

Street Shootings: Covert Photography and Public Privacy

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I. INTRODUCTION

Street photographers, like snipers, pride themselves on stealth.¹ Camouflaged in nondescript clothing, they wander the streets undetectable, armed, and on the hunt. When they find their mark, they act quickly. As the famous twentieth-century street photographer

1. Street photography is a genre of photography that features people in candid situations in public places. For purposes of this Note, “street photography” will be used broadly to mean photography that occurs in public. It is well-established that people have a right to privacy in their homes and other nonpublic arenas. The terms “public” and “public places” apply to areas outside the borders of an individual’s home or private property. Streets, parks, beaches, malls, amusement parks, and athletic fields are all examples of public places.

Henri Cartier-Bresson described: “The creative act lasts but a brief moment, a lightning instant of give-and-take, just long enough for you to level the camera and to trap the fleeting prey in your little box.”²

While methods of “trapping prey” vary from shooter to shooter, the mission remains the same—staying as covert as possible and catching an unknowing subject in a candid pose.³ In the formative years of street photography, Cartier-Bresson concealed himself by wrapping a large handkerchief around his camera and pretending to blow his nose while discretely taking a picture.⁴ He also covered his camera in black tape to conceal any shiny parts that might give him away to his subjects.⁵

Today’s street photographers are armed with a new generation of weapons that hardly need concealment. The rise of miniaturized and digital technologies has taken street shooting to a whole new level. In a world where companies compete to make the smallest, most inexpensive cameras, surreptitious photography runs rampant. For example, cell-phone cameras and “dime-sized spy cameras” make it possible for photographers to shoot their subjects from virtually any angle without detection.⁶ However, as technology advances, so does the potential scope and harm from photographic invasions of a subject’s privacy.

One of the most disturbing products of these developments is the birth of “upskirt photography.”⁷ As its name suggests, upskirt

2. PHOTOGRAPHY YEAR: 1980 EDITION, at 22 (Time-Life Books ed. 1980). Henri Cartier-Bresson (1908–2004) was a French photographer and perhaps the most influential figure in the development of street photography. He is arguably the father of modern photojournalism and a master of candid photography.

3. In fact, street photographers have dedicated entire websites to the art of stealth. See, e.g., Mason Resnick, *Street Photography*, 2002, <http://web.archive.org/web/20020726123004/http://www.nelsontan.com/articles/strtfoto/strtfoto.htm> (“A long focal length lens will allow you to shoot the details, and slip away without being noticed.”); Fine Art by Arthur Durkee, *Stealth Photography*, <http://www.arthurdurkee.net/stealthphotography.html> (last visited May 10, 2010) (“The real ‘trick’ [to street photography] . . . is to remain unobtrusive and keep a low profile. A small camera which you know well can be very helpful, since you can shoot from the hip; people are often aware that you are taking a photo only when you raise the camera to your eye and look through the viewfinder.”).

4. *Kingdoms of the World in a Moment*, ECONOMIST, Aug. 7, 2004, at 67 (profiling Henri Cartier-Bresson).

5. *Id.*

6. Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual’s Image over the Internet*, 49 SANTA CLARA L. REV. 313, 360 (2009); Clay Calvert & Justin Brown, *Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace*, 18 CARDOZO ARTS & ENT. L.J. 469, 471 (2000).

7. See David D. Kremenetsky, *Insatiable “Up-Skirt” Voyeurs Force California Lawmakers to Expand Privacy Protection in Public Places*, 31 MCGEORGE L. REV. 285, 285 (2000).

photography involves taking pictures of women up their skirts. There are currently over one hundred websites featuring upskirt images, indicating just how in-demand the product is.⁸ This form of unauthorized photography can have devastating effects on subjects.⁹ An upskirt photograph draws attention to a private aspect of a person's life that would not have been seen by the naked eye and that the subject likely would not have consented to put on public display.¹⁰ In this regard, upskirt photographs infringe on basic precepts of human dignity.¹¹ They also often cause outrage, mental suffering, shame, or humiliation for their subjects.¹²

Despite these severe injuries, an individual photographed in public has nearly no recourse under current civil law.¹³ Street photography thrives because an individual has no right to privacy in public places.¹⁴ Instead, the law protects the photographer, not the victim.

