 n.100 (2000) (citing the author's article on the voyeurism value to support the proposition that there is "a mutually reinforcing culture of unashamed exhibitionism and voyeurism"); A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1466 n.13 (2000) (citing the author's article on the voyeurism value to support the textual statement that we live in an age of "televised public talk-show confessionals and other forms of media-sanctioned exhibitionism and voyeurism . . ."); Francesca Ortiz, *Zoning The Voyeur Dorm: Regulating Home-Based Voyeur Web Sites Through Land Use Laws*, 34 U.C. DAVIS L. REV. 929, 930 n.2 (2001) (citing the author's article on the voyeurism value to support the proposition that "[m]ost computer exhibitionists open up their private lives"). For examples of student-written comments and notes, see DeLeith Duke Gossett, *Note: Constitutional Law and Criminal Procedure-Media Ride-Alongs into the Home: Can They Survive a Head-on Collision Between First and Fourth Amendment Rights?*, 22 U. ARK. LITTLE ROCK L. REV. 679, 686 n.52 (2000) (citing the author's article on the voyeurism value in the context of an analysis of the United States Supreme Court's opinion in Wilson v. Layne, 526 U.S. 603 (1999)); Lance E. Rothenberg, *Comment: Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and The Failure of the Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space*, 49 AM. U.L. REV. 1127, 1128 n.4 (2000) (citing the author's article on the voyeurism value in the context of a discussion of hidden-camera video voyeurism).

7. *See* Katti Gray, *Some Prefer Reality in Televised Doses*, NEWSDAY, Sept. 16, 2003, at B02 (writing that "Reality TV is voyeurism, indeed" and describing the "hyper-production of reality TV shows" in 2003); Matthew Gilbert, *On TV; Reality Gets a Summer Makeover, 'Osbournes'-Style*, BOSTON GLOBE, June 6, 2002, at D1 (writing that reality television shows "continue to thrive on a mix of real people, temporary fame, and *voyeurism*") (emphasis added).

8. Kate Zernike, *The Nation: What Privacy?; Everything Else But the Name*, N.Y. TIMES, Aug. 3, 2003, § 4 at 4.

9. Alex Kuczynski, *In Hollywood, Everyone Wants to Be Ozzy*, N.Y. TIMES, May 19, 2002, § 9 at 1 (noting how the voyeurism of a show like *The Osbournes* has changed celebrities' notions of privacy).

10. *See* Anabelle De Gale, *Jazzing up the John; In South Beach, Restaurateurs' Best Ideas Land in the Toilet*, MILWAUKEE J. SENTINEL, June 16, 2002, at 21A (describing the relationship between an area in which a person has no reasonable expectation of privacy and the legality of voyeurism).

11. Calvert, *supra* note 1, at 308.

12. *Id.* at 302–03.

voyeurism, while addressing the notions of geographic privacy and newsworthiness that are critical in this conflict. In particular, this article surveys five specific and cutting-edge areas in the law that demonstrate the conflict between privacy and voyeurism and the legal system's struggles to reconcile the two concepts. Each of these is an area that has developed since the proposal of the voyeurism value in 1999. Ultimately and unfortunately, the clear pattern that is revealed across these areas is that of inconsistency—there is still ferment in the field. We are only minimally closer to resolving the legal issues that divide privacy and voyeurism.

Following this Introduction, Part I of this article examines the stepped-up efforts in 2003 of legislative bodies, including the U.S. Congress, to control the burgeoning phenomenon of hidden-camera video voyeurism[13] that often involves the prurient taping of women in various stages of undress, and in under-the-dress shots.[14] This part also critiques recent judicial opinions that have struck down some of these efforts, thus allowing video voyeurism to proliferate. Part II then turns from sex to death to explore the tension that has developed since the death of NASCAR driver Dale Earnhardt in February 2001: between keeping private autopsy photographs private and giving the press access to those images to learn more about what might have caused the deaths in question.[15] The Earnhardt death now has left a legacy of legislation and litigation, as well as a voyeuristic controversy that did not exist when the voyeurism value was proposed in 1999. Next, Part III turns to another area that demonstrates the tension between voyeuristic glimpses of death and the right to privacy: namely, the efforts of *The New York Times* to obtain what might be called impending death tapes—emergency 911 telephone calls made on September 11, 2001 by victims of the terrorist attacks on the World Trade Center.[16] Again, this is a new controversy taking place since the voyeurism value was initially articulated. Part IV shifts to a series of cases pertaining to the ability of the media—and, by extension, the general public—to obtain the sordid and private details about divorces and marital dissolutions involving high-profile figures.[17] Part V examines and analyzes the controversial practice of "perp walks" in which criminal defendants are publicly paraded by law enforcement

13. *See generally* Clay Calvert & Justin Brown, *Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace*, 18 CARDOZO ARTS & ENT L.J. 469 (2000) (describing the early stages of video voyeurism and some of the first attempts to control it).

14. *See infra* notes 21–66 and accompanying text.

15. *See infra* notes 67–96 and accompanying text.

16. *See infra* notes 97–115 and accompanying text.

17. *See infra* notes 116–135 and accompanying text.

officials before the voyeuristic lens of the media seeking to get a glimpse of the alleged perpetrators.[18]

Finally, this article features a discussion in Part VI, which attempts to synthesize these five areas, each of which highlights the dissonance between privacy and the voyeurism value.[19] In the end, the legal efforts to constrain voyeurism have proven only partially successful. As our appetite for voyeurism continues to grow—witness, for instance, that "the news media pitch its most elaborate tents around accused child molester Michael Jackson"[20]—the problems persist and continue to plague the legal system. One critical concept that needs to be re-examined, as the Discussion points out, is newsworthiness. It is this concept, concomitant with the concept of the public's right to know, that justifies voyeuristic activities when it can be said to exist; conversely, when the images or information in question are not newsworthy, privacy rights can trump voyeurism. A second key issue that must be addressed is the geographic notion of privacy that now hinders legal efforts to restrict the forms of sexual voyeurism discussed in Part I. Without a revised conception of privacy and, in particular, the setting in which individuals have legitimate and objectively reasonable expectations of privacy, sexually deviant voyeurism will continue to thrive.

I. VIDEO VOYEURISM AND THE UPSKIRTING[21] OF PRIVACY

When a made-for-television movie called *Video Voyeur: The Susan Wilson Story* debuted on the Lifetime cable channel, it brought to public attention one of the most vexing problems at the intersection of voyeurism and privacy—how to control the conduct of technology savvy Peeping Toms who prey on unsuspecting women.[22] The movie, which garnered a large audience[23] and starred Angie Harmon,[24] told

18. *See infra* notes 136–154 and accompanying text.

19. *See infra* notes 155–173 and accompanying text.

20. Tim Rutten, *Hurry, Hurry, Get a Ticket to the News*, L.A. TIMES, Nov. 22, 2003, at E1.

21. Upskirting is "the lewd practice of a camera operator offering peeks under a woman's skirt." Jose Martinez, *N.Y. Law Makes Video Peeping a Felony*, DAILY NEWS (N.Y.), June 24, 2003, at 24.

22. *See generally* Kenneth Lovett, *Make Peepers Pay; LA Voyeur Victim Rips N.Y. Pols Over Law Lag*, N.Y. POST, Mar. 10, 2003, at 19.

23. *See* John Dempsey, *Lifetime Pulls Pair of No. 1s*, VARIETY, Jan. 30, 2002, at News 7 (describing *Video Voyeur: The Susan Wilson Story* as "a blockbuster original movie" and writing that it, along with three first-run series, "propelled Lifetime to an average of 1.975 million homes in primetime, representing a strapping lead of 450,000 households, on average, over second-place USA" in January 2002). After it first ran, the movie became "tied as the 5th highest rated original movie in Lifetime's 18-year history." *Lifetime's 1Q 2002 Primetime Ratings Victory*

the story of Susan Wilson, who was victimized by a neighbor in Monroe, Louisiana, who had installed surveillance equipment in the attic over her bedroom and bathroom.[25]

The problem for Wilson was that there was no crime, at that time, of secret videotaping in Louisiana.[26] Indeed, "[m]any wiretapping or eavesdropping laws regulate audiotaping or recording but are silent as to videotaping. If sound is not recorded when a videotape is made, then prosecutors must seek other remedies to punish video voyeurs."[27] It is not surprising, then, that "law enforcement officials have not been as successful in prosecuting these high tech video voyeurs. Numerous video voyeurs escape prosecution because the laws did not and some still do not address the crimes."[28]

While states such as Louisiana, Susan Wilson's home and the first state to make video voyeurism a felony,[29] have recently adopted video voyeurism laws,[30] others have not, thus allowing voyeurism to thrive and privacy to erode. The consequences for the victims of video voyeurism, in turn, are tragic. Consider, for instance, a July 2003 opinion by an appellate court in New Jersey that vacated the criminal conviction of a man who installed a hidden video camera in the bathroom of his residence in order, by his own admission, to see "naked" two female guests.[31] The defendant, Stephen Burke, was charged under a state statute which provides that:

> A person commits a crime of the fourth degree if, knowing that he is not licensed or privileged to do so, he peers into a window or other opening of a dwelling or other structure adapted for overnight accommodations for the purpose of invading the privacy of another person and under circumstances in which a

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Marks the Longest Consecutive Quarterly Basic Cable Winning Streak in Five Years, PR NEWSWIRE, Apr. 2, 2002, at Entertainment, Television and Culture.

