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TO CATCH A PREDATOR

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TO CATCH A PREDATOR

Amy Adler[£]

“[D]esire is never renounced, but becomes preserved and reasserted in the very structure of renunciation.”

--Judith Butler, EXCITABLE SPEECH 117

Introduction

In the last two decades, a new term—“sexual predator”—has arisen to describe criminals who commit sexual offenses against children. We used to refer to such offenders as “pedophiles” or perhaps “child molesters.” Since this new terminology first emerged in the 1990’s, the word “predator” has become a term of art in legal regulation, and a mainstay in media reports and in the popular imagination.¹ How did the “pedophile” become the “predator”? And what were

^{£*} Professor of Law, NYU School of Law. Thanks to Ann Pellegrini, Mimi Rupp, Avgi Saketopoulou, Richard Schechner and Richard Sherwin for helpful feedback. I am particularly grateful to the NYU Center for the Study of Gender and Sexuality, the Psychoanalytic Psychotherapy Study Center, the Postdoctoral Program in Psychotherapy and Psychoanalysis at NYU, and *Studies in Gender and Sexuality* for hosting me at the Spectacles Of Childhood event, part of their lecture series on "Pornography and Anxiety: Psychoanalysis, Morality and Culture," which gave me a chance to present an early draft of this essay. Eva Gardner and Janine Tien provided superb research assistance. Special thanks to Gretchen Feltes in the NYU School of Law library for outstanding library assistance, as always.

¹First emerging in crime fiction, the term “predator” as applied to sex offenders entered the legislative arena in the early 90’s and appeared for the first time in the Supreme Court’s jurisprudence in 1997. *Kansas v. Hendricks*, 521 U.S. 346 (1997). See Adam J. Falk, *Sex Offenders, Mental Illness and Criminal Responsibility: The Constitutional Boundaries of Civil Commitment after Kansas v. Hendricks*, 25 AM. J. L. & MED. 117 (1999). See generally Philip Jenkins, *“Go and Sin No More”: Therapy and Exorcism in the Contemporary Rhetoric of Deviance* (2001) (offering historical account of emergence of term predator); Philip Jenkins, *Moral Panic: Changing Concepts of the Child Molester in Modern America* (1998). For a general survey of predator laws see Eric S. Janus and Robert A. Prentky, *Sexual Predator Laws: A Two-Decade Retrospective*, 212 Federal Sentencing Reporter (2008).

A particularly influential book from 1993 sounded the alarm: “[S]exual predators have crossed an osmotic membrane. They can’t step back to the other side - our side. And they don’t want to. If we

the effects of this transformation?

As the category took shape, a vast new legal apparatus arose to regulate and monitor this emerging species of criminal.² New methods developed³ to detect and scrutinize him.* The term “predator” implied that the offender was relentless and animal-like; thus, it no longer sufficed merely to send him to jail. After his release, we now had to register him, track him for the rest of his life,⁴ or commit him indefinitely to a mental hospital.⁵ Some states began to castrate him.⁶

Since the term “predator” first emerged in legal regulation, its meaning has expanded and mutated to include a broadening array of sex criminals.⁷ The category now encompasses a diverse range of offenders, from the most violent child rapists, to teens who commit statutory rape or download “soft-core”⁸ child pornography.⁹ Indeed, as the category of predator has grown, it has become

don’t kill them or release them, we have but one choice. Call them monsters and isolate them.... I’ve spoken to many predators over the years. They always exhibit amazement that we do not hunt them. And that when we capture them, we eventually let them go.” Andrew Vachss, *Child Abuse* (1993).

² The Adam Walsh Child Protection and Safety Act of 2006 Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered sections of 18 and 42 U.S.C.) unified the previous state run sex offender registry systems and created national child abuse and sex offender registries, increased federal criminal penalties for violent and sexually violent crimes against children, and provided grants to states to establish, enhance, and operate civil commitment programs for sexually dangerous persons For further discussion of the Act , previous measures that governed the monitoring and registering of predators, and other complementary regulation, see [string cite of most important law review articles here].

³ The attempt to catch the predator before he strikes has lead to the rise of sting operations such as the ones enacted by *To Catch A Predator*, but also to the explosion of prosecutions for downloading child pornography. The decision to vigorously pursue “downloaders” has been strengthened by new, albeit controversial, studies purporting to show that possession of child pornography leads inevitably to child predation. See *The Butner Study Redux: A Report of the Incidence of Hands-on Child Victimization by Child Pornography Offenders*, 24 *J. of Family Violence*, 183 (2009).

* I use the masculine advisedly. Until the recent “sexting” cases, discussed *infra*, the predator has always been pictured as a man in public policy and in popular culture. (Finkelhor; Wolak). *To Catch A Predator* has never once netted a woman predator.

⁴ Section 302 of the Adam Walsh Act, entitled the Jimmy Ryce Civil Commitment Program authorizes and establishes procedures for the potentially lifetime commitment of a “sexually dangerous person.” See 18 U.S.C. § 4248(a) (codified at Title 18, Sections 427 and 4248. See generally Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 *New Eng. J. on Crim. & Civ. Confinement* 17 (2008).

⁵ *Kansas v. Hendricks* 521 U.S. 346 (1997)..

⁶ E.g. Kris W. Druhm, Comment, *A Welcome Return to Draconia: California Penal Law § 645, The Castration of Sex Offenders and the Constitution*, 61 *Alb. L. Rev.* 285 (1997).

⁷ Many of whom might not have previously been categorized as such at all. See See Amy Adler, *The Perverse Law of Child Pornography*, 101 *COLUM. L. REV.* 209 (2001)see, e.g. Radley Balko, *Grandma Arrested for Child Porn*, May 4, 2009 Reason.com available at <http://reason.com/blog/2009/05/04/grandma-arrested-for-child-por>.

⁸ See Adler, *Inverting the First Amendment for an explanation of this term.*

⁹ See also *Iowa v. Canal*, No. 07–1051 (Iowa, September 18, 2009). On the exploding

increasingly unstable. A salient example comes from the recent epidemic of “sexting” prosecutions, which began in earnest in early 2009.¹⁰ These cases prosecute teens as sex offenders for making child pornography of themselves—taking sexual pictures of themselves with their cell phones and texting them to their friends or sexual partners. Now the teen who creates child pornography of herself is a “predator.” How did a body of law designed to protect children from predators come to be used against the children it was designed to protect? How did the law come to picture the predator and the victim as one and the same person?

I want to suggest that the seeming illogic of the sexting cases—the simultaneous expansion and disintegration of the category “predator” that they signal—in fact follows a deeper logic of cultural fantasy and desire. In this paper, I explore that cultural fantasy by turning to a wildly popular television series called *To Catch A Predator* that played a dramatic role in shaping the category of “predator” in popular imagination, in public policy and in law.

My argument is that *To Catch A Predator* functioned as a realm of regulatory fantasy that served to restrict, produce, and fracture desire. In my view, the show’s invocation of the category of predator both constituted and destabilized that category in ways that have shaped the legal discourse on child predation.

As with much of my work, this piece is indebted to my reading of Judith Butler’s foundational scholarship. The analysis I offer below has been deeply shaped by my engagement with her work, particularly *Excitable Speech, The Psychic Life Of Power*, and her essay “The Force Of Fantasy.”

Below, I offer two different but related readings of *To Catch A Predator*. The first reading pictures the show as producing a kind of disavowed child pornography. The second reading, psychoanalytic in approach, pictures the show as a spectacle of sadomasochism and a scene of oscillating and proliferating desire. Here I focus on the audience’s and the predator’s shifting pleasure, self-beratement and shame. Ultimately, I suggest that our surprising identification with the predator leads us to disavow that identification through the force of law.