8. *Id.* at 287 (“Demand for ‘up-skirt’ pictures has produced more than one hundred Internet sites devoted to this genre.”).

9. For further discussion of the negative consequences photography can have on individuals, see *infra* note 34 and accompanying text (citing Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1029 (1995)).

10. McClurg, *supra* note 9, at 1029; see Philip Greenspun, *Street Photography*, PHOTO.NET, Jan. 2007, <http://photo.net/learn/street/intro> (“The best thing about street photography is that it is possible for the final viewer of a print to see more than the original photographer.”).

11. See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962, 970–71 (1964) (an individual's privacy is essential to his dignity); J. Braxton Craven, Jr., *Personhood: The Right to Be Let Alone*, 1976 DUKE L.J. 699, 702–03 (discussing the importance of privacy for individuality and personhood); Daniel R. Ortiz, *Privacy, Autonomy, and Consent*, 12 HARV. J.L. & PUB. POL'Y 91, 92–97 (1989) (reasoning that privacy is central to an individual's sense of autonomy).

12. Daniel J. Solove, *Conceptualizing Property*, 90 CAL. L. REV. 1087, 1148 (2002).

13. McClurg, *supra* note 9, at 1004 (citing *Dempsey v. Nat'l Enquirer*, 702 F. Supp. 927, 932–33 (D. Me. 1988)); see *id.* at 992 (stating that tort law “provides little protection from intrusive . . . photography . . . so long as the activity occurs in a public place”). The lack of protection for victims of upskirt photography can also be seen in the context of criminal laws. See, e.g., Clay Calvert, *Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of Death*, 27 SEATTLE U. L. REV. 721, 727–28 (2004) (noting that a New York law criminalizing upskirt photography without any limitation on the victim's location could fall to a constitutional challenge because “under common tort principles, one has no expectation of privacy in a public place”).

14. See *infra* Part II.B; see also Bill Rams, *Cyber-Peeping: It's Growing, It's Frustrating, and It's Legal—Trend: Officials Say There's Nothing They Can Do to Stop Men from Filming up Skirts in Public Places*, ORANGE COUNTY REG., June 26, 1998, at A1 (describing how several men were caught filming up women's skirts and down their blouses); Bill Rams, *Prosecuting Up-Skirt Videotaping May Be Uphill Battle—Crime: Another Man Is Acquitted of Similar Charges. The Problems Is the Law Doesn't Address the Offense*, ORANGE COUNTY REG., Aug. 27, 1998, at B2.

Civil law must keep pace with technology and break away from its current conception of privacy in public places.¹⁵ Upskirt photography will persist until the law provides a remedy that serves as a sufficient deterrent against the behavior.¹⁶ Deterrence, though, cannot be achieved when courts cling to conventional thinking that invasions of privacy cannot occur in the public sphere.¹⁷ New and problematic forms of street photography necessitate a reexamination of photographic invasions of privacy.¹⁸

Part II of this Note provides a brief history of the right to privacy, highlights specific characteristics unique to photography that intensify its threat to privacy, and introduces the conventional rationales for denying individuals a right to privacy in public. Part III surveys photographic invasion-of-privacy cases and examines the classic rationales for upholding photographers' rights to shoot subjects covertly in public. Drawing upon the concepts discussed in Part III, Part IV then proposes that the tort of battery should be expanded to encompass photographic street shootings. The tort of battery protects an individual's dignity from intentional invasions.¹⁹ Accordingly, the interests at stake in street shootings fit squarely within the interests battery seeks to preserve. Part IV further argues that the "contact" requirement of battery can be satisfied either by actual contact between the photographer and the victim (or the victim's clothing) or

15. An emerging body of scholarship recognizes the need for the law to recognize public invasions of privacy. *See, e.g.*, Blackman, *supra* note 6, at 354 (advocating creation of a right to digital identity); Calvert & Brown, *supra* note 6, at 568 ("If the legal system is to value privacy in the future, then it must be vigilant in updating existing laws and creating new ones—criminal, civil, or both—that protect the very real privacy interests of individuals against people toting and planting the latest video technologies in the most intrusive locations."); Kristin M. Beasley, Comment, *Up-Skirt and Other Dirt: Why Cell Phone Cameras and Other Technologies Require a New Approach to Protecting Personal Privacy in Public Places*, 31 S. ILL. U. L.J. 69, 92–93 (2006) (arguing for application of definitions from criminal invasion of privacy laws to privacy torts); Aimee Jodoi Lum, Comment, *Don't Smile, Your Image Has Just Been Recorded on a Camera-Phone: The Need for Privacy in the Public Sphere*, 27 U. HAW. L. REV. 377, 411 (2005) (proposing a new tort that recognizes privacy in public).