24. Harmon is perhaps better known for her role as prosecutor Abbie Carmichael on NBC's *Law & Order*. *See* Lloyd Grove, *The Reliable Source*, WASH. POST, Apr. 16, 2002, at C03 (identifying Harmon as both starring in *Video Voyeur: The Susan Wilson Story* and in *Law & Order*).

25. Lovett, *supra* note 22, at 19.

26. *Id.*

27. CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY AND PEERING IN MODERN CULTURE 202 (2000).

28. Brian Mills, *Video Voyeurism: Are You Being Watched?*, 3 LOY. INTELL. PROP. & HIGH TECH. J. 11, 15 (2000).

29. *See Man Admits to Videotaping in Restroom*, ADVOCATE (Baton Rouge, La.), Sept. 25, 2002, at News 5-B (writing that "Louisiana's video voyeurism law, passed in 1999, was the first in the United States making the crime a felony").

30. *See* LA. REV. STAT. ANN. § 14:283 (West 2003) (setting forth Louisiana's video voyeurism statute).

31. New Jersey v. Burke, 826 A.2d 808 (N.J. App. 2003).

> reasonable person in the dwelling or other structure would not expect to be observed.[32]

The three-member appellate panel focused on the term "peers into" and concluded that the statute requires the peering "be from a location outside,"[33] and that it "requires an intrusion into the dwelling from a vantage point outside that dwelling."[34] The court thus concluded that "[t]he type of video voyeuristic surveillance that occurred here simply was not criminalized by the language or intent of this statute."[35] The appellate court also opined that it was not its role to stretch the meaning of the statute to apply to modern-day video voyeurism, writing that "[w]hether video voyeurism that surreptitiously occurs from inside a dwelling should be criminalized is a matter for the Legislature to address, not this court."[36]

The opinion, not surprisingly, was greeted by disgust from state officials. New Jersey Attorney General Peter C. Harvey called for the passage of a new video voyeurism law and remarked that "our statutes were written at a time when no one contemplated the type of technology now proposed. We have to tighten the law."[37]

Today, legislative efforts are being made in some states, including New Jersey where Stephen Burke was allowed to walk free,[38] to rein in video voyeurism and, conversely, to expand privacy.

For instance, in June 2003, New York Governor George Pataki "signed into law a measure that makes video voyeurism—secretly capturing images of another person in a private place, like a bathroom or bedroom—a felony that carries a maximum penalty of seven years in prison."[39] Known as Stephanie's Law, [40] the measure "was named for Long Island resident Stephanie Fuller, who was secretly videotaped by her landlord. He had installed a tiny video camera in

32. N.J. STAT. ANN. § 2C:18-3 (West 2003).

33. *Burke*, 826 A.2d at 811.

34. *Id.* at 812.

35. *Id.*

36. *Id.*

37. Tom Bell, *Panel Rules NJ Law Does Not Forbid Video Voyeurism in Home*, ASSOC. PRESS STATE & LOCAL WIRE, July 8, 2003, at State and Regional.

38. *See* N.J. STAT. § 2C:14-9 (West 2003), effective Jan. 8, 2004, which creates the crime of video voyeurism. The new law closes "a legal loophole that prosecutors and the victims of sexual assault fought to end." *"New Law Makes Video-Voyeurism 3rd-Degree Crime,"* RECORD (Bergen County, NJ), January 10, 2004, at A08.

39. *Pataki Signs Law Barring Secret Video Voyeurism*, TIMES UNION (Albany, NY), June 24, 2003, at B2.

40. Stephanie's Law, ch. 69, 2003 N.Y. Laws S. 3060-B, (N.Y. 2003) (effective Aug. 11, 2003) (codified in amendments to N.Y. PENAL LAW § 250.00–.35, N.Y. CORRECT. LAW § 168, and in newly enacted sections N.Y. PENAL LAW § 250.40–65).

the smoke detector above her bed."[41] Other proponents of the new law included "two upstate women, whose daughters were taped in a dressing room by their kindergarten teacher."[42] Prior to the adoption of the new law, "the New York statute on unauthorized surveillance covered only audio recordings."[43]

The new law in New York has several different provisions. Among other things, it creates the crime of unlawful surveillance in the second degree, which occurs when a person:

> For his or her own, or another person's amusement, entertainment, or profit, or for the purpose of degrading or abusing a person, he or she intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record a person dressing or undressing or the sexual or other intimate parts of such person at a place and time when such person has a reasonable expectation of privacy, without such person's knowledge or consent.[44]

The law also targets the growing and disturbing practice in the United States and beyond[45] known as upskirting, which has been described as:

> a predatory sport that takes advantage of easily concealed, micro-camera technology – common in most mobile phones today – to secretly film unsuspecting victims in public. Voyeurs typically prey on potential victims in crowded places, such as slipping a bag with a camera under a woman's skirt in a shopping mall.[46]

Under the new law in New York, an individual commits a second-degree class E felony when, "[w]ithout the knowledge or consent of a person, he or she intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record, under the clothing being worn by such person, the sexual or other intimate parts of such person."[47] A

41. Harry A. Valetk, *Keeping Tom From Peeping; New Law Will Not Protect All Victims of High-Tech Voyeurs*, N.Y. L.J., Aug. 5, 2003, at 5.

42. Kenneth Lovett, *L.I. Victim: Post IDs of Vid Voyeurs*, N.Y. POST, Mar. 20, 2003, at 27.

43. *A Video Voyeur Law; Finally, The Legislature Rules Out an Outrageous Invasion of Privacy*, Buffalo News, June 17, 2003, at B10.

44. N.Y. PENAL LAW § 250.45 (McKinney Supp. 2004).

45. The problem of upskirting appears not to stop at the borders of the United States. For instance, "Japanese police say they have apprehended people using camera phones to take photos up the skirts of unsuspecting women in crowded trains and stores." Monique Beeler, *New Types of Mischief Calling on Camera-Equipped Cell Phones*, ALAMEDA TIMES-STAR (Alameda, Calif.), July 20, 2003, at Bay Area Living.

46. Valetk, *supra* note 41, at 5.

47. N.Y. PENAL LAW § 250.45 (McKinney Supp. 2004).

potential problem, however, with the constitutionality of this latter provision of the New York law is that it is *not* limited to locations where individuals have a reasonable expectation of privacy and, under common tort principles, one has no expectation of privacy in a public place.[48] A major shift in how the law conceptualizes privacy will thus be necessary to sustain the law against a potential legal challenge.

New York was not alone in 2003 in revising its laws to build up a bulwark around the privacy interests that are jeopardized by high-tech voyeurs and electronic Peeping Toms. In May 2003, for instance, Washington Governor Gary Locke "signed legislation making it a felony to film or photograph up women's skirts."[49] The law[50] was warmly greeted by privacy advocates in the state. As one of the bill's co-sponsor's remarked, "We can feel safe enough to put on our summer skirts."[51]

But that feeling of safety may not last forever. Why? Because less than one year before, the Supreme Court of Washington held that the state's voyeurism statute did not apply to actions taken in purely public places and, concomitantly, did not prohibit upskirt voyeurism in public places.[52] The decision was disparaged by the *Seattle Times* editorial board as "unsettling" because of the implication that "it was legal to film up women's skirts in public."[53] That 2002 opinion, however, did *not* involve a voyeurism statute that specifically targeted the practice of upskirting, but rather one providing that:

> A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she 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 place where he or she would have a reasonable expectation of privacy*.[54]

48. *See* CALVERT, *supra* note 27, at 202–05. The now 40-year-old opinion of Daily Times Democrat v. Graham, 162 So. 2d 474 (Ala. 1964), provides an exception to this general rule in what amounts to the first primitive upskirt case of its kind. *See* CALVERT, *supra* note 27, at 203–04 (discussing the Graham case).