Part I describes *To Catch A Predator’s* formula. Part II explores the show’s ratings success, its extraordinary influence on public policy, the lawsuits it provoked, and the vociferous criticism it received. In Part III, I offer two different readings of the show as a scene of fantasy. In the first, I argue that the

category of the child who is also a sex offender, see generally Howard Barbaree and William L. Marshall, *The Juvenile Sex Offender* (2008).

¹⁰ See, e.g., *Miller v. Skumanick*, 605 F. Supp. 2d 634 (M.D. Pa. 2009), affirmed (3rd Cir March 2010). Last year, Nebraska, Utah and Vermont changed their laws to reduce penalties for teenagers who engage in sexting, and this year, according to the National Council on State Legislatures, 14 more states are considering legislation that would address the explosion of sexting prosecutions. See National Council on State Legislatures, 2010 Legislation Related to “Sexting”, available at <http://www.ncsl.org/default.aspx?tabid=19696> (last updated Mar. 15, 2010); Tamar Lewin, *Rethinking Sex Offender Laws for Youth Texting*, N.Y. Times, Mar. 20, 2010 at A1, available at <http://www.nytimes.com/2010/03/21/us/21sexting.html?scp=1&sq=amy%20adler&st=cse>

show spreads the very spectacle of the sexual child that it seeks to shut down. In the second, I use Freud's essay 'A Child is Being Beaten' as a template through which to read the show as an s/m scene.

I. THE SCENE OF THE CRIME

To Catch A Predator, a wildly popular network television series, netted would-be child predators in a sting operation and filmed them as they were caught and confronted on camera. The series began in 2004, when Dateline NBC, the news magazine show, had fallen into a ratings slump. Searching for a new formula, Dateline began broadcasting a series entitled "*To Catch A Predator*." Joining forces with a vigilante group called "Perverted Justice," Dateline used "decoys," adults posing as 13-15 year old teenagers on-line, to engage in explicit sex chats with men.¹¹ The decoys lured the men to a sting house with the promise of sex, but they were met instead by a camera crew and, ultimately, the police.

The show consists of a series of formulaic scenes once the would-be predator arrives at the sting house. First the decoy, usually a young looking woman named Dell who works for Perverted Justice, answers the door for the predator, invites him in, then quickly excuses herself and disappears.¹² She is replaced by Chris Hansen, the host of Dateline.¹³ A tall, preppy, white guy, Hansen strolls into the kitchen of the house with the air of a man who has just been called off the golf course and is irritated about the interruption. Hansen has been watching on hidden camera and has been privy to the secret online chats between the predator and the decoy. Skeptical, all seeing, all knowing, he's not just a man, but "The Man." In fact, refusing to name himself, perhaps Hansen is not just "The Man" but some sort of avenging god, or at least daddy or the police. Almost all of the would-be predators believe that Hansen is either the decoy's father or a police officer.¹⁴ In any event, the predator senses Hansen's authority; it is remarkable how many of them obey instantly.

¹¹ For a description of the show, see *Conrad v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 384 (S.D.N.Y. 2008).

"Sometimes the decoys act eager about having sex." Chris Hansen, *A Cyber Twilight Zone in Ft. Myers, Fla.*, MSNBC, <http://www.msnbc.msn.com/id/12728348/>, May 10, 2006 (television broadcast report).

¹² Dell was 22 years old when the show began. PeeJ Profile: Del Harvey, Perverted-Justice.com, <http://www.perverted-justice.com/?pg=profiledel> (last visited Aug. 12, 2009). Dell is not only accomplished at pretending to be a teenager, but is also a convincing cross-dresser, performing as "male and female and ages 10 to 15 and every ethnicity in-between," depending on the predator. Chris Hansen, *Dateline: Reflections on "To Catch A Predator"*, MSNBC, <http://www.msnbc.msn.com/id/17601568> (last visited Aug. 12, 2009) (report on Mar. 13, 2007 NBC television broadcast).

¹³ *Conrad v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 384 (S.D.N.Y. 2008).

¹⁴ *Id.* Hansen's dual role as father/policeman suggests the intersection that the show occupies between the power of the state and the psyche. Although I don't pursue it here, in my view, Hansen is not only the daddy and policeman but also the analyst: the predator plays the child, the criminal and the analyst.

As Hansen begins peppering him with a series of questions,¹⁵ the predator typically insists that he had no intention to act out his online fantasies.¹⁶ This prompts Hansen to go on the attack. Increasingly incredulous and contemptuous, Hansen reads back in painstaking, salacious detail the predator's sexual chat log with the decoy.¹⁷ This recitation of the sordid chat log often goes on to the point where the predator literally begs for mercy, sometimes sobbing, reduced to his knees, pleading with Hansen to please, please stop.¹⁸

At this point comes the final blow. Hansen announces: "I'm Chris Hansen with Dateline NBC" and tells the predator that he is being filmed for national TV. And then, to drive home the predator's spectacular ruin, comes what I call the "money shot."¹⁹ We watch as a swarm of cameramen surround the predator, pointing their cameras at him. Susan Sontag told us that the camera was predatory like a gun.²⁰ If only she had lived to see this show. "You are free to leave now," announces Hansen, and the predator, who has been groveling on the ground, stands up and departs. But of course he is not free.²¹ When he exits the house, a swarm of heavily armed policemen tackle him, cuff him, and arrest him. As one journalism critic writes, the police handle the predator "as if he has just shot the president."²²

II. THE SHOW'S IMPACT: RATINGS, SUICIDE AND LEGISLATION

A major force in public policy, *To Catch A Predator* was also "ratings gold."²³ Indeed, it became a cultural phenomenon, the subject of everything from

¹⁵ See, e.g., November 2005 Virginia sting, <http://www.msnbc.msn.com/id/9927253/> ("What are you doing here?"); September 2006 Georgia sting, <http://www.msnbc.msn.com/id/14824427/> ("Why are you here?").

¹⁶ See April 2006 Ohio sting, <http://www.msnbc.msn.com/id/12503802/>:

Hansen: You ask her if she's horny?

Stacey: What's wrong with that?

Hansen: You ask if she does anal.

Stacey: It's a question. . . It's just talking. The Internet and real life are two different things.

¹⁷ For example, in one episode, Hansen says, "The problem is that I have the transcript of your online chat. Want to try again?" states Hansen who then produces some particularly salacious details. "What position do you like? You know how to ride? Do u like doggy?" says Hansen, reciting from the chat transcript. The voiceover then announces "he gets up and begins to pace." The predator groans, "oh God, stop okay?"

September 2006 Georgia sting: <http://www.msnbc.msn.com/id/14824427/>

¹⁸ Id.

¹⁹ I borrow the term of course from the vernacular of pornography. See e.g., LINDA WILLIAMS: *HARD CORE: POWER, PLEASURE, AND THE "FRENZY OF THE VISIBLE"* 45 (2d ed. 1999).

²⁰ SUSAN SONTAG, *In Plato's Cave*, in *ON PHOTOGRAPHY* 3, 14 (Macmillan 2001) (1977).

²¹ Example from September 2006 Georgia sting, <http://www.msnbc.msn.com/id/14824427/>: [voiceover]

"He's free to leave, but he won't get very far. . . He's arrested and taken away."

²² Douglas McCollam, *The Shame Game*, *COLUM. JOURNALISM REV.* 28-33, Jan./Feb. 2007.