16. This Note focuses exclusively on the treatment of upskirt photography by civil law, under which victims have no redress. However, it is also worth mentioning the potential criminalization of upskirt photography. While some states have enacted criminal statutes meant to address this problem, many states have not. In many states that have passed statutes, they are largely ineffectual. *See* Beasley, *supra* note 15, at 92–93 (discussing the shortcomings of the criminal system's approach to upskirt photography).

17. *See infra* Part II.B; *see also* Calvert, *supra* note 13, at 730 ("[I]f 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.").

18. *See* Calvert & Brown, *supra* note 6, at 566 ("By now it should be abundantly clear that developments in technology—in this case, miniature video recording devices and the Internet—raise serious new concerns about privacy invasions.").

19. *See infra* note 181 and accompanying text.

by a nontraditional theory of contact via light particles. Characterizing street shootings as a form of battery eliminates many of the impediments faced by plaintiffs in photographic invasion-of-privacy claims.

II. THE RIGHT TO PRIVACY AND PHOTOGRAPHY

Although jurists have long recognized substantive rights to privacy under the law, changing technologies have challenged conventional understandings of these rights. Photography, in particular, exacerbates invasions of privacy and thus poses a unique challenge to privacy rights. Yet tort law has proved ineffectual at protecting an individual's public right to privacy in photography cases.

A. The Origin of the Right to Privacy and the Special Problem of Photography

Two of the earliest and most influential advocates for legal protection of a right to privacy were Supreme Court Justice Louis D. Brandeis and Professor Samuel Warren.²⁰ In 1890, they wrote their seminal article, *The Right to Privacy*, which became the foundation for privacy law in the United States.²¹ The article served in part as a response to changes in photographic technology occurring at that time.²² Prior to 1884, cameras were large, expensive, and minimally portable, and they required subjects to sit still for extended periods of time to have their photograph taken.²³ In 1884, the Eastman Kodak Company introduced the "snap camera," an inexpensive, handheld camera that could take instantaneous photographs of people in public.²⁴ With the advent of this technology and the growing popularity of print media,²⁵ Warren and Brandeis feared that surreptitiously taken photographs would threaten the "right to be let

20. See Benjamin E. Bratman, *Brandeis and Warren's The Right to Privacy and the Birth of the Right to Privacy*, 69 TENN. L. REV. 623, 650 (2002) (noting that Warren and Brandeis's article "get[s] the credit for spawning a mini-revolution in the law, a revolution that eventually spread throughout the United States and throughout several fields of law to give us a wide-ranging right to privacy").

21. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

22. DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE* 57 (2004).

23. *Id.*

24. *See id.*

25. *Id.* In the late second half of the nineteenth century, newspapers grew dramatically in popularity, with circulation increasing 1,000 percent from 1850 to 1890. *Id.* By 1890, there were 900 papers and over eight million readers. *Id.*

alone” and observed that “[i]nstantaneous photographs . . . invaded the sacred precincts of private and domestic life.”²⁶ Recognizing this threat, they constructed a “right to privacy” predicated on the need to protect a person’s “inviolable personality” from injury.²⁷

In the aftermath of Warren and Brandeis’s article, courts based decisions involving photography on the right to privacy, which they viewed as a “natural,” “immutable,” and “absolute” right.²⁸ As one court addressing a photographic invasion of privacy concluded:

[T]he body of a person cannot be put on exhibition at any time or at any place without his consent. The right of one to exhibit himself to the public at all proper times, in all proper places, and in a proper manner is embraced within the right of personal liberty. . . . [The use of a person’s image without his consent makes him] under the control of another [so] that he is no longer free, and that he is in reality a slave²⁹

Given the nature of photography, Warren and Brandeis’s concerns were well-voiced. Several characteristics unique to photography make it likely to multiply the impact of invasions of privacy. First, a photograph creates a permanent and unchanging record of a subject, such that “[t]he temporal limitations that are otherwise inherent in public intrusions are eliminated.”³⁰ In other words, while nonphotographic invasions of privacy last only as long as the victim is in public, photographs immortalize intrusions on privacy.³¹ Second, because of a camera’s ability to freeze images in time, a photograph may also illuminate or reveal aspects of a scene that otherwise would not be noticed by a casual observer.³² Third, when a photographer takes a picture, she gains ownership of her subject’s image, resulting in the subject’s loss of control over display of

26. Warren & Brandeis, *supra* note 21, at 195–96.

27. *Id.* at 205.