49. Steven Friederich, *Locke Signs Up-Skirt Camera Ban*, SEATTLE POST-INTELLIGENCER, May 13, 2003, at B2.

50. Act of May 12, 2003, ch. 213, 2003 Wash. Legis. Serv. S.H.B. 1001 (West) (amending WASH. REV. CODE § 9A.44.115).

51. *'Up-Skirt' Camera Ban Goes to Locke*, SEATTLE POST-INTELLIGENCER, Apr. 23, 2003, at B1.

52. Washington v. Glas, 147 Wash. 2d 410, 414, 54 P.3d 147, 151 (2002).

53. *No Skirting This Law for Common Dignity*, SEATTLE TIMES, Jan. 21, 2003, at B4.

54. WASH. REV. CODE § 9A.44.115 (2002) (amended 2003) (current version at WASH. REV. CODE § 9A.44.115 (Supp. 2003) (emphasis added).

The high court of Washington opined that "although the Legislature may have intended to cover intrusions of privacy in public places, the plain language of the statute does not accomplish this goal."[55] The new 2003 legislation thus was a direct response—much like that in New York—to this gap in the voyeurism laws. It attempts to plug the legal loophole by revising the Washington voyeurism law to include the filming and photographing of "the intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place."[56] The statute defines "intimate areas" as "any portion of a person's body or undergarments that is covered by clothing and intended to be protected from public view."[57]

The state of Hawaii also adopted new legislation in 2003 targeting upskirt voyeurism after Tyler Takehara escaped conviction in 2002 for using "a small, concealed camera to shoot video up the skirts of unsuspecting women riding escalators at Ala Moana Center."[58] Under the new law in Hawaii, a person commits the criminal offense of violation of privacy in the second degree if he or she "covertly records or broadcasts an image of another person's intimate area underneath clothing, by use of any device, and such image is taken while that person is in a public place and without that person's consent."[59]

The U.S. Congress even began paying attention to the issue of upskirt and downblouse voyeurism in 2003 when Senator Mike DeWine, an Ohio Republican, and Senator Charles Schumer, a New York Democrat, introduced a new bill called the Video Voyeurism Prevention Act of 2003.[60] The bill passed the United States Senate in September 2003 and was referred to the House Committee on the Judiciary and later to the Subcommittee on Crime, Terrorism, and Homeland Security.

In a statement on the Senate floor on June 19, 2003, Senator DeWine stated that the bill:

> seeks to close the gap in the law and ensure that video voyeurs will be punished for their acts. Our bill would make it a crime to videotape, photograph, film, or otherwise electronically record

55. *Glas*, 147 Wash. 2d at 414, 54 P.3d at 151.

56. WASH. REV. CODE § 9A.44.115 (Supp. 2003).

57. *Id.*

58. Bruce Dunford, *Lingle Signs Bill Banning "Upskirt Photography,"* ASSOC. PRESS STATE & LOCAL WIRE, May 9, 2003, at State and Regional.

59. HAW. REV. STAT. § 711-1111 (2003).

60. Video Voyeurism Prevention Act of 2003, S.1301, 108th Cong. (2003).

> the naked or undergarment-clad genitals, pubic area, buttocks, or female breast of an individual, without that individual's consent. This bill would help ensure that when a person has a reasonable expectation that he or she will not be videoed, filmed, or photographed as I have just described, that expectation of privacy will be recognized in and protected by the law. Additionally, our bill would make certain that perpetrators of video voyeurism are punished, by imposing a sentence of a fine or imprisonment for up to one year.[61]

The question now is whether courts will uphold the new laws that specifically target upskirt voyeurism. Challenges against these laws brought by individuals who will be prosecuted under their terms are almost inevitable. To the extent that the use of cameras involves images and thereby raises freedom of expression concerns, these challenges may include facial attacks, such as ones based on vagueness[62] and overbreadth.[63]

The key issue, however, will be whether courts are willing to stretch the notion of privacy to include filming and photography that takes place in public. Surely a woman who wears a skirt possesses a reasonable expectation, regardless of whether she is in a closed changing room or in a public shopping mall food court, that technology will not be used to catch a glimpse of her underwear. As Harry Valetk, an attorney with the U.S. Department of Justice, contends, "members of any civil society understand that privacy expectations go well beyond private places."[64] The location or site of the privacy expectation that judges must consider when determining whether there is a reasonable expectation of privacy is not the geographic setting—a shopping mall, a public park or a baseball stadium where upskirt voyeurism occurs—but rather the area underneath a woman's skirt. Parsed differently and more bluntly, if privacy concerns are eventually to trump those of the voyeur, then it must be found that a person has a reasonable expectation of privacy under her skirt. Until that time, however, the legal tension between

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61. Speech of Senator DeWine, Floor Statement: Video Voyeurism Prevention Act of 2003, June 19, 2003, *available at* http://www.dewine.senate.gov/pressapp/record.cfm?id=205296 (last visited Feb. 27, 2003).

62. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 763 (1997) (providing that "[a] law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted").

63. *See* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 255 (2002) (providing that "[t]he overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process").

64. Valetk, *supra* note 41, at 5.

voyeurism and privacy brought in video voyeurism cases will continue to fester. Indeed, it may be exacerbated by new technology.[65]

To address the question of privacy in upskirt cases that take place in public spaces, the Video Voyeurism Prevention Act of 2003, by its terms, applies to "circumstances in which a reasonable person would believe that his or her naked or undergarment-clad pubic area, buttocks, genitals, or female breast would not be visible to the public, *regardless of whether that person is in a public or private area.*"[66] If this bill becomes law, the emphasized portion will most likely be contested in the courts. Why? Because it applies in public areas, not merely those that are private. This would be a radical change for in the legal system's conception of privacy, but surely one that is necessary to preserve human dignity from offensive intrusions.

II. DEVIANT VOYEURISM OR LEGITIMATE INVESTIGATION?: DALE EARNHARDT, VINCE FOSTER, AND GLIMPSES OF DEATH

As a society, we have long been fascinated with photographic images of death. In 1928, Tom Howard brought a miniature camera "into an electrocution room in New York to capture the moment as a 2,200-volt current shot through the body of the condemned murderer Ruth Snyder."[67] Howard's photograph was plastered the next day on the front-page of the *Daily News* in New York City.[68] That issue "sold a million copies, and there were only 15 letters of protest, but the incident sparked a controversy about what constitutes journalistic excess."[69] The controversy about journalistic excesses and images of death has not receded in the 75 years since that photograph was published.

In 2001, in direct response to the race-track death of driver Dale Earnhardt at the Daytona 500[70] and the subsequent request for autopsy photographs by the *Orlando Sentinel* and other newspapers,[71]

65. Senator Mike DeWine, for instance, in proposing the Video Voyeurism Prevention Act of 2003, observed that "[t]he high quality and concealability of modern cameras, along with advances on the Internet, make cyber-peeping an underground industry." Sabrina Eaton, *Ohio Legislators Push Bills Targeting Video Voyeurs*, PLAIN DEALER (Cleveland, Ohio), July 24, 2003, at A11.

66. S.1301, 108th Cong. (2003) (emphasis added).

67. CALVERT, *supra* note 27, at 38–39.

68. *Id.* at 39.

69. Alice Reid, *Ad for News Media Museum Dismays Death Penalty Opponents*, WASH. POST, May 29, 1997, at D01.

70. *See generally* Liz Clarke, *Dale Earnhardt Killed at Daytona; Legend's Death Clouds NASCAR's Biggest Day*, WASH. POST, Feb. 19, 2001, at A01 (describing the death of Earnhardt).