²³ James Poniewozik, *Mark Foley's Real Sin Was ...: Breaking America's Favorite Taboo*, *Time Magazine*, Sunday, Oct. 08, 2006.

Saturday night live skits to college drinking games. *Predator* proved such a ratings bonanza for Dateline that it became a staple of sweeps week.²⁴ NBC built it into a network franchise.²⁵ The show regularly outdrew anything else in the network's primetime fare.²⁶

While *To Catch A Predator* has been repeatedly praised²⁷ as performing a public service,²⁸ it also gave rise to two high-profile lawsuits against the show²⁹

²⁴ *Id.* Indeed, it became so popular that it was satirized on Saturday Night Live, inspired a South Park episode, and became the subject of a drinking game. Chris Hansen, *Dateline: Reflections on "To Catch A Predator,"* MSNBC, <http://www.msnbc.msn.com/id/17601568>, Mar. 13, 2007 (television broadcast mentioning influence on other television shows); *South Park: Le Petit Tourette* (Comedy Central television broadcast Oct. 3, 2007); Barry Freed, *To Catch A Predator Drinking Game*, <http://tellinghimfred.com/2006/09/26/to-catch-a-predator-drinking-game/> (last visited Aug. 12, 2009); see also Monica Bell, *Grassroots Death Sentences? The Social Movement For Capital Child Rape Laws*, 98 J. Crim. L. & Criminology 1, 18 (2007) (describing Hansen as a "folk hero").

²⁵ "Ratings for the 'Dateline' broadcasts, a series called '*To Catch A Predator*' that has become a network franchise, have averaged 9.1 million viewers, compared with 7 million viewers for other 'Dateline' episodes, according to Nielsen Media Research." Allen Salkin, *Web Site Hunts Pedophiles, and TV Goes Along*, N.Y. TIMES, Dec. 13, 2006, available at <http://www.nytimes.com/2006/12/13/technology/13justice.html?pagewanted=all>. See also Douglas McCollam, *The Shame Game*, COLUM. JOURNALISM REV. 28-33, Jan./Feb. 2007 (describing the show as "rarest of rare birds in the television news world: a clear ratings winner. The show regularly outdraws NBC's other primetime fare. . . . The show's ratings success has made it a sweeps-week staple and turned Chris Hansen into something of a pop-culture icon."); Brian Stelter, *"To Catch A Predator" Is Falling Prey to Advertisers' Sensibilities*, N.Y. TIMES, Aug. 27, 2007, available at <http://www.nytimes.com/2007/08/27/business/media/27predator.html> ("In July, 19 of MSNBC's 25 highest-rated hours were late-night 'Predator' reruns.").

²⁶ Douglas McCollam, *The Shame Game*, COLUM. JOURNALISM REV. 28-33, Jan./Feb. 2007.

²⁷ *Conrad v. NBC Universal, Inc.* notes that the show has "been the subject of praise. Some have argued, for example, that the show has 'increased public awareness of Internet dangers by trading the use of guns to pursue criminals for televised, large-scale Internet sting operations to track down sex offenders.'" 536 F. Supp. 2d 380, 398 n.10 (S.D.N.Y. 2008) (quoting Bridget M. Boggess, *Attempted Enticement of a Minor: No Place for Pedophiles to Hide Under 18 U.S.C. § 2422(B)*, 72 MO. L.REV. 909, 909 (2007)).

²⁸ *To Catch A Predator* has led to numerous convictions. Perverted Justice claims a 100% conviction rate for all of its stings, including those conducted on *To Catch A Predator*. Info for Police, Perverted-Justice.com, <http://www.perverted-justice.com/index.php?pg=policeinfo> (last visited August 12, 2009). An independent calculation made using the numbers provided on the organization's own website, however, indicates that the per-sting conviction rate for the show ranges from 4% to 92%, and that in total, only 47% of the "busts" on the show have led to convictions in a court of law. See Group Media Busts Archives, Perverted-Justice.com, <http://www.perverted-justice.com/?groupmedia=byDate> (last visited August 12, 2009) for sting-by-sting bust and conviction numbers.

Most of the men *To Catch A Predator* nets plead guilty Amy Rokuson, *To Catch A Predator" Gets Caught: Are NBC's Television Journalists Sacrificing Media Ethics And Legal Procedures For A Chance In The Spotlight?* 19 Seton Hall J. Sports & Ent. L. 511 (2009) Nonetheless, some critics have questioned the show's effectiveness in fighting crime. [document ICAC criticism of *To Catch A Predator*]. For example, Lt. Joseph Donohue, head of the New York State Internet Crimes Against Children Task Force, raised the concern that non-police decoys impersonating teenagers "may be too aggressive, not understanding the need to let predators initiate the sexual chat and therefore not gathering chat-log evidence that will stand up in court." Allen Salkin, *Web Site Hunts Pedophiles, and TV Goes Along*, N.Y. TIMES, Dec. 13, 2006, available at <http://www.nytimes.com/2006/12/13/technology/13justice.html?pagewanted=all>.

and to a cottage industry of vociferous criticism.³⁰ Ultimately the controversy was significant enough that NBC halted its investigations in 2008.³¹ Although Dateline no longer enacts stings, the previous episodes of Predator live on: old episodes, with additional, previously unaired, footage have become a new series called *Predator Raw: The Unseen Tapes*, on MSNBC, NBC's sister channel. It is the most popular show on MSNBC.³²

A recently settled lawsuit against the show gives a flavor of its controversial tactics. The lawsuit involved *To Catch A Predator*'s responsibility for the suicide of one of its targets, a prominent Texas district attorney, William Conratt, who had chatted online with a Perverted Justice decoy pretending to be a teenaged boy. When Conratt decided not to meet the decoy at the designated sting house, the police and a horde of NBC cameramen surrounded Conratt's home, along with a heavily armed SWAT team.³³ Observing the show of force and

See also Widener L.J. (200X) (questioning utility of internet stings in general).

At least one prosecutor declined to prosecute any of the arrests made as a result of the show's sting operation in his jurisdiction, viewing the evidence as tainted because of the show's methods. That prosecutor cited "tainted evidence due to 'amateur involvement' and lack of jurisdiction because the suspects and decoys were not in his county during the online chats." Amy Rokuson, Comment, "*To Catch A Predator*" Gets Caught: Are NBC's Television Journalists Sacrificing Media Ethics and Legal Procedures for a Chance in the Spotlight?, 19 SETON HALL J. SPORTS & ENT. L. 511, 513 (2009). He was later honored by the Texas District and County Attorneys Association for "steadfastly refus[ing] to take on cases contaminated by the '*To Catch A Predator*' television show." Judge John D. Roach Named Lone Star Prosecutor, PROSECUTOR (Tex. Dist. & County Attorneys Ass'n, Austin, Tex.), Mar.-Apr. 2009, available at <http://www.tdcaa.com/node/4192>.

²⁹ See *Conratt v. NBC Universal, Inc.*, 536 F. Supp. 2d 380 (S.D.N.Y. 2008) (plaintiff alleging NBC caused her brother's suicide by humiliating him on show); *Bartel v. NBC Universal, Inc.*, 543 F.3d 901 (7th Cir. 2008) (plaintiff, producer at NBC, alleging wrongful termination for questioning show's ethics).