28. *See, e.g.*, *Pasevich v. New Eng. Life Ins. Co.*, 50 S.E. 68, 69–70 (Ga. 1905) (“Any person whose intellect is in a normal condition recognizes at once that as to each individual member of society there are matters private and there are matters public so far as the individual is concerned. Each individual [will] instinctively resent any encroachment by the public upon his rights which are of a private nature A right of privacy in matters purely private is therefore derived from natural law.”).

29. *Id.* at 63, 70.

30. McClurg, *supra* note 9, at 1041–42.

31. *Id.*

32. *Id.*; *see also* Greenspun, *supra* note 10 (“The best thing about street photography is that it is possible for the final viewer of a print to see more than the original photographer.”).

her image.³³ When a subject's image leaves her control, she no longer dictates when and how the public sees her.³⁴

Fourth, because a camera replicates the scene before its lens, photographs create a misconception of objectivity.³⁵ As famous photographer Ansel Adams once said, "Not everybody trusts paintings but people believe photographs." Cameras are limited, though, in their capacity to tell the whole truth. For example, the camera does not capture the events immediately before and after a photograph is taken; in this sense, the photograph removes an image from its temporal context. Also, depending on the width of the lens or the position of the cameraman, a photograph may not capture a subject's entire surroundings, thereby misrepresenting the subject.

Finally, the negative impact on a person's psyche from an unwanted reproduction of her image can be particularly severe.³⁶ "Visual imagery can evoke powerful emotions and reactions that render it distinct from (or simply unparalleled by) other forms of expression."³⁷ As one scholar described, the impact of a photograph is "instantaneous, visceral, and intense."³⁸ For all of these reasons, as Warren and Brandeis recognized, the distinct nature of photography militates in favor of paying special attention to photographic invasions of privacy.

33. See Ysolde Gendreau, *United States*, in COPYRIGHT AND PHOTOGRAPHS 303, 303–05 (Ysolde Gendreau, Axel Nordemann & Rainer Oesch eds., 1999) (a photographer gains a property right in his subject's image); McClurg, *supra* note 9, at 1041 (a photographer "take[s] a part of the subject with him").

34. McClurg, *supra* note 9, at 1041. The negative implications of the transfer of control over the subject's image from the subject to the photographer are even more pronounced because of the Internet, which allows for widespread and unauthorized dissemination of a captured image. See Jeffrey Rosen, *Continental Divide*, LEGAL AFF. 49, 53 (2004) (discussing the "unsettling results" created by the Internet's capacity for exposition).

35. See Elaine Wang, *Equal Protection in the World of Art and Obscenity: The Art Photographer's Latent Struggle with Obscenity Standards in Contemporary America*, 9 VAND. J. ENT. & TECH. L. 113, 117 (2006) (discussing how the nature of photography as a multi-functional medium that is perceived as capturing objective truth is more readily offensive to the viewer).

36. See Ysolde Gendreau, *France*, in COPYRIGHT AND PHOTOGRAPHS, *supra* note 33, at 131 ("Because they can reproduce a person's physical traits, photographs are particularly likely to infringe a person's privacy or publicity rights.").

37. Wang, *supra* note 35, at 117; see also Amy Adler, *The Art of Censorship*, 103 W. VA. L. REV. 205, 213 (2000) (reasoning that "images are dangerous because of their irrational power, their appeal to passion rather than reason").

38. VICKI GOLDBERG, *THE POWER OF PHOTOGRAPHY: HOW PHOTOGRAPHS CHANGED OUR LIVES* 7 (1991).

B. Current Civil-Law Remedies

Following Warren and Brandeis, Dean William Prosser triggered the next major movement in American privacy law when he identified four distinct privacy torts³⁹ that were later adopted in the *Restatement (Second) of Torts*.⁴⁰ They included (1) unreasonable intrusion upon the seclusion or solitude of another, (2) public disclosure of private facts, (3) publicity that places another in a false light, and (4) appropriation of another's name or likeness for personal advantage.⁴¹ These privacy torts are frequently used by plaintiffs seeking redress for invasions of their right to privacy.