71. *See generally* Greg Stoda, *Earnhardt: Both Sides Have a Case*, PALM BEACH POST (Fla.), Mar. 7, 2001, at 1C (describing the battle over the autopsy photographs).

the Florida legislature passed a bill called the Earnhardt Family Protection Act[72] that was signed into law by Governor Jeb Bush. The law makes photographs and videotapes of autopsies confidential and exempt from that state's public records act.[73] The newspapers had sought access to the photographs to determine the reasons for Earnhardt's death and, in particular, whether a particular safety device might have saved his life.[74] In brief the, "paper's interest was not voyeuristic. It followed an investigation by reporters of the safety of NASCAR racing."[75] In 2002, however, a Florida appellate court upheld the constitutionality of that statute and its retroactive application against a challenge brought by the *Independent Florida Alligator*,[76] the student newspaper at the University of Florida. The Supreme Court of Florida declined to hear the case in July, 2003, letting the appellate court decision stand.[77] The United States Supreme Court denied a petition for a writ of certiorari for the case in December 2003.[78]

In reaching its decision, the Florida appellate court focused on the interests to be balanced and, in the end, deferred to the legislature's judgment and decision to enact the law:

> The Florida Constitution gives every citizen the right to inspect and copy public records so that all may have the opportunity to see and know how the government functions. It is also a declared constitutional principle that every individual has a right of privacy, and while our constitution does not catalogue every matter that one can hold as private, autopsy photographs which display the remains of a deceased human being is certainly one of them. But we need not say so because the Legislature has said so and that is its prerogative, not ours.[79]

72. FLA. STAT. ch. 406.135 (2003).

73. *Id.*

74. Stoda, *supra* note 71, at 1C.

75. *Autopsy Photos and Medical Teaching*, TAMPA TRIB., Apr. 10, 2001, at 8.

76. For more information on this newspaper, one can visit its site on the World Wide Web, *available at* http://www.alligator.org (last visited Feb. 27, 2004).

77. Campus Communications, Inc. v. Earnhardt, 821 So. 2d 388 (Fla. Ct. App. 2002), *petition for review denied*, 848 So. 2d 1153 (2003). The Supreme Court of Florida's decision not to hear the case came in a close 4–3 vote.

78. Campus Communications, Inc. v. Earnhardt, 124 S.Ct. 821 (2003). *See Earnhardt Autopsy Photos Are Off Limits*, WASH. POST, Dec. 2, 2003, at D02 (describing how the "*Alligator*, an independent newspaper staffed by University of Florida students, sought the photos as questions arose over how the racer died and whether better safety equipment might have saved him," and addressing the U.S. Supreme Court's decision of December 1, 2003 to reject the newspaper's appeal challenging "the constitutionality of a Florida law passed after Earnhardt's death, barring public access to autopsy pictures").

79. *Campus Communications, Inc.*, 812 So.2d at 402.

The Florida law attempts to squelch voyeurism while simultaneously recognizing that there may be, in some instances, legitimate reasons for looking at autopsy photographs. To this extent, it provides that a court:

> upon a showing of good cause, may issue an order authorizing any person to view or copy a photograph or video recording of an autopsy or to listen to or copy an audio recording of an autopsy and may prescribe any restrictions or stipulations that the court deems appropriate. In determining good cause, the court shall consider whether such disclosure is necessary for the public evaluation of governmental performance; the seriousness of the intrusion into the family's right to privacy and whether such disclosure is the least intrusive means available; and the availability of similar information in other public records, regardless of form.[80]

Regardless of whether such a good-cause provision strikes the proper balance between protecting privacy from voyeurism and allowing good-faith journalistic investigations under the First Amendment's free press protection, [81] the disturbing aspect for access advocates is that other states are now jumping on the Florida bandwagon. For instance, Louisiana[82] and Georgia[83] adopted similar legislation after (and as a result of) the Earnhardt accident, while

80. FLA. STAT. ch. 406.135 (2003).

81. *See generally* Joe Black, *Open Records Debate Rages; Right to Know, Privacy at Odds in Dispute*, FLA. TIMES-UNION, Mar. 6, 2003, at G-6 (describing, in the context of a discussion of the battle over the Earnhardt autopsy photographs, how "the dispute between privacy and the public's right to know is a fight lawmakers and First Amendment advocates grapple with when the exemptions are considered").

82. The law in Louisiana provides in relevant part:

> Notwithstanding any other provision of law to the contrary, photographs, video, or other visual images, in whatever form, of or relating to an autopsy conducted under the authority of the office of the coroner shall be confidential, are deemed not to be public records, and shall not be released by the office of the coroner or any officer, employee, or agent thereof except as otherwise provided in this Section.

LA. REV. STAT. ANN. § 44.19 (West 2003). *See The Week in Review*, SUNDAY ADVOCATE (Baton Rouge, La.), May 6, 2001, at 6-B (describing how the Louisiana "autopsy bill was prompted by controversy over the death of race-car driver Dale Earnhardt"); Kathey Pruitt, *Governor Approves Final Bills*, ATLANTA J. & CONST., May 1, 2001, at B3 (describing the signing of the Georgia law that would "shield the release of autopsy photos by hospitals, a law that grew out of a dispute in Florida over autopsy pictures after the death of race car driver Dale Earnhardt").

83. The law in Georgia attempts to strike a balance between privacy interests and newsgathering concerns by providing in relevant part that "[a] superior court may, in closed criminal investigations, order the disclosure of such photographs upon findings in writing that disclosure is in the public interest and that it outweighs any privacy interest that may be asserted by the deceased's next of kin." GA. CODE ANN. § 45-16-27(d) (2003).

legislation similar to Florida's was considered by the legislature in North Carolina in 2003.[84]

The United States Supreme Court also wrestled with the issue of access to death-scene photographs and the concerns of privacy that conflict with voyeurism in 2003 and 2004. In May 2003, the Court granted certiorari for *Office of Independent Counsel v. Favish*[85] and heard oral argument on December 3, 2003.[86] At issue in this case were photographs of the body of former Deputy White House Counsel Vincent Foster taken at the scene of his death and whether exemption 7(C)[87] of the Freedom of Information Act[88] exempts those images from public disclosure.[89] Allan Favish,[90] "a Los Angeles lawyer who suspects Foster's reported suicide may have been a homicide, sued under the Freedom of Information Act to obtain photos in the official files, including close-up views of his dead body."[91] He "has spent hundreds of hours in the last decade researching the death of Vince Foster"[92] and believes "the federal government bungled the investigation and may have incorrectly determined it was a suicide. He says Foster was probably murdered."[93] The Supreme Court must now "decide whether the right of surviving family members to 'be left alone to grieve' should trump the public's right to know"[94] or, parsed

84. *See* David Rice, *Committee Oks Autopsy Bill; Revision Would Reduce Violation from Felony to Class 1 Misdemeanor*, WINSTON-SALEM J., May 30, 2003, at 1 (describing how a bill pending in North Carolina "would remove autopsy photos from the public records that anyone can currently view. It would preserve verbal autopsy reports as public records and even allow anyone to view original autopsy photographs—but not to make copies for distribution").

85. Favish v. Office of Independent Counsel, 37 Fed. Appx. 863 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 1928 (2003).

86. *See generally* Charles Lane, *Privacy Goes Before Justices; Man Battling Family for Access to Vincent Foster Photos*, WASH. POST, Dec. 4, 2003, at A4 (describing oral arguments in the *Favish* case).

87. *See* 5 U.S.C. § 552(b)(7)(C) (2003) (providing an exemption from discovery for "records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy").

88. *See generally* U.S. DEP'T OF JUSTICE, GUIDE TO THE FREEDOM OF INFORMATION ACT (2002), *available at* http://www.usdoj.gov/oip/foi-act.htm (last visited Feb. 27, 2004).

89. *See generally* Tony Mauro, *High Court to Mull Release of Death-Scene Photographs*, LEGAL INTELLIGENCER, Feb. 18, 2003, at 7 (describing the Favish case).

90. One can read Favish's views about the Foster death on Favish's site on the World Wide Web, *available at* http://www.allanfavish.com/foster.htm (last visited Feb. 27, 2004).

91. David G. Savage, *45 Cases Await Returning High Court Justices*, L.A. TIMES, Oct. 5, 2003, at 27.

92. Bill Adair, *Passion Propels Rookies to High Court*, ST. PETERSBURG TIMES (Fla.), Nov. 17, 2003, at 1A.

93. *Id.*

94. Jane Kirtley, *Releasing the Vince Foster Photos*, AM. JOURNALISM REV., Aug.–Sept. 2003, at 74. *See* Tony Mauro, *Do-It-Yourself Defendants Imperil Their Own Cases*, USA TODAY,

slightly differently, "whether the public's right to know certain government information outweighs any privacy rights of a dead person and surviving family members."[95] Not surprisingly, the Court granted a motion allowing Dale Earnhardt's widow, Teresa Earnhardt, to file an amicus brief in the *Favish* case.[96] The Court had not issued a ruling in the case when this article went to print.

In summary, since the voyeurism value was proposed in 1999, the topic of access to images of death has developed into a fertile new battleground, with the concept of privacy being the prize to be won or lost. At this stage, it remains to be seen how many more legislative bodies will adopt laws similar to those in Florida while the outcome of *Favish* remains unclear. The topic of death, however, has triggered debates beyond those of the visual to that of the aural, as the next part of this article suggests.