³⁰ Critics attack the show for a range of issues, including among other things, its apparent violation of journalistic ethics. Many of these ethical problems were outlined by the court in the Conratt case. *Conratt v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 398 n.9 (S.D.N.Y. 2008). (quoting the SPJ Code of Ethics). The Conratt court detailed several aspects of journalistic codes of ethics that the show may have violated, such as the duty to avoid "staged news events." *Id.* See also Gary Hill, *Putting "Predator" Under the Microscope*, SPJ Ethics Answers, <http://www.spj.org/ethicsdearspj1.asp> ("Dateline finds itself in a financial arrangement with people [Perverted Justice] who are working directly with law enforcement for the apprehension and prosecution of individuals who are caught in a sting that is orchestrated by Dateline, PJ.com and local authorities."); Douglas McCollam, *The Shame Game*, Colum. Journalism Rev., Jan.-Feb. 2007, available at http://www.cjr.org/feature/the_shame_game.php (last visited Feb. 23, 2008) ("*Dateline* hasn't so much covered a story as created one. In the process it has further compromised the barrier between reporters and cops that is central to the mission of journalism."); *Bartel v. NBC Universal, Inc.*, 543 F.3d 901, 903 (7th Cir. 2008) (employment lawsuit in which producer alleged that NBC paid sources and maintained an inappropriate relationship with the police); Alessandra Stanley, *Gotcha! A Walk of Shame for Online Predators*, N.Y. TIMES, May 17, 2006, at E1 (writing that the show "was accused of checkbook journalism, which technically would be correct if the cheesy magazine program actually rose to the level of journalism").

³¹ See Stelter, *supra* note xx (noting that NBC had filmed seven episodes of the segment in 2006 but only one in 2007).

³² *Id.*

³³ *Conratt v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 386 (S.D.N.Y. 2008). In *Conratt*, the

the cameras outside, Conradt shot himself dead inside his house.³⁴ A former district attorney in Texas said of the incident, "They murdered that man. That man is dead . . . merely because of the way it was handled."³⁵

To Catch A Predator had a powerful and direct impact on law. The spectacle the show presented—a seemingly endless supply of men desperate to prey on teens for sex—terrified parents³⁶ and became a catalyst for legislative action.³⁷ Policymakers claim that the show's debut ushered in a "radical change"

deceased suspect's sister brought (on her own behalf and on behalf of his estate) brought civil rights and state tort suit against NBC, alleging it wrongfully persuaded police to arrest suspect in unnecessarily dramatic fashion for purpose of producing footage for reality TV show, with the result that his humiliation at prospect of being filmed caused him to commit suicide. The plaintiff alleged that Dateline was responsible for her brother's death and the harm to his reputation and "good name." On a motion to dismiss, the court granted the motion in part and denied it in part. It held, inter alia, that the allegations were sufficient to plead that police and broadcaster acted with deliberate indifference and in conscience-shocking manner and that the allegations stated a claim for intentional infliction of emotional distress under Texas law; and for fourth amendment violation.

In total, more than a dozen police officers were on the scene. (*Id.*) Some have argued that prudent police practice would have dictated that they arrest the suspect at work at his government office. Luke Dittrich, *Tonight on Dateline This Man Will Die*, *Esquire*, Sept. 2007, at 235.

³⁴ See Marcus Baram, *Turning the Tables on "To Catch A Predator": Fired Producer Marsha Bartel Sues NBC for \$1 Million, Claims Show Goes Too Far*, ABC NEWS ONLINE, June 5, 2007, <http://abcnews.go.com/US/story?id=3235975&page=1>:

Bartel argued that the program violated ethical standards by giving *Perverted Justice* a "financial incentive to lie to trick targets of its sting." She also complained that *Perverted Justice* refused to give her complete transcripts of their chats with minors, making it impossible to "independently verify the accuracy of those transcripts." She further claimed that NBC's relationship with local law enforcement was unethical, claiming that the network provided the police with video equipment and video tapes and "unethically pays or indirectly reimburses law enforcement officials to participate in the 'Predator' stings in order to enhance and intensify the dramatic effect of the show."

See also Adam Cohen, *Editorial, What's on TV Tonight? Humiliation to the Point of Suicide*, N.Y. TIMES, Mar. 10, 2008, at A16.

³⁵ Marcus Baram, *Turning the Tables on "To Catch A Predator": Fired Producer Marsha Bartel Sues NBC for \$1 Million, Claims Show Goes Too Far*, ABC NEWS ONLINE, June 5, 2007, <http://abcnews.go.com/US/story?id=3235975&page=1>:

Conradt's sister sued NBC, alleging that it had wrongfully persuaded police to arrest Conradt in an unnecessarily dramatic fashion in order to produce better footage and that her brother's humiliation at prospect of being filmed caused him to commit suicide. NBC settled the lawsuit after it survived a motion to dismiss

³⁶ Indeed, the NY times reported in 2006 that the current "wave of parental concern [over the issue of teens and the internet] seems to have been largely spurred by *To Catch A Predator*. Anna Bahney, *Don't Talk to Invisible Strangers*, N.Y. Times, Mar. 9, 2006, at G2.

³⁷ See, e.g., Laura M. Klever, *Reinvigorated Judicial Discretion After Booker: Burden Or Boon To Sexual Exploitation Offenders?*, 11 J. Gender Race & Just. 93, 124 (2007); Mary B. Kibble, *Fear Mongering, Filters, The Internet And The First Amendment: Why Congress Should Not Pass Legislation Similar To The Deleting Online Predators Act*, 13 Roger Williams U. L. Rev. 497, 527-28 (2008) (arguing that *To Catch A Predator* gives "continual visibility" to "remote threats" and drives "pressure on Congress" to produce legislation).

in the political and legislative climate.³⁸ A leading authority on online safety, described *To Catch A Predator* as “the avalanche that been driving all of us” since it began.³⁹

Most prominently, *To Catch A Predator* lead directly to the passage of the *ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006*, the legislation that dramatically stiffened the national requirements for tracking and registering predators.⁴⁰ Senator Bill Frist, one of the sponsors of the Act, described how the show motivated him to sponsor the legislation: “[The issue of child predation] didn't really hit, to be honest, until I saw *To Catch A Predator* [A]ll of a sudden I started seeing these faces themselves, and I started relating it back to the fact that I'm a parent, and I've got three children. They've come up in this Internet age.”⁴¹ Senator Frist made several references to *To Catch A Predator* during the Senate debate.⁴² For example, Senator Frist remarked: “I followed a Dateline series, “*To Catch A Predator*,” over the last several weeks and month. . . . I think we have all been moved by this excellent investigative type of reporting.”⁴³ He directly thanked the show’s host, Chris Hansen, for his contributions to the legislation.⁴⁴ Republican Sen. Orrin Hatch also invoked the show as he introduced the legislation that became the Adam Walsh Act.⁴⁵ Once it was enacted, he thanked *Perverted Justice* for “directly impacting” the law's passage.⁴⁶

The public fear that the show produced has also led to a flurry of legislative activity directed to protecting youth online, such as age verification requirements for social networking sites, restrictions on social networking sites in publicly funded institutions such as schools, or expansion of COPPA, the Federal

³⁸ Quoting Perry Aftab.

³⁹ Online Child Safety, Privacy, and Free Speech: An Overview of Challenges in Congress and the States, Progress on Point, Vol. 16, issue 20, at 20 (Progress & Freedom Foundation 2009).

⁴⁰ See, e.g. Neal F. Wilson, No Child Left Behind: The Adam Walsh Act And Pennsylvania Juvenile Sex , 70 U. Pitt. L. Rev. 327 (2008) (describing Act as responding to “fever pitch” of parental concern surrounding *To Catch A Predator*).

⁴¹ Quoted in Klever, supra note xx, at 124. See also 152 CONG. REC. S1676 (daily ed. Mar. 3, 2006) (statement of Sen. Frist) (calling for the future consideration and passage of a Children’s Safety Act and saying that “‘*To Catch A Predator*,” vividly demonstrated” that child predation is a bigger “real-world nightmare than at any time in the past”).