However, in most cases, these torts have proved ineffectual for individuals who are photographed in public.⁴² Victims of street photography generally bring claims for either unreasonable intrusion upon the seclusion of another or public disclosure of private facts.⁴³ In order to establish a claim for intrusion upon the plaintiff's seclusion or solitude, a plaintiff must show that the defendant (1) intentionally intrudes into a *private* place or matter (2) as to which a plaintiff has a reasonable expectation of privacy (3) in a manner objectionable to a reasonable person.⁴⁴ To recover under the tort of public disclosure of private facts, a plaintiff must show that the defendant (1) gave publicity to (2) a matter concerning plaintiff's *private* life (3) whose publication would be "highly offensive to a reasonable person" and (4) not of legitimate public concern.⁴⁵ Both of these torts focus on intrusions into an individual's *private* sphere. Unfortunately for plaintiffs, courts uniformly have held that the sphere of privacy does not extend to public places. This means that photographers may take unauthorized photographs of people in public without legal repercussions.⁴⁶

Dean Prosser offered several arguments supporting this spatial delineation of the right to privacy. First, once an individual steps into

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

40. RESTATEMENT (SECOND) OF TORTS §§ 652A–E (1977).

41. *Id.*

42. See Beasley, *supra* note 15, at 72–78 (explaining how Prosser's four privacy torts limit recovery for invasions of privacy); see also McClurg, *supra* note 9, at 999 ("[A] review of court decisions involving privacy claims raises doubts as to whether there really is a tort remedy for invasion of privacy.").

43. See Beasley, *supra* note 15, at 72–78.

44. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

45. *Id.* § 652D.

46. See Note, *Privacy, Photography, and the Press*, 111 HARV. L. REV. 1086, 1089 (1998) (discussing limited applicability of tort of intrusion).

public, she no longer has a reasonable expectation of privacy.⁴⁷ Second, photographing in a public place does not constitute an invasion of privacy “since this amounts to nothing more than making a record, not differing essentially from a full written description, of a public sight which any one present would be free to see.”⁴⁸

In addition, the First Amendment limits the tort of intrusion.⁴⁹ Specifically, the First Amendment bars liability for the use of photographs that are newsworthy or publicize matters of legitimate public concern.⁵⁰ As Dean Prosser explained, the protection of newsworthy photographs “arises out of the desire and the right of the public to know what is going on in the world, and the freedom of the press and other agencies of information to tell them.”⁵¹ Additionally, photography that has an expressive purpose, such as artistic photography, falls within the protection of the First Amendment.⁵² Therefore, even in cases where a court may find a legitimate invasion of an individual’s privacy, it must still balance the intrusion against the constitutionally protected interest in free expression.⁵³

As discussed in the next Part, courts often employ Dean Prosser’s rationales to justify rulings adverse to the right to privacy while placing little emphasis on the nature of the invasions felt by targets of street photography.⁵⁴

47. Prosser, *supra* note 39, at 391–92; *see also* RESTATEMENT (SECOND) OF TORTS § 652B, cmt. c (1977) (a photographer cannot be liable for taking another’s photograph in a public place “since [the subject] is not then in seclusion”).

48. Prosser, *supra* note 39, at 391–92.

49. *See id.*

50. *Battaglieri v. Mackinac Ctr. for Pub. Policy*, 680 N.W.2d 915 (Mich. Ct. App. 2004) (rejecting appropriation and false light claims of invasion of privacy brought by teachers union and its president against advocacy group that mailed fundraising letters quoting union president because the letter concerned matter of legitimate public concern privileging it under the First Amendment and the group failed to show actual malice in mailing the letter).