III. DYING DECLARATIONS: LISTENING IN TO EMERGENCY TELEPHONE CALLS

In November 2003, New York City Mayor Michael Bloomberg essentially declared war on aural voyeurism when he vowed "to challenge a federal subpoena requiring the city to turn over records of 911 calls from the Sept. 11 terrorist attacks. He said that the request was ghoulish, and that complying would invade the privacy of the victims' families."[97] A New York state trial court had ruled in February 2003 on a request for the tapes made by *The New York Times*.[98] That court allowed the release of the dispatchers' sides of 911 recordings,[99] but not the words of the victims. In striking this balance between privacy and access to the details of death, Judge Richard F. Braun wrote:

Dec. 3, 2003, at 23A (writing that "[t]he court will have to strike a balance between the privacy interests of Foster's family and the public's right to know").

95. Warren Richey, *A Family's Privacy vs. Public's Right to Know*, CHRISTIAN SCI. MONITOR, Dec. 3, 2003, at 2.

96. Office of Independent Counsel v. Favish, 124 S. Ct. 31 (2003).

97. Winnie Hu, *Privacy Is Primary Issue, Mayor Says of 9/11 Tapes*, N.Y. TIMES, Nov. 22, 2003, at B2.

98. New York Times Co. v. City of New York Fire Dept., 754 N.Y.S.2d 517 (N.Y. Sup. Ct. 2003).

99. In releasing these portions of the tapes, the judge wrote:

> There is no privacy exemption as to the portion of the tapes and transcripts which consist of the words of dispatchers and 911 operators, and members of respondent's units, as they were performing their jobs at the time as public employees, and thus were not entitled to any expectation of privacy for their part of the conversations.

Id. at 524.

> The 911 tapes and transcripts contain communications made by people using that emergency telephone number in extreme circumstances, and for many it was the last words of their lives. Their calls for help in extremis should be protected as private utterances for the sake of both the victims who died, and their surviving family members and others who cared about them.[100]

In January 2004, a five-judge panel of the appellate division of the Supreme Court of New York considered Judge Braun's order.[101] On the one hand, it upheld that part of his order requiring redaction of "the words of the callers,"[102] reasoning that the "[d]isclosure of the highly personal expressions of persons who were facing imminent death, expressing fear and panic, would be hurtful to a reasonable person of ordinary sensibilities who is a survivor of someone who made a 911 call before dying."[103] The appellate panel added that "[t]he anguish of these relatives, as well as the callers who survived the attack, outweighs the public interest in disclosure of these words, which would shed little light on public issues."[104] Michael A. Cardozo, an attorney for the City of New York, issued a statement lauding this portion of the appellate court's decision, remarking that it "protects the privacy of the victims of the attacks of Sept. 11, as well as the privacy of their families and survivors."[105]

On the other hand, the appellate court reversed part of Judge Braun's order and directed disclosure of "the personal expressions of feelings contained in the oral histories"[106] conducted by the Fire Department with firefighters concerning their activities at the World Trade Center on September 11, 2001. The panel found that such material does not fall within any of the exceptions for disclosure under New York's Freedom of Information Law (FOIL).[107]

The battle in New York was not the only one from the past year dealing with emergency telephone calls and related communications. In November 2003, the *Providence Journal* obtained access to 277 phone calls and radio communications made to the West Warwick, Rhode Island Police Department dispatch center made during the night and early morning hours that a West Warkwick, Rhode Island

100. *Id.* at 523.

101. New York Times Co. v. City of New York Fire Dep't., 770 N.Y.S.2d 324 (App. Div. 2004).

102. *Id.* at 327.

103. *Id.*

104. *Id.*

105. *Court Orders Release of City 9/11 Records*, N.Y. TIMES, Jan. 11, 2004, at 29.

106. *New York Times Co.*, 770 N.Y.S.2d at 327.

107. *Id. See* N.Y. PUB. OFF. LAW § 87 (Consol. 2003) (governing access to agency records in New York).

nightclub, called The Station, burned down.[108] The tapes obtained by the media "capture the widespread chaos, destruction, and panic at the site of the fire, which killed 100 people."[109] The newspaper, in turn, was able to give its readers "a behind-the-scenes glimpse of how the West Warwick police responded in the opening minutes of the disaster, an unprecedented event for the department of some 60 people."[110]

Are these two instances described above examples of voyeurism run amok? Or, alternatively, are they instances in which a free press, performing its watchdog role[111] of monitoring the reactions and responses of government agencies to tragedies, is rightfully entitled to listen in and to monitor death as it transpires? The issues raised by such cases clearly implicate and affect the legitimate newsgathering abilities of media outlets, whether it be *The New York Times*, the *Providence Journal* or other newspapers across the United States.[112]

Judge Braun certainly recognized such First Amendment concerns in his decision involving access to the tapes stemming from the September 11, 2001 terrorist attacks. He wrote:

> Freedom of access by the press and public to government information preserves a free society. Unless the government proves that there is a reason that information should be withheld, government records sought by way of a FOIL [Freedom of Information Law] request must be provided. The press and public should be permitted to obtain as much non-

108. Thanassis Cambanis, *Station Fire Horrors Heard in Police Tapes*, BOSTON GLOBE, Nov. 7, 2003, at B1.

109. *Id.*

110. Mark Arsenault & Zachary R. Mider, *The Station Nightclub Fire: Station Tapes Tell of the Drama and the Response*, PROVIDENCE J.-BULLETIN, Nov. 7, 2003, at A-01.

111. Watchdog journalism is that "in which crusading reporters expose lies, gross deceptions and corruption." W. LANCE BENNETT, NEWS: THE POLITICS OF ILLUSION 16 (4th ed. 2001).

112. For instance, the *Courier-News* of Bridgewater, New Jersey, won a ruling in March 2003 from a New Jersey appellate court that "the Hunterdon County prosecutor must release a recording of the 911 phone call made from the home of the former basketball star Jayson Williams on the night prosecutors say he killed a limousine driver there." Iver Peterson, *Court Orders Release of Tape In Killing at Home of Ex-Net*, N.Y. TIMES, Mar. 20, 2003, at B7. Prosecutors in the case charging Williams with first-degree manslaughter and other charges had "refused to release the tape, saying public exposure would complicate selection of a jury." Greg Gittrich, *Jayson 911 Tape Ruling*, DAILY NEWS (N.Y.), Mar. 20, 2003, at 20. *See* Courier News v. Hunterdon County Prosecutor's Office, 817 A.2d 1017, 1023 (N.J. Super. Ct. App. Div. 2003) (holding that the "[d]efendant is ordered to immediately provide plaintiff with a copy of the sound recording of the 911 emergency telephone call made on February 14, 2002 from the home of Jayson Williams").

> exempt information as available in relation to one of the most poignant episodes of our lifetimes.[113]

Viewed in this light, cases such as these involving emergency tape recordings are *not* about voyeurism in the sordid or sexual sense described in Part I of this article. Rather, they are about quality investigative journalism[114] and the need—not just the mere desire or want—to obtain information that informs the public. In the case of sexual voyeurism described in Part I, it is only a voyeur's private interest that is fulfilled if gazing is permitted, not a public interest in a societal-level good. The wants-versus-needs dichotomy is one that is useful to keep in mind, and it seems clear that there is a need for the transcripts of the 911 telephone calls. As the *Washington Post* opined in November 2003 regarding New York City Mayor Bloomberg's refusal to turn over material, "[i]t is not possible to study the 'immediate response' to the attacks without full access to the tapes of emergency calls or the after-action interviews."[115]

IV. DIVORCING DETAILS: FINDING OUT WHAT HE SAID, SHE SAID

Want to find out how much it costs to raise a young daughter in Beverly Hills, California if you're washed-up tennis professional Lisa Bonder Kerkorian, the thirty-something ex-wife of billionaire octogenarian Kirk Kerkorian?[116] All one needs to do is visit a Web site called "The Smoking Gun" to find out.[117] The total, for the curious and voyeuristic, is $323,931.36—and that's just per month.[118]

The details of the Kerkorian divorce became public and soon found their way to the Web in January 2002 when Lisa Bonder Kerkorian filed an unsealed 33-page document seeking a modification from a previous child support order.[119] It contained "a number of factual assertions about the couple's relationship and the plaintiff's

113. New York Times Co. v. City of New York Fire Dep't, 754 N.Y.S.2d 517, 524 (N.Y. Sup. Ct. 2003).

114. *See generally* JAMES S. ETTEMA & THEODORE L. GLASSER, CUSTODIANS OF CONSCIENCE: INVESTIGATIVE JOURNALISM AND PUBLIC VIRTUE (1998) (examining the values of investigative journalism).