⁴² Many of his comments were directed toward the for the Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Notification Act. S. 1086, 109th Cong. (2006). This bill’s provisions were later combined with those of a House bill to create the Adam Walsh Act. See 152 Cong. Rec. S8012 (daily ed. July 20, 2006) (discussing relationship between two acts); see also 152 CONG. REC. S8031 (daily ed. July 20, 2006) (statement of Sen. Frist)

⁴³ 152 Cong. Rec. S4089 (daily ed. May 4, 2006) (statement of Sen. Frist).

⁴⁴ On ‘Dateline NBC,’ the producer, who has done a tremendous job, Chris Hansen, has been the face and voice in heading this show, ‘*To Catch a Predator*.’” 152 Cong. Rec. S4090 (daily ed. May 4, 2006) (statement of Sen. Frist).

⁴⁵ 152 Cong. Rec. S8012 (daily ed. July 20, 2006) (statement of Sen. Hatch) (invoking *To Catch A Predator* in introducing the bill).

⁴⁶ Vanessa Grigoriadis, *To Catch A Predator: The New American Witch Hunt for Dangerous Pedophiles*, Rolling Stone, July 30, 2007.

Children’s Online Privacy Protection Act.⁴⁷ For example, the sponsor of the Deleting Online Predators Act of 2006, cited *To Catch a Predator* as “visual evidence” that online predators posed a problem.⁴⁸

The anxiety the show invoked also influenced child pornography law. Attorney General Alberto Gonzales cited statistics provided by *To Catch A Predator* to justify the major new initiative he launched against child pornography in 2006.⁴⁹ The statistic Gonzales cited from the show—that at any time, 50,000 predators are lurking online waiting to molest children—turned out to be completely baseless according to the FBI.⁵⁰

Indeed, *To Catch A Predator’s* impact on public policy raises a significant problem: the show appears to have distorted the public perception about the problem of child molestation. It gives the impression that online predation is a growing and overwhelming menace.⁵¹ But this is actually not the case. The most recent and authoritative study commissioned by 49 state attorneys general and released in 2009 concluded that online sexual solicitation of children by adults, although a terrible crime when it occurs, occurs relatively rarely.⁵² In fact, the

⁴⁷ For a full discussion of these measures, see Online Child Safety, Privacy, and Free Speech: An Overview of Challenges in Congress and the States, Progress on Point, Vol. 16, issue 20 at p. 2 Progress & Freedom Foundation 2009).

⁴⁸H.R. 5319, 109th Cong. (2006) (statement of Michael Fitzpatrick) (“What would have happened in these circumstances if the children these predators were to meet were not decoys and Chris Hansen was not there? How many assaults, rapes and ruined lives would have resulted in these encounters?”) 152 Cong. Rec. H5886 (daily ed. July 26, 2006) (statement of Rep. Fitzpatrick); see also 152 CONG. REC. H5889 (daily ed. July 26, 2006) (statement of Rep. Jackson-Lee) (also citing *To Catch A Predator* to support the bill). Similarly, Representative Nicholas Lampson (TX) cited *To Catch a Predator* in explaining his support for a bill, Securing Adolescents from Exploitation Online Act of 2007, H.R. 3791, 110th Cong. (2007): “Many of us have watched Dateline’s popular series “To Catch a Predator,” and organizations such as Perverted Justice that actively look for Internet child predators. We need to become partners in this fight by talking with our children about the dangers of strangers online and making Internet use a family activity.” 153 Cong. Rec. H14193 (daily ed. Dec. 5, 2007) (statement of Rep. Lampson). Cf. 153 Cong. Rec. H6255–56 (daily ed. June 12, 2007) (statement of Rep. Stearns) (citing *To Catch a Predator* in his statement supporting the Resolution Supporting the Goals and Ideals of National Internet Safety Month, H.R. Res. 455, 110th Cong. (2007)).

⁴⁹ Adler, All Porn All the Time, *supra* note xx.

⁵⁰ The show had relied on a manufactured “goldilocks” figure “not small and not large” according to one FBI agent. See McCollam, *supra* note xx.

⁵¹ *To Catch A Predator* gives the impression by constantly revisiting the issue “that this is sort of a growing trend or growing menace.” Talk of the Nation: Ethics of NBC’s Sting Show “*To Catch A Predator*” (NPR radio broadcast Jan. 16, 2007), <http://www.npr.org/templates/story/story.php?storyId=6870926&sc=emaf> (interview with Douglas McCollam).

⁵² BERKMAN CTR. FOR INTERNET & SOC’Y AT HARVARD UNIV., ENHANCING CHILD SAFETY & ONLINE TECHNOLOGIES: FINAL REPORT OF THE INTERNET SAFETY TECHNICAL TASK FORCE 15 (2008), *available at*

http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/ISTTF_Final_Report.pdf.

page 15: “Youth identify most sexual solicitors as being other adolescents (48%; 43%) or young adults between the ages of 18 and 21 (20%; 30%), with few (only 4%; 9%) coming from older adults and the remaining being of unknown age (Finkelhor et al. 2000; Wolak et al. 2006).” See id at 16: “the image presented by the media of an older male deceiving and preying on a young child does not paint an accurate picture of the nature of the majority of sexual solicitations and Internet-

number of teenagers receiving online solicitations has actually **declined** since 2000.⁵³ Furthermore, the show may also reinforce a particularly tenacious but misleading myth about the actual dangers facing children: the myth that the greatest threat to children comes from strangers when, in fact, the overwhelming amount of child sexual abuse is committed by a family member or close family friend.⁵⁴

III. READING THE SHOW AS A SCENE OF FANTASY

If you have ever seen it, the show is almost unbearable to watch—so deeply uncomfortable and disturbing, that even I, a seasoned scholar of child pornography law, find it painful to view. What, then, could explain the show’s spectacular popular appeal? I want to take the show seriously not as law enforcement or public service but instead as a realm of entertainment, spectacle, pleasure and fantasy so powerful that it would influence our legal framework.

In “The Force Of Fantasy: Feminism, Mapplethorpe, and Discursive Excess,” discussing Laplanche and Pontalis’ view of film as a *mise-en-scene* of fantasy,⁵⁵ Butler writes:

“There is, then, strictly speaking, no subject who has a fantasy, but only fantasy as the scene of the subject’s fragmentation and dissimulation; fantasy enacts a splitting or fragmentation, or perhaps better put, a multiplication or proliferation of identifications that puts the very locatability of identity into

initiated offline encounters.”

Douglas McCollam, *The Shame Game*, COLUM. JOURNALISM REV., Jan./Feb. 2007:

In general, according to data compiled by the National Center for Missing and Exploited Children, more than 70 percent of sexual abuse of children is perpetrated by family members or family friends. The question is whether the level of coverage is proportional to the actual problem.”

See also, Janis Wolak et al., *Online “Predators” and their Victims: Myths, Realities and Implications for Prevention and Treatment*, 63 AM. PSYCHOL. 111, 115 (Feb.-Mar. 2008), available informally at <http://www.unh.edu/ccrc/pdf/Am%20Psy%202-08.pdf> (“Internet-initiated sex crimes account for a salient but small proportion of statutory rape offenses and a relatively low number of the sexual offenses committed against minors overall.”)

⁵³ Id.

⁵⁴ Wolak, Online “Predators”, supra note xx.