51. Prosser, *supra* note 39, at 412.

52. *See Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) (holding that photography is a protected activity); *Baker v. City of New York*, No. 01 CIV. 4888(NRB), 2002 WL 31132880, at *5 (S.D.N.Y. Sept. 26, 2002) (“It is undisputed that [plaintiffs] street photography is First Amendment expression[.]”); *see also* American Civil Liberties Union of Florida, *Artistic Freedom*, available at http://www.aclufl.org/take_action/download_resources/info_papers/14.cfm (last visited May 10, 2010) (“Artistic creations, whatever their medium or message, and even if their content is unpopular and of poor quality, are protected by the First and Fourteenth Amendments to the United States Constitution.”). Without such protection, imagine all the forms of expression that would have been chilled over the last century—Walker Evans’s 1940s subway photographs, Henri Cartier-Bresson’s famous picture of the man with an umbrella jumping into a puddle, or Lee Friedlander’s photographs of strangers in New York City, to name a few.

53. For examples of this balancing, *see infra* Part III.

54. *See, e.g., McNamara v. Freedom Newspapers*, 802 S.W.2d 901, 903 (Tex. Ct. App. 1991) (upholding the First Amendment in the face of an “offensive” invasion of privacy).

III. JUDICIAL TREATMENT OF PHOTOGRAPHY CLAIMS

Courts face a variety of photographic invasion-of-privacy claims. To illustrate the range of issues courts face, the cases analyzed in this Part fall into four categories based on the nature of the invasion felt by the plaintiff. Under the first category of cases, termed “Accidental Celebrities,”⁵⁵ the photographs in question do not reveal anything private about the plaintiff. In such cases, plaintiffs object to the mere fact of being photographed without consent. The second category discusses cases in which photographers capture images of plaintiffs in public venues engaging in private actions. The third category of cases involves plaintiffs whose private parts are unintentionally caught on film and published by defendants. Finally, the fourth category presents upskirt cases, in which photographers intentionally take pictures of private areas of females’ bodies.

A. Accidental Celebrities: Nussenzweig v. DiCorcia

In *Nussenzweig v. DiCorcia*, photographer Philip-Lorca DiCorcia conducted a two-year project on the streets of New York City.⁵⁶ He took candid photographs of passersby without obtaining their consent.⁵⁷ After gathering hundreds of photographs of random people from the street, he selected images of seventeen individuals who, unbeknownst to them, became the subjects of his photographic collection “Heads.”⁵⁸ The collection debuted at the Pace Gallery in Chelsea, a highly frequented Manhattan gallery.⁵⁹

One of the photographs DiCorcia displayed depicted the image of plaintiff Erno Nussenzweig, an Orthodox Hasidic Jew and retired diamond merchant.⁶⁰ In connection with the exhibit, Nussenzweig’s image appeared in catalogs, newspapers, and magazines.⁶¹ Now, Nussenzweig’s image is immortalized on thousands of web pages and

55. The term “Accidental Celebrities” refers to the ability of a photograph to turn an ordinary person into a celebrity against his will.

56. *Nussenzweig v. DiCorcia*, No. 108446/05, 2006 WL 304832, at *3–4 (N.Y. Sup. Ct. Feb. 8, 2006). Phillip Lorca DiCorcia is a world renowned street photographer, known for his juxtaposition of carefully planned staging and real-life subjects. His famous works include the following series of photographs: “Hustlers,” “Streetwork,” “Heads,” “A Storybook Life,” and “Lucky Thirteen.”

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

archives.⁶² Nussenzweig, a deeply religious man and a Holocaust survivor, has a firmly rooted religious belief that the use of his picture violates his religion's prohibition against graven images.⁶³ He sued DiCorcia in the New York County Supreme Court under Civil Rights Law sections 50 and 51, seeking both a permanent injunction to prevent future use of his image and monetary damages for its prior use.⁶⁴

The court weighed Nussenzweig's right to privacy against the value of free speech. Relying on a series of New York court holdings establishing "art" as constitutionally protected speech, the court held that the right to free expression transcends an individual's right to privacy.⁶⁵ The court did note, however, that the use of Nussenzweig's photograph was "deeply and spiritually offensive" and the effect on Nussenzweig was "distress[ing]."⁶⁶ In a broader context, it commented that First Amendment protections have been upheld "even in the face of a deeply offensive use of someone's likeness."⁶⁷ It further stated that "constitutional exceptions to privacy will be upheld, notwithstanding that the speech or art may have unintended devastating consequences on the subject, or may even be repugnant."⁶⁸ Such consequences are "the price that every person must be prepared to pay for in a society in which information and opinion flow freely."⁶⁹ Cases like *Nussenzweig*