115. *Cooperate, Mr. Bloomberg*, WASH. POST, Nov. 26, 2003, at A24.

116. Kirk Kerkorian's wealth was estimated at $3.4 billion by *Forbes* magazine in 2003. Vanessa Hua, *Even Billionaires Have Problems with Economy*, S.F. CHRON., Feb. 28, 2003, at B1.

117. *See* Attachment 2 to Expense Information, page 1, The Smoking Gun Web site, *at* http://www.thesmokinggun.com/archive/kerkorian1.html (last visited Feb. 27, 2004).

118. *See* Attachment 2 to Expense Information, page 7, The Smoking Gun Web site, *at* http://www.thesmokinggun.com/archive/kerkorian7.html (last visited Feb. 27, 2003).

119. Kerkorian v. Kerkorian, 2003 Cal. App. Unpub. LEXIS 2539, at *5 (Cal. Ct. App. 2003).

[Kirk Kerkorian] lifestyle,"[120] including "the circumstances of the marriage and its ensuing dissolution."[121] The details of the exorbitant request soon made the media,[122] providing the public with a very voyeuristic glimpse of the proverbial lifestyles of the rich and famous. And while a judge rejected the mother's enormous request in September 2002, calling it a "disguised form of spousal support,"[123] the dispute over public access to the initial information would not be resolved until March 2003. That's when a California appellate court rendered a victory for voyeurism by rejecting several causes of action brought by plaintiff Kirk Kerkorian arguing that the filing of the unsealed documents violated certain confidentiality agreements he had with his ex-wife. The court wrote:

> In this case, plaintiff employed the public powers of California courts to obtain a dissolution of his marriage. Plaintiff did not want aspects of his lifestyle made public. However, evidence concerning plaintiff's lifestyle were directly pertinent to the child support issue. Moreover, plaintiff presented no evidence establishing an overriding interest in keeping his lifestyle private that is superior to the public's right of access.[124]

Indeed, the public's right of access—a right of access to play the role of voyeur—prevailed in this case. There is, of course, no public *need* to find out the details of the divorce or the lifestyles of the Kerkorians. The information in their case has absolutely no redeeming social value at a societal level and thus is decidedly unlike the autopsy photographs sought in the case of Dale Earnhardt's death or the transcripts of the emergency telephone calls made on September 11, 2001, and requested by *The New York Times*. Parsed differently, the same investigative journalism values in the autopsy photo and 911 call cases described in Parts II and III simply are not relevant in the case of a divorce. The divorce might be interesting to the public, but there is no public good served by the release of its details. The California appellate court thus handed down a victory for voyeurism at the expense of privacy.

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120. *Id.* at *18.

121. *Id.* at *19.

122. *See, e.g.*, Lauri Githens, *Poor Little Rich Girl and The Cost Of Stereotypes*, BUFFALO NEWS, Jan. 20, 2002, at E1 (describing the demands for support of young Kira Kerkorian); Alex Kuczynski, *Backspin; Can a Kid Squeeze By on $320,000 a Month?*, N.Y. TIMES, Jan. 20, 2002, at section 9, 1 (mocking the request for support).

123. *Judge Limits Support for Kerkorian Child*, SAN DIEGO UNION-TRIB., Sept. 14, 2003, A-5.

124. *Kerkorian*, 2003 Cal. App. Unpub. LEXIS 2539, at *47 (Cal. Ct. App. 2003).

Yet not all courts in 2003 struck a balance in favor of voyeurism in details-of-divorce disputes. For instance, in *Welch v. Welch*,[125] the Superior Court of Connecticut rejected the request of *The Connecticut Post* to unseal documents filed in another high-profile divorce case, this one involving the former chief executive officer of General Electric, Jack Welch. The court ruled in August 2003 that "[t]he public's interest in this case is nothing but idle curiosity."[126] The court had determined that the privacy interests at stake were sufficient to "override the public's right to know."[127]

The language regarding "idle curiosity" is key because clearly, despite the holding to the contrary in *Kerkorian*, there was nothing more than "idle curiosity" at stake in the Kerkorian dispute as well. Yet the California appellate court failed to closely examine what the real interest was—merely a *public interest* in the sensational or a greater *public need* in governmental affairs? As the author of this article wrote in 1999, "the voyeurism value panders to the public's interest—individual-level, autonomous wants and preferences, not collective-level needs"[128] and it "privileges speech that private individuals want to watch, regardless of whether that speech facilitates truth seeking, truth testing, or wise voting."[129] If privacy, however, is to trump the voyeurism value in divorce cases, reasoning like that applied in the *Welch* case must prevail over the logic in *Kerkorian*.

The decisions in 2003 regarding access to details of divorces were not limited to the cases of billionaires like Kirk Kerkorian and Jack Welch. In particular, the Superior Court of Pennsylvania in July 2003 rejected the attempt by former *Playboy* Playmate[130] and adult Web site star Victoria Zdrok[131] to close the trial to the public in order to keep details of her divorce from attorney Alexander Zdrok out of the pubic eye.[132] In allowing for an open trial, the court wrote that Victoria Zdrok, the appellant,

> did not establish that her personal interest in secrecy outweighs the traditional presumption of openness. Here, Appellee initiated an assumpsit action—an adversarial proceeding—in

125. 2003 Conn. Super. LEXIS 2312 (2003).

126. *Id.* at *4.

127. *Id.* at *3.

128. Calvert, *supra* note 1, at 312.

129. *Id.* at 311.

130. *See* Danielle N. Rodier, *Playmate's Divorce Hearings Not Closed*, LEGAL INTELLIGENCER, July 17, 2003, at 1 (writing that Zdrok "appeared as a Playboy Playmate in the October 1994 issue after having been discovered by a *Playboy* talent scout").

131. Victoria Zdrok's "official" Web site is called "Planet Victoria," at http://www.planetvictoria.com (last visited Feb. 27, 2004).

132. Zdrok v. Zdrok, 829 A.2d 697 (Pa. Super. Ct. 2003).

> which he claims entitlement to certain earnings of Appellant. The fact that Appellant's business ventures may have made her well-known to a certain segment of the public does not of itself entitle her to a closed trial. Many a "celebrity" has faced open court proceedings in both the criminal and civil realm. As for her claims that certain intimate details of the parties' stormy marriage may cause her embarrassment and a potential target of stalking if placed before the court, we find such claims spurious. The trial court has already indicated that it intends to preclude any such details from being admitted. We fail to discern how examination of the details of whether a valid contract exists and the income earned from Appellant's business ventures will make it more likely that stalkers would be able to locate her and do injury to her or her family.[133]

The *Zdrok* decision, of course, is perfect for the voyeurism value since it blends the sexual voyeurism of the World Wide Web with the voyeurism that comes from learning about the details of someone else's divorce. A woman who makes her living by sacrificing her privacy for more than a few dollars on the World Wide Web, who "was once a guest on the Howard Stern radio show,"[134] and who more recently appeared at the opening of a Penthouse Boutique,[135] has little expectation that a life she voluntarily (and profitably) made very public will be shielded from prying public eyes.

In summary, the different outcomes of the divorce cases illustrated above illustrate the ferment in the legal field that has yet to produce a consistent result. Changing notions of what constitutes news and newsworthiness will ultimately impact what happens over time in terms of how much information courts are willing to release regarding the details of divorces. If, however, the notion of idle curiosity discussed in the *Welch* case becomes what society—and judges—consider news, then the voyeurism value will prevail over privacy concerns.

V. WALK THIS WAY: STRUTTING FOR THE CAMERA AGAINST THEIR WILL

A "perp walk" takes place "when an accused wrongdoer is led away in handcuffs by the police to the courthouse, police station or jail," and it is an activity that has "been featured in newspapers and

133. *Id.* at 701.