⁵⁵ “Fantasy, however, is not the object of desire, but its setting. In fantasy the subject does not pursue the object or its sign: he appears caught up himself in the sequence of images. He forms no representation of the desired object, but is himself represented as participating in the scene although, in the earliest forms of fantasy, he cannot be assigned any fixed place in it As a result, the subject, although always present in the fantasy, may be so in a desubjectivized form, that is to say, in the very syntax of the sequence in question.” Jean Laplanche & Jean-Bertrand Pontalis, *Fantasy and the Origins of Sexuality*, in FORMATIONS OF FANTASY 14, 26 (Victor Burgin et al. eds., 1986). See also Judith Butler, *The Force of Fantasy: Feminism, Mapplethorpe, and Discursive Excess*, in FEMINISM AND PORNOGRAPHY (Drucilla Cornell ed. 2000) (discussing Laplanche and Pontalis).

question.” (Force of Fantasy, 110).

With this as a starting point, in what follows, I read *To Catch A Predator* as a scene of pornographic fantasy that serves to multiply, proliferate, split, fragment and destabilize the category of the predator. I offer two different but related readings of the show’s spectacular appeal.

A. Reading the Show As Disavowed Child Pornography

"The prohibition does not seek the obliteration of prohibited desire; on the contrary, prohibition pursues the reproduction of prohibited desire and becomes itself intensified through the renunciations it effects. . . . [T]he prohibition not only sustains, but is sustained by, the desire that it forces into renunciation."

--Butler, *Excitable Speech* 117

I have previously written about child pornography law as a realm of discourse that inadvertently replicates and spreads the sexualization of children that it fights.⁵⁶ I believe that *To Catch A Predator* repeats but also complicates that problem. The show offers yet another venue in which we are enthralled—anguished, enticed, bombarded—by the spectacle of the sexual child. It purports to be a public service, a crime fighting program that gets predators off the streets and stamps out the horror of child predation. Yet the show continually stages the spectacle of the sexual child that it disavows.⁵⁷ As Butler tells us, “Language that is compelled to repeat what it seeks to constrain invariably reproduces and restages the very speech that it seeks to shut down.” (*Excitable Speech* 129).⁵⁸

⁵⁶ Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209 (2001); Amy Adler, *Inverting the First Amendment*, 149 PA. L. REV. 921 (2001); see also Jim Lewis, *Age of Innocence*, in MODERN ART AND CULTURE: A READER (Francis Frascina ed., 2008) (interviewing Adler); Amy Adler, *Child Pornography*, in THE CHILD (U. Chicago Press, forthcoming 2009).

⁵⁷ The repetition of the prohibition on pedophilic desire becomes a new displaced site of pleasure; as Butler has shown in other contexts, “the prohibition pursues the reproduction of prohibited desire”; it “sustains [and] is sustained by the desire that it forces into renunciation.” (*Excitable Speech* xx) (Cf. *Psychic Life of Pleasure* 81)

⁵⁸ “[D]esire is never renounced, but becomes preserved and reasserted in the very structure of renunciation” (117 *Excitable Speech*). In this way, it may be comparable to Foucault’s view of the power of eighteenth century sex manuals that warned parents of the dangers of childhood masturbation. As Foucault writes,

One might argue that the purpose of these discourses was precisely to prevent children from having a sexuality. But their *effect* was to din it into parents’ heads that their children’s sex constituted a fundamental problem . . . [T]his had the consequence of sexually exciting the bodies of children while at the same time fixing the parental gaze and vigilance on the peril of infantile sexuality Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, at 120 (Colin Gordon ed., Colin Gordon et al. trans., Pantheon Books 1980) (1977) [hereinafter Foucault, *Power/Knowledge*]

In my view, *To Catch A Predator* functions as a displaced and disavowed form of child pornography. To break down and castigate the predator, Hansen reads back to him his online pornographic chat. For example, when one predator proclaims his innocence, Hansen replies "But you said you couldn't wait to pour chocolate syrup all over her and lick it off with your tongue."⁵⁹ Or, to another predator: "But you said, 'I would love to feel your bleep deep inside my bleep,'" says Hansen. "'What position do you like? You know how to ride? Do u like doggy?'" he quotes sternly. Who is this man scornfully repeating the text of this chat and who are we the viewers, riveted, as the ratings tell us, by this retelling?

Consider this scene between Hansen and a predator called Robert. While Robert insists his online chat with an imaginary 13 year old boy was just rhetoric, the avenging Hansen replies,

Hansen: Rhetoric? I've got the transcripts of your conversation here. ... What it sounds like, Robert, is that you wanted to ... have [sex] with a 13-year-old boy. You said, "...I want to see you and taste your beautiful body? make love to you. You are a gorgeous thirteen year old boy."⁶⁰

Safe within his disgust and contempt, Hansen luxuriates in the details of these imaginary sex scenes, conjuring up again and again another "beautiful" sexualized teenage body. And with righteous indignation, Hansen broadcasts these words to a national audience. "Then you said," quotes Hansen: "'We will be making love all the time.'" "'With my tongue up your [blank].'"⁶¹

Nothing deters Hansen from doing his duty of conjuring up the gory details, not even a predator who says, you're right, I'm wrong, I confess, please arrest me right now and take me to jail. There is no apparent reason to go on, yet Hansen persists, "And then you wanted to do blank to his 13 year old body and then you said you wanted to bleep him." Oral sex, group sex,⁶² s and m,⁶³ Hansen soldiers on.

⁵⁹ Douglas McCollam, *The Shame Game*, COLUM. JOURNALISM REV., Jan./Feb. 2007.

⁶⁰ From February 2006 California sting, <http://www.msnbc.msn.com/id/11152602/>

⁶¹ From September 2006 Georgia sting, <http://www.msnbc.msn.com/id/14960266/>:

Hansen: Now does your boss know that you are on line chatting with 13-year-old girls?

Bhaskaran: I am sure they don't.

Voiceover: So what would his bosses think if they read a transcript of his pornographic online chat?

Hansen (reading from chat): You ask if she masturbates.

Bhaskaran: Right.

Hansen (reading): You say you want to have oral sex with this girl you say ...

Hansen (reading): You say "I feel like kissing you now, and suck on your blank and feel the tummy."

⁶² From March 2007 Florida sting: <http://www.msnbc.msn.com/id/17491919/>: "one guy hash is [bleep] in her mouth. . . . the other guy has his [bleep] in her [bleep] or her [bleep]."

⁶³ Hansen (reading) "I want to lay back on my back. I want to lay on my back with a pillow and let you sit on my chest with your knees over my forearms and punch me repeatedly."

Please stop says the man. But Hansen can't stop. Even when the man says I confess, I'm guilty, there's nothing to dispute, Hansen can't stop. It's the best part of the show.⁶⁴

In this way, *To Catch A Predator* fits within a long tradition in pornography, the tradition of the exploitation film. As Eric Schaefer describes in his definitive history of the exploitation film genre, risky films would come with an extra real that offered a prefatory statement about the moral ill the film claimed to combat.⁶⁵ Like that pornographic tradition, *To Catch A Predator* packages titillation as if it were a public service.

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⁶⁴ From March 2007 Florida sting: <http://www.msnbc.msn.com/id/17491919/>
Hansen (reading chat): "We will be making love all the time I'm there." "Okay, cool."
Wiles: I said that—
Hansen: "With my tongue up your blank."
Wiles: I said. I say that—
Hansen: What does that mean?
Wiles: I know what it's—means. But I say that on all the—all—
Hansen: You say that all the time.
Wiles: Right.