62. See, e.g., Philip Geffer, *The Theater of the Street, the Subject of the Photograph*, N.Y. TIMES, Mar. 19, 2006, http://www.nytimes.com/2006/03/19/arts/design/19phot.html?_r=1&scp=1&sq=nussenzweig&st=cse (last visited May 10, 2010); Wikipedia, File:Dicorcia.jpg, <http://en.wikipedia.org/wiki/index.html?curid=4962634> (last visited May 10, 2010). DiCorcia also created ten edition proofs and three artist's proofs of the Nussenzweig photograph. *Nussenzweig*, 2006 WL 304832, at *3–4. The gross sale of these prints earned DiCorcia in the neighborhood of \$20,000 to \$30,000 each. *Id.*

63. Nussenzweig is a member of the Klausenber Sect of Orthodox Hasidic Judaism, a sect that was almost completely eliminated during the Holocaust. *Nussenzweig*, 2006 WL 304832, at *4. According to his religion, DiCorcia's use of his image violates the second commandment (Exod. 20:3–5; Deut. 5:7–9), which reads: "Thou shalt not make unto thee any graven image, or any likeness of any thing that is in heaven above, or that is in the earth beneath, or that is in the water under the earth." *Id.*

64. *Nussenzweig*, 2006 WL 304832, at *4. Section 50 creates a right to privacy, under which a person may not use "for advertising purposes, or for the purposes of trade," a picture of a person without first obtaining consent. N.Y. CIV. RIGHTS LAW § 50 (Consol. 2008). Section 51 allows equitable actions and damages for violations of an individual's right to privacy. *Id.* § 51.

65. *Nussenzweig*, 2006 WL 304832, at *6–7 (citing *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 350 (S.D.N.Y. 2002) (observing that New York courts have taken the position that "art is speech, and, accordingly, that art is entitled to First Amendment protection vis-à-vis the right of privacy"), and *Simeonov v. Tiegs*, 602 N.Y.S.2d 1014, 1018 (Civ. Ct. 1993) ("[W]orks of art . . . convey ideas, just as do literature, movies or theater.")).

66. *Nussenzweig*, 2006 WL 304832, at *8.

67. *Id.*

68. *Id.*

69. *Id.*

reflect a judicial commitment to protect photography as a form of free speech, even in the face of an egregious invasion of privacy.

B. Private Acts in Public: Gill v. Hearst Publishing Co.

Gill v. Hearst Publishing Co. involved a photograph that depicted a couple romantically embracing at a farmer's market.⁷⁰ The photograph was published in an issue of *Harper's Bazaar* in an article on the topic of love.⁷¹ Plaintiffs sued for damages claiming an invasion of their right to privacy.⁷² The Supreme Court of California held that publication of the photograph did not invade the couple's right to privacy because "[b]y their own voluntary action plaintiffs waived [this right]."⁷³ In other words, because they willingly embraced in an environment where others could see them, they assumed the risk of being photographed. The court further reasoned that an individual cannot have an expectation of privacy in public.⁷⁴

Justice Carter "most emphatically" dissented from the majority holding.⁷⁵ He found "no basis for the conclusion that the second a person leaves the portals of his home he consents to have his photograph taken under all circumstances thereafter."⁷⁶ He argued that the photograph had no independent news value.⁷⁷ Additionally, he claimed, "By plaintiffs' doing what they did in view of a tiny fraction of the public, does not mean that they consented to observation by the millions of readers of the defendant's magazine."⁷⁸ Under the majority's logic, a photographer could take a picture of an individual's unintentionally exposed naked body and disseminate it without fear of liability.⁷⁹

C. The Original Upskirt Cases: Daily Times Democrat v. Graham and McNamara v. Freedom Newspapers

Even before the surge of upskirt photography, courts were confronted with unauthorized photographs that unveiled private areas

70. 40 Cal. 2d 224, 226 (1953).

71. *Id.*

72. *Id.*

73. *Id.* at 230.

74. *Id.*

75. *Id.* at 234.

76. *Id.* at 233.

77. *Id.* at 232.

78. *Id.*

79. *Id.* at 233.

of victims' bodies. As this Section shows, there are competing notions about how to resolve such cases.