134. Rodier, *supra* note 130, at 1.

135. Greg Shulas, *Porn Protesters Parade as Models Greet Guests*, CONNECTICUT POST, July 25, 2003, at Local/Regional News.

newscasts for decades."[136] The walk itself, one federal appellate court recently observed, may serve the "purpose of educating the public about law enforcement,"[137] but it may also be broadcast for "entertainment value"[138]—a matter that directly implicates "the accused's privacy interests."[139]

In 2000, the Second Circuit Court of Appeals held that staged perp walks—ones in which the press is offered a staged recreation solely for its benefit—violate the Fourth Amendment[140] privacy interests[141] of suspects and lack any legitimate law enforcement purposes.[142] As the appellate court wrote in that case, *Lauro v. Charles*, "such a staged perp walk exacerbates the seizure of the arrestee unreasonably and therefore violates the Fourth Amendment."[143] In so holding, the appellate court in *Lauro* placed a legal hurdle in the way of video voyeurism—not the type of video voyeurism involving hidden cameras described in Part I of this article, but rather the kind that involves sensational footage designed to do no more than gain high ratings and feed the public's appetite for the sensational. It also is important to note that, for the appellate court, "it did not matter that the perp walk occurred in a context in which Lauro had no reasonable expectation of privacy."[144] Privacy concerns still prevailed – something that appears not to be the case with upskirt voyeurism, as described in Part I of this article, which often takes place in geographic areas where individuals have no reasonable expectation of privacy. The court in *Lauro*, however, did not consider whether un-staged perp walks also may violate the Fourth Amendment rights of the accused.

In September 2003, the Second Circuit held that the Fourth Amendment privacy interests of an accused were *not* violated by a

136. Caldarola v. County of Westchester, 343 F.3d 570, 572 (2d Cir. 2003).

137. *Id.*

138. *Id.*

139. *Id.* at 573.

140. The Fourth Amendment to the United States Constitution provides:

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

U.S. CONST. amend. IV.

141. *See generally* Martin E. Halstuk, *Shielding Private Lives From Prying Eyes: The Escalating Conflict Between Constitutional Privacy and the Accountability Principle of Democracy*, 11 COMMLAW CONSPECTUS 71 (2003) (discussing the evolution of a privacy right grounded in the Fourth Amendment and specifically addressing the issue of perp walks within that context).

142. Lauro v. Charles, 219 F.3d 202 (2d Cir. 2000).

143. *Id.* at 203.

144. Tracey Maclin, *The Fourth Amendment on the Freeway*, 3 RUTGERS RACE & L. REV. 117, 189 n.234 (2001).

non-staged perp walk.[145] The court reached this result despite the fact a government employee videotaped the accused, Joseph Freeman, and other arrestees while they were "walking through the DOC [Department of Correction] parking lot as they were escorted from the DOC building, where they were arrested, to the cars in which they were transported to the police station for booking."[146] This tape was later played the same day at a press conference publicizing the arrests and copies of it were distributed by law enforcement officials to the media.[147]

In balancing the privacy rights of Freeman, who was accused of receiving disability benefits on the basis of fraudulent job injury claims, against the law enforcement interests at stake, the appellate court wrote that "the County's purposes in making the videotape were the same as its purposes in distributing the videotape to the media: the County created and distributed the videotape to inform the public about its efforts to stop the abuse of disability benefits by its employees."[148] The court found that "the County videotaped Freeman as he was being legitimately transported pursuant to a lawful arrest"[149] and it thus distinguished the situation from the staged perp walk in *Lauro*.

Of particular significance in the appellate court's reasoning is its statement that "[t]he fact that corrections officers—*public employees*—were arrested on suspicion of grand larceny is *highly newsworthy* and of *great interest to the public at large*."[150] This statement suggests that the voyeurism value succeeds, at least in part, in this case because the individuals whom the public is able to watch are government officials. This distinction, in turn, ties directly to the privileged role of the press as a watchdog of both government officials and government abuse, as described earlier in Part III.[151] It also comports with the beliefs of philosopher-educator Alexander Meiklejohn, whose theory of democratic self-governance privileges public/political speech "upon matters of public interest – roads, schools, poor houses, health, external defense, and the like."[152] The First Amendment, Meiklejohn

145. *Caldarola*, 343 F.3d 570.
146. *Id.* at 572.
147. *Id.*
148. *Id.* at 576.
149. *Id.*
150. *Id.* (emphasis added).
151. *See supra* notes 111–115 and accompanying text.
152. ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24 (1960).

wrote, "protects the freedom of those activities of thought and communication by which we 'govern.'"[153]

The public's need to see the videotape of Freeman and the other arrestees, all of whom were government officials at the time of their arrests, thus is far greater than, for instance, the public's need to have access to the details of the Kerkorian or Zdrok divorces described in Part IV, neither of which involved government officials. Privacy interests, concomitantly, are diminished when the individuals who are the focus of the voyeur's gaze are public employees who, by virtue of being paid with taxpayer dollars, work for those same voyeurs.[154]

VI. DISCUSSION

This article has covered a wide range of current legal issues that illustrate the tension between the voyeurism value and privacy concerns. While the outcomes in the cases do not yield a clear pattern of judicial resolution of this conflict, what is certain is that our appetite for consuming private details and intimate facts has not been satiated. Indeed, it has grown. We want more information than ever before.

In the attempt to synthesize the analyses and results from the five diverse areas covered in this article—sexual voyeurism, autopsy photographs, 911 telephone calls, details of high-profile divorces and perp walks—there are some common themes. For instance, all of the cases test and challenge our notions of privacy. The challenge for privacy is particularly important and difficult when the information is sought by journalists attempting to perform an investigative function in the public interest. Such information, from a journalistic perspective, is newsworthy and serves an unenumerated First Amendment right to know. The concept of newsworthiness is relevant in any consideration of privacy because it is a defense to invasion of privacy actions under the tort of public disclosure of private facts.[155] It is, as one First Amendment scholar has observed, a "legal acknowledgment that the public has a right to know in some cases, even at the expense of an individual's privacy."[156]

153. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

154. Government employees are paid, in part, by taxpayer dollars. Thus, the voyeur-taxpayer has a heightened interest in learning how his or her money is being spent or, in the case of Joseph Freeman, allegedly stolen.

155. *See* JOHN D. ZELEZNY, COMMUNICATIONS LAW: LIBERTIES, RESTRAINTS AND THE MODERN MEDIA 185 (4th ed. 2004) (writing that "a private facts claim cannot succeed unless the court is also convinced that the disclosures were not newsworthy").

156. *Id.*

In terms of its relation to the voyeurism value, newsworthiness becomes the key for gaining access, under the First Amendment protection for newsgathering, to images and audiotapes that otherwise would be protected as private. Both the autopsy photographs of Dale Earnhardt, discussed in Part II, and the 911 telephone recordings from September 11, 2001, discussed in Part III, should be made public for our voyeuristic consumption because there are newsworthy aspects attached to each. The autopsy photographs of Earnhardt carried the potential to illustrate whether a special safety restraint would have saved his life,[157] while the recordings from September 11, 2001 could demonstrate governmental preparedness for its response to one of the most momentous tragedies in United States history.[158] The public should have a right to know such information. It is important to note that the *Orlando Sentinel* itself recognized the privacy concerns at stake over the publication of the Earnhardt photographs, when "the *Sentinel* agreed to allow them to be permanently sealed after an independent expert examined them"[159] and did not publish them. The *Sentinel*, in brief, struck a balance between newsworthiness and privacy that kept voyeurism in check.

Likewise, the photographs of Vince Foster, no matter how gruesome they may prove to be, illustrate and illuminate the still-controversial death of a government official who had very close ties to a former President of the United States. Surely information about such an individual is newsworthy. Favish's conspiracy theory may be farfetched and incorrect, but he should have the opportunity to make his case in the court of public opinion—and to possibly have it disproved—by obtaining access to the death scene photographs.

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157. *See generally* Rick Minter, *NASCAR Runs Under Black Flag*, ATLANTA J. & CONST., May 6, 2001, at D1 (discussing the controversy over whether a device known by the acronym HANS, which stands for Head And Neck Support, would have saved Earnhardt's life and noting how "the *Orlando Sentinel* and several other news organizations asked for access to Earnhardt's autopsy photos so the paper could have its own expert determine the cause of death"). The *Orlando Sentinel* eventually obtained access to the photographs so that its own expert could review them. Dustin Long, *Expert: Earnhardt Died from Whiplash*, NEWS & RECORD (Greensboro, N.C.), Apr. 11, 2001, at C1. The expert wrote a four-page report, based on viewing the photographs for about thirty minutes, determining that "violent whiplash caused Dale Earnhardt's fatal injuries in the Daytona 500" and "not a broken left lapbelt, as NASCAR's medical expert suggested." *Id.*

158. *See* Timothy Williams, *Commission Seeks City's Records of 9/11 Aftermath*, N.Y. SUN, Nov. 21, 2003, at 2 (describing how a bi-partisan federal Congressional commission is seeking the tapes and other information for purposes of "investigating the nation's preparedness before September 11 and its response to the attacks and will make recommendations for guarding against similar disasters").