Voiceover: And when the girl asks about group sex, he describes it in graphic detail.
audiovideo: simply put one guy has is d*** in her mouth
anni_anni_bobanni: o geez
audavideo: the other guy has his d*** in her p*** or her b***
anni_anni_bobanni: o dANG
audavideo: I love teaching you . its so fun
Fine: I don't know what you're talking about.
Hansen: "Can I lick your" blank? And how old is the boy that you came to see today?
Fine: I don't know what you're talking about.
Hansen: 14, male.
Fine: It musta been somebody on my-- (TAPE GLITCH)
Hansen: was on your computer who made plans to meet right down here, and magically you showed up?
Fine: I'm not gonna say anything. Hansen: Okay. "I want to lay back on my back. I want to lay on my back with a pillow and let you sit on my chest with your knees over my forearms and punch me repeatedly."

⁶⁵ ERIC SCHAEFER, BOLD! DARING! SHOCKING! TRUE! A HISTORY OF EXPLOITATION FILMS, 1919-1959, at 69-75 (2d Ed. 1999); see also Kathleen Karr, *The Long Square-Up: Exploitation Trends in the Silent Films*, 3 J. POPULAR FILM, Spring 1974, at 108 (documenting the history of the square-up in silent film era).

heads that their children's sex constituted a fundamental problem . . . [T]his had the consequence of sexually exciting the bodies of children while at the same time fixing the parental gaze and vigilance on the peril of infantile sexuality.⁶⁶

Ultimately, *To Catch A Predator*'s restaging of the sexuality it condemns works to preserve, disseminate, and, in my view, even normalize the predator's sexual fantasies. After all, as the show's spectacular ratings attest, it is no longer merely the "predator," but we, the viewers of NBC, who gain some sort of disturbing satisfaction from these fantasy scenarios. Even though our pleasure is experienced through the veil of disgust and condemnation, doesn't our experience of pleasure align us with the predator? His fantasy is longer the stuff of furtive, clandestine chats. Now the "pervert's" fantasy is mainstream entertainment, packaged for sweeps week, repeated again and again, long after it is useful or accurate, for a seemingly insatiable viewing audience. Transforming the "pervert's" fantasy into mainstream entertainment, then, the show spreads and normalizes the very imaginings it purports to condemn.⁶⁷

B. Reading Two: The S/M Scene

"The subject embraces the very form of power that threatens him and calls him into being."

--Judith Butler, *The Psychic Life of Power*

Here I want to read the text as a different kind of pornographic fantasy, not as a form of disavowed child pornography, but instead as an s/m scene. I use Freud's essay, *A Child Is Being Beaten*, to approach this reading.⁶⁸ I have previously written about the significance of this essay to the crisis of child predation.⁶⁹ Here I want to sketch out its relevance to *To Catch A Predator* and

⁶⁶ Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, at 120 (Colin Gordon ed., Colin Gordon et al. trans., Pantheon Books 1980) (1977) [hereinafter Foucault, *Power/Knowledge*].

⁶⁷ In this way, the show participates in what I have called mainstream soft core child pornography--the cultural adulation of the teenager as sexual icon and the concomitant disavowal of that adulation. See Adler, *Inverting the First Amendment*.

⁶⁸ 17 SIGMUND FREUD, *A Child is Being Beaten: A Contribution to the Study of the Origin of Sexual Perversions*, in THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 175 (James Strachey et al. eds., James Strachey trans., Hogarth Press 1955) (1922) [hereinafter FREUD, *Child*].

I must note the significant complexity of the Freud text and in particular, its gender complexity. As scholars have noted, *A Child is Being Beaten* is one of the few Freud texts to focus on female patients as a model for development. What follows continues in the tradition of most classical scholarship about Freud's text by following his female model as primary. See, e.g., Person, *supra* note xx.

⁶⁹ Adler, *The Perverse Law of Child Pornography*, *supra* note xx, at n.220 and accompanying

particularly to the splitting and spreading of desire that I think the show accomplishes.

Freud begins the essay with this observation: “It is surprising how often people who seek analytic treatment confess to having indulged in the fantasy ‘A child is being beaten.’”⁷⁰ Who is this child being beaten? According to Freud, the fantasy goes through three distinct phases and the identity of the child shifts in each one. In the first, the patient imagines that her father is beating another child whom she hates. In the second, she imagines that her father is beating her. And in the third, she imagines that she is a spectator to a beating in which she no longer knows the players.⁷¹

Freud’s essay, which highlights the voyeuristic role of the spectator and the shifting identity of the characters, bears relevance to *To Catch A Predator*. Below, I suggest how the s/m of the show maps onto each phase of the Freudian scenario.

1. Phase 1 : Sadism in *A Child Is Being Beaten*

In the first phase of the fantasy, the Freudian subject describes her fantasy as follows: “My father is beating the child whom I hate.”⁷²

The structure of this sadistic fantasy may also be found in *To Catch A Predator*. The obvious sadism of the show should have been apparent from my earlier description of it. As Judge Chin explained in a recent case, the “mainstay of [*To Catch A Predator*] is public humiliation.”⁷³ A television critic dubbed the series “humilitainment.”⁷⁴ The pure sadistic glee of the show is palpable as Chris Hansen metaphorically beats the predator into submission until the predator is left groveling on the floor begging stop, please stop. The cameras (Sontag’s guns) finish him off. The camera shot or money shot assures the predator’s complete debasement. He is now himself a victim of the pornographic imagination, seeing himself being seen, objectified, caught and shot by the camera.

When the predator switches roles and becomes the prey of this humiliating scenario, I believe that he takes on the role of the child being beaten in the Freud narrative. Now he is an infantilized victim: helpless, abject, and caught. Remember that in this first sadistic phase of the fantasy, Freud tells us that this child being beaten is always someone whom we the onlookers hate. And of course we hate the predator. Who could we possibly hate more than a child predator? As a group, child molesters are the most reviled people on earth.⁷⁵ Thus the pleasure

text.

⁷⁰ FREUD, *Child*, *supra* note xx, at 179.

⁷¹ The fantasy always accompanied by feelings of pleasure and leads to “masturbatory satisfaction” according to Freud. *Child*, *supra* note xx, at 175.

⁷² FREUD, at 185.

⁷³ *Conrad v. NBC Universal, Inc.*, 536 F. Supp. 2d 380, 385 (S.D.N.Y. 2008).

⁷⁴ Deborah Potter, *Over the Line*, 29 AM. JOURNALISM REV., Aug.–Sept. 2007.

⁷⁵ See, e.g. Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The*

of watching Hansen “beat” the predator: since the predator’s suffering is warranted, our sadistic urge feels justified.⁷⁶

Furthermore, if the predator is the child whom we hate, then Chris Hansen is certainly the Daddy. As noted earlier, most predators believe Hansen is the decoy’s father. Looming over the predator, impossibly tall and white and stern, Chris Hansen, is the father beating the child whom we hate.

2. Phase Two : Masochism

The show’s sadistic appeal is patently obvious. Less easy to spot is the masochism in which I believe *Predator* also trades. This disguised masochism is consistent with phase two of Freud’s account. Freud tells us that in this second phase of the fantasy’s development, the subject producing the fantasy would imagine that the child being beaten is no longer another child whom she hates; now she *herself* is the child and her father is beating her.⁷⁷ Although “accompanied by a high degree of pleasure” according to Freud, this stage of the fantasy is always suppressed and never conscious.⁷⁸ As Freud writes, “This second phase is the most important and most momentous of all. But we may say of it that in a certain sense it never had a real existence. It is never remembered; it has never succeeded in becoming conscious. It is a construction of analysis....”⁷⁹

As in Freud’s account, the masochistic component of *To Catch A Predator* is also suppressed. The masochism appears on two levels. First, the predator is often masochistic. Some predators collapse on the floor moaning, sobbing, and agreeing with Hansen’s furious accusations: “Wasn’t it wrong for a grown man to say this to a child?” says Hansen and the man replies, “Yes sir, I was wrong sir, I am bad, sir.” One predator, confronted by Hansen, says after a few minutes, “**I need you to arrest me and take me to jail and execute me. ...**”⁸⁰

Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation, 27LAW & SOCIAL INQUIRY 529 (2002); Adler, *Perverse Law*, supra note xx, at xx.

⁷⁶ As a television critic writes of the pleasure of the show: “Predator” is ratings gold, a jaw-dropping combination of public service and blood sport that lets viewers indulge their voyeurism righteously—like the Coliseum, if the lions were allowed to eat only the really, really evil Christians.” Poniewozik, supra, note xx.

Cf. Butler, *Force of Fantasy*, at 114 “It may well be more frightening to acknowledge an identification with the one who debases than with the one who is debased”.

⁷⁷ FREUD, *Child*, supra note xx, at 185. Note that there are significant contradictions between Freud’s account of masochism in this essay and in his later 1924 paper on *The Economic Problem of Masochism*, which posited a primary masochism. See Jack Novick and Kerry Kelly Novick, *Not for Barbarians: An Appreciation of Freud’s “A Child is Being Beaten”* in Person, supra note xx, at 31, 36-42 (elaborating differences between Freud’s varying theories of masochism).

⁷⁸ Zizek compares this stage to the Lacanian real. Slavoj Zizek, *Looking Awry: An Introduction to Jacques Lacan Through Popular Culture* 120 (1992)

⁷⁹ Freud, supra note xx.

⁸⁰ From Dateline NBC “February 2006: Riverside, CA,” available at <http://www.msnbc.msn.com/id/11152602/> Another predator describes himself to Hansen as “a sick son of a bitch.” When Hansen asks him “what are you doing here?” the predator replies “getting my ass kicked.”

Indeed, Zizek associates phase two of the beating fantasy with the death drive, writing about film that “our desire to annihilate the villain is already the desire of the villain himself.”⁸¹ According to Zizek, the audience’s “sadistic desire for the ‘villain’ to be killed is followed by a sudden awareness that it is actually the ‘villain’ himself who is in a stifled but nonetheless unequivocal way disgusted with his own corruption and wants to be delivered from this unbearable pressure through his own punishment and death.”⁸²

A further indicator of the predators’ masochism arises from one of the most puzzling features of the show. The stings constantly net predators who are deeply familiar with the show, even to the point where they can recite Chris Hansen’s lines for him, as if they were engaging in a highly scripted, ritualized s/m scene.⁸³ One predator caught by the show even came back for more: *To Catch A Predator* caught him in two separate stings.⁸⁴

What should we make of this peculiar phenomenon--the predator who is also a fan? Chris Hansen comments frequently on this phenomenon of the predator/fan with disgust and disbelief, as if it demonstrates that nothing will stop these hardened criminals. I think this phenomenon suggests something else: that the show may be an incitement to would be predators who masochistically desire to participate in the show’s spectacle of crime and punishment. The predator as fan recalls for me Butler’s description of the subject who passionately “embraces the very form of power that threatens him and calls him into being.” (Psychic Life of Power). The show seems to be producing its own predators.

But could the masochism be not only the predator’s but also our masochistic pleasure as viewers? I believe there is a masochistic component to our pleasure, but as in Freud’s text, this masochism is repressed. It comes from two sources. First, as described in my child pornography reading, the show pictures the enthralled viewer as strangely complicit with the predator, imagining that we too will somehow delight, albeit under the veil of condemnation, in his

⁸¹ Zizek, supra note xx, at 121.

⁸² Id.

⁸³ See e.g., *To Catch A Predator* III, available at <http://www.msnbc.msn.com/id/11152602/page/5/>

Hansen: Do you ever watch Dateline NBC?

Keith Williams: Ah, I’ve seen that [...]

Hansen: Well, I’m Chris Hansen. You saw the earlier episode.

Williams: Yes, I did.

Hansen: So let me get this straight. You saw our earlier story.

Williams: Right.

Hansen: You drove by this house and saw police out front.

Williams: Yeah.

Hansen: Yet you walked in here anyway.

⁸⁴ Christ Hansen, A Repeat Predator in Our Eight Investigation, Inside Dateline, January 29, 2007, available at <http://insidedateline.msnbc.msn.com/archive/2007/01/29/44305.aspx>.

fantasies.

But our identification with the predator comes from another source. As the show stalks the predator, luring him to the sting house to be beaten by Chris Hansen, showing him caught and objectified by the pornographic gaze of the camera, the show turns the table. The predator is now prey and the show has become predatory. In fact, the show as predator got a little out of control. Some say it got blood on its hands, stalking a man until he killed himself. And as we as viewers delight in this reversal and enjoy watching the prey succumb, it gives us a taste of blood, a taste of pleasure and perhaps just a taste of perversity.⁸⁵ We are all predators now. Even though our predation compared to his feels justified, do we too deserve to be punished?

3. Phase 3 : The S/M of Spectatorship

Freud writes that in this final conscious phase of the fantasy, his patients would fantasize about a child being beaten by an authority figure of some kind, a father substitute.⁸⁶ But now the person producing the fantasy plays no obvious role in it. She is no longer the child as she was in the phase two. The man administering the punishment is now no longer her father as he was in phases one and two.⁸⁷ In fact, in this phase, she doesn't know either of the players in the scene. Now she is conveniently off-scene, a mere onlooker, bearing no responsibility for the sadomasochistic pleasure she has conjured up. She depersonalizes the fantasy, deepening her pleasure by disavowing her role in it or her authorship.⁸⁸ When Freud would press his patients to describe their role in this part of the fantasy, the most they could say was this: "A child is being beaten and I am probably looking on."⁸⁹

Like Freud's patients, we the viewers of *To Catch A Predator* are also just "looking on." We luxuriate in the show's spectacular pains and pleasures while denying our desire, complicity, and shame.

CONCLUSION

We can see that both "A Child Is Being Beaten" and *To Catch A Predator* become scenes of fantasy "that put the very locatability of identity into question." (Butler, Force of Fantasy, 110). The predator becomes the beaten child. The

⁸⁵ Cf. Butler, *Psychic Life of Power*, describing how the "sadistic pleasure involved in watching another becomes, in the mode of unhappiness, a displeasureable watching of oneself." 45

⁸⁶ FREUD, *Child*, *supra* note xx, at 185-86.

⁸⁷ *he man administering the punishment is no longer her father as he was in phases one and two*

⁸⁸ See Marcelo N. Vinar, Construction of a Fantasy: Reading "A Child is Being Beaten", in ON FREUD'S "A CHILD IS BEING BEATEN" (Ethel Spector Person, ed.) 179, 188 (Yale U. Press 1997) ("the fantasizer... manufactures the fantasy in order to disclaim responsibility for his place in the scene even to the point of denying its authorship").

⁸⁹ FREUD, *Child*, *supra* note xx, at 186.

viewer becomes the predator, the victim, the father/policeman. We are beating and beaten. I suggest that this fragmentation and proliferation of identification finds its structural repetition in the instability of the legal category of the “predator” and ultimately in the sexting cases, where the predator and the victim are one. And in the final analysis, our identification with the predator--and our concomitant desire disgust and shame--lead us to disavow that identification through the force of an increasingly punitive and incoherent legal structure.