159. Pat Dunnigan, *Postmortem Privacy*, BROWARD DAILY BUS. REV., Feb. 10, 2003, at 23.

In contrast to these cases, it is fairly impossible to make a reasonable or rational argument that the private wants of video voyeurs to take pictures of women in various stages of undress or to shoot video underneath women's skirts is somehow justified under the concept of newsworthiness. These matters do not concern government affairs and they do not involve any issue of public concern.

Between the extremes of newsworthy information like the autopsy photographs and 911 calls described in Parts II and III, respectively, and the decidedly non-newsworthy images of upskirt voyeurism analyzed in Part I, lies a much more difficult call: what about the details on divorces of individuals like Jack Welch and Kirk Kerkorian described in Part IV? Clearly the public is interested in the lifestyles of the rich and famous, yet none of the individuals involved in these cases is a government employee and the information obtained or gleaned by the press about their divorces does not in any way affect governmental policy. It will be recalled that in the *Welch* case, the court concluded that "[t]he public's interest in this case is nothing but idle curiosity."[160] Parsed differently, the information was not truly newsworthy and thus sealing the records was permissible to prevent voyeuristic delving into divorce details. Yet in *Kerkorian v. Kerkorian*,[161] a California appellate court went the other direction. Why the split?

The real problem here lies with the amorphous nature of the concept of newsworthiness.[162] As the Supreme Court of California recently observed, newsworthiness is "difficult to define because it may be used as either a descriptive or a normative term."[163] There thus is "considerable variation in judicial descriptions of the newsworthiness concept."[164] The court in *Welch* clearly believes that an "idle curiosity" is not tantamount to newsworthiness. Something more is necessary to rise to the level of newsworthiness. Until courts can agree on a definition of newsworthiness, decisions affecting our voyeuristic proclivities will continue to vary from jurisdiction to jurisdiction.

Courts such as those in California often weigh three factors when determining newsworthiness, including:

160. Welch v. Welch, 2003 Conn. Super. LEXIS 2312, at *4 (Conn. Super. Ct. Aug. 11, 2003).

161. 2003 Cal. App. Unpub. LEXIS 2539 (Cal. Ct. App. Mar. 17, 2003).

162. *See generally* CALVERT, *supra* note 27, at 140–44 (discussing the concept of newsworthiness as a critical legal standard with a direct bearing on voyeurism).

163. Shulman v. Group W Productions, Inc., 18 Cal. 4th 200, 218 (1998).

164. *Id.* at 219.

- The social value of the facts published;
- The depth of the article's intrusion into ostensibly private affairs; and
- The extent to which the party voluntarily rose to public notoriety.[165]

These factors were set forth, however, more than twenty years ago, long before the explosion of modern-day voyeurism and our fascination with reality television. It is time for courts to consider whether our society's shifting standards of privacy in the intervening two decades necessitate a re-examination of those factors. Clearly the current factors have not resolved the problem or tension between privacy and the voyeurism value in today's must-see culture.

Perhaps one way of addressing the issue is to have courts engage in a formula that weighs or considers both public "wants" and public "needs" for the information in question. For instance, the public may "want" to engage in a voyeuristic activity like reading about a celebrity's sex life and therefore seek information about it, but there is no public "need" for such information, if a public "need" is conceptualized in terms of information that affects, directly or indirectly, politics or public policies. On the other hand, reading about the sex life of a politician may actually serve a public "need" if it can be argued that the information in question reflects on the character of the politician and might, in turn, influence voting decisions. It is a dangerous proposition, however, to let courts and judges make editorial judgments about what the public wants or needs, as this may be seen as affecting the First Amendment freedom of the press. This is, then, a very difficult issue that needs further analysis and discussion that is beyond the scope of this article.

In addition to the concept of newsworthiness, the very concept of privacy itself must be re-examined, as the issue of upskirt voyeurism in public places makes clear. As voyeuristic, hidden-camera images proliferate on the World Wide Web,[166] sites such as JayPicz.Com,

165. Diaz v. Oakland Trib., Inc., 139 Cal. App. 3d 118, 134 (1983).

166. For instance, a site called "Seevoyeur.com" has a link related directly to voyeur images, *at* http://www.seevoyeur.com/pages/voyeur.html (last visited Feb. 27, 2004). Another site called The "Voyeurweb" has a section devoted to voyeur photos, *at* http://www.voyeurweb.com (last visited Feb. 27, 2004). Still another Web site is called "Free Project Voyeur" and features both voyeur and exhibitionist images, *at* http://www.projectvoyeur.com/voyeur.htm (last visited Feb. 27, 2004). There's even a Web site simply called "Upskirt.Com" *at* http://www.upskirt.com (last visited Feb. 27, 2004). A collection of voyeur Web site links can be found online at "TwistedLinks.Net" *at*

which proclaims itself to be the "Home of the World's Top Voy [sic] Shooters"[167] and Downblouse.it, which hails itself as "The Biggest Site Fully Dedicated to Accidental Downblouse and Nipple Slips,"[168] the law must stretch the concept of privacy to include physical locations that are otherwise visible in the public and open to plain view. Without such a change, and without the addition of new laws like those in New York and Washington that target upskirt voyeurism described in Part I,[169] the most deviant forms of sexual voyeurism will continue to grow. The explosion of sales of cell phone cameras[170] in the last two years alone has increased the pace of such sexually deviant voyeurism.[171] As the *Los Angeles Times* recently reported:

> The new breed of cell phones with built-in cameras is stirring anxiety in L.A.'s fitness world, where some health clubs are banning cell phones from locker rooms and other areas of the gym. Their concern: The phones, which typically have a tiny lens on the back and a viewing screen in the front, could be used to take clandestine shots that could find their way to the Internet or elsewhere.[172]

The irony, of course, is that this form of sexual voyeurism cannot be justified under the newsworthiness concept, yet it nonetheless slips

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http://voyeur.twistedlinks.net (last visited Feb. 27, 2004), and at "Naughty Voyeur" *at* http://www.naughty-voyeur.net (last visited Feb. 27, 2004).

167. Jaypicz.com Web site, *at* http://www.jaypicz.com (last visited Feb. 27, 2004).

168. Downblouse.it Web site, *at* http://www.downblouse.it (last visited Feb. 27, 2004).

169. *Supra* notes 40, 50 and accompanying text.

170. Dan Benson, *YMCAs Expose Potential for Peeping Telephones*, MILWAUKEE J. SENTINEL, Nov. 28, 2003, at 1A (describing how "[c]ell phones with built-in cameras allow users to take a digital photograph while they appear to be merely talking on the phone, checking a wireless e-mail or scrolling for other information stored on the devices").

171. *See generally* Jennifer Wolcott, *Cellphone Cameras Ring Warning Bells*, CHRISTIAN SCI. MONITOR, Nov. 7, 2003, at 13 (describing how 80 million cellphone cameras have been sold since they were introduced in 2002 and how some of those cameras are being used to take pictures of people in compromising positions without their consent). A recent illustrative example of sexual voyeurism using cellphone cameras is the case of Brent Allen who, while in a crowded sports bar in northwest Austin, Texas, in July 2003, "slipped his Sanyo cellular phone with built-in camera under several patrons' skirts, snapping photographs as the women moved about unaware." Tony Plohetski & Sarah Coppola, *Man Charged With Digital Peeping*, AUSTIN AMERICAN-STATESMAN, Sept. 17, 2003, at B1. Allen was charged under a Texas law "that took effect in September 2001 [that] prohibits such photography and videotaping for sexual arousal." *Id.* Situations such as those involving Allen have lawmakers scrambling for legal solutions. As Phuong Ly of the Washington Post observed in February 2004, "as video cameras get smaller and can be placed within such ordinary objects as cell phones, lawmakers across the country are being asked to act tougher on video voyeurism." Phuong Ly, *Videotaping Crackdown Considered*, WASH. POST, February 17, 2004, at B01.

172. Jeannine Stein, *Bodywork; In Gyms, Few are Smiling for the Camera; Cell Phones That Also Take Pictures Raise Concerns About Privacy in L.A.'s Health Clubs*, L.A. TIMES, July 21, 2003, at F1.

by because we have largely defined privacy in terms of geographic locations where one has a reasonable expectation of privacy.[173] Until that location is determined to encompass areas on one's body that are clothed, the problem will exist.

Future cases undoubtedly will raise different problems at the intersection of voyeurism and privacy. In the meantime, however, this article has demonstrated that the law currently has numerous problem areas running the gamut from sexual voyeurism to the images and sounds of death that have yet to be resolved. The voyeurism value will continue to flourish unless changes are made in our conceptions of both privacy and newsworthiness.

173. *Supra* note 48 and accompanying text.