In 1964, the Alabama Supreme Court decided *Daily Times Democrat v. Graham*, in which the plaintiff sued for invasion of privacy when a newspaper published a picture of her at a county fair.⁸⁰ The photograph, taken after the wind blew up her skirt, revealed her undergarments.⁸¹ Even though the photograph was taken in public, the court held that the publication of the picture constituted an invasion of the plaintiff's right to privacy.⁸² The court did acknowledge that, under some circumstances, privacy rights must yield to the public interest in being informed.⁸³ However, the court distinguished this claim by noting that the photograph of the plaintiff was not newsworthy and thus not entitled to First Amendment protection.⁸⁴

The court also rejected the argument that an individual has no right to privacy in public, reasoning that such a principle should not be applied when its application leads to illogical results.⁸⁵ Here, the photograph was "embarrassing to one of normal sensibilities, . . . 'offensive to modesty and decency,'" and depicted "something which delicacy, purity, or decency forbid to be expressed."⁸⁶ The court therefore concluded that "[t]o hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right to privacy merely because she happened at the moment to be part of a public scene would be illogical, wrong, and unjust."⁸⁷

When courts determine that photographs are newsworthy, however, they have reached different results.⁸⁸ In *McNamara v. Freedom Newspapers*, decided in 1991, the Texas Court of Appeals addressed a newspaper's publication of a photograph depicting a high-school soccer player running after a ball with his private parts inadvertently exposed.⁸⁹ McNamara sued for invasion of privacy under Texas law, which recognizes a cause of action for public disclosure of embarrassing private facts about a plaintiff.⁹⁰ The court held that the

80. 162 So. 2d 474, 478 (Ala. 1964).

81. *Id.* at 476.

82. *Id.* at 478.

83. *Id.* at 477.

84. *Id.*

85. *Id.* at 478.

86. *Id.* at 477.

87. *Id.*

88. *See, e.g.,* McNamara v. Freedom Newspapers, 802 S.W.2d 901, 903 (Tex. Ct. App. 1991).

89. *Id.*

90. *Id.* at 903 n.2.

publication accurately depicted a public, newsworthy event, and therefore the First Amendment insulated the newspaper from liability for invading McNamara's privacy.⁹¹ In effect, the court established a rule that the First Amendment trumps the right to privacy when an individual is photographed for a newsworthy publication.⁹² It reasoned that "[t]he risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press."⁹³ Reflective of the value placed on the freedoms of speech and of the press, courts must uphold First Amendment rights "even though [the result is] offensive to ordinary sensibilities."⁹⁴

As both *Daily Times Democrat* and *McNamara* demonstrate, the First Amendment sets an outer limit on plaintiffs' ability to recover for invasions of privacy when the published image is deemed to be newsworthy and of public interest. Any approach designed to strengthen the rights of photographed victims will have to incorporate such First Amendment limits.

D. Upskirt Cases: State v. Glas

In *State v. Glas*, the Washington Supreme Court addressed the appeals of two separate defendants, both of whom were found guilty of criminal upskirt voyeurism.⁹⁵ The first defendant, Glas, was discovered lurking in the ladies' department at a department store.⁹⁶ On two separate occasions, female employees noticed him squatting on the floor beside them, camera in hand.⁹⁷ When the police later confiscated his film, it revealed pictures of their undergarments.⁹⁸ The other defendant, Sorrells, was caught with a video camera at a public food festival in Seattle.⁹⁹ His film revealed images taken at ground level up the skirts of both young girls and women.¹⁰⁰

Glas and Sorrells were both tried under Washington's voyeurism statute, which makes it a crime to photograph another

91. *Id.* at 905.

92. *Id.*

93. *Id.* at 904 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967)).

94. *Id.*

95. 54 P.3d 147, 154 (Wash. 2002). While this Note focuses on the civil treatment of photographic invasions of privacy, *Glas*—a criminal case—has been included because the court's analysis provides the best example of the dangers of applying the traditional "no reasonable expectation of privacy in public rationale" to the unique genre of upskirt cases.

96. *Id.* at 149.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

person for the purpose of “arousing or gratifying . . . sexual desire . . . while the person . . . *is in a place where he or she would have a reasonable expectation of privacy.*”¹⁰¹ The statute defines a place where a person “would have a reasonable expectation of privacy” as either “[a] place where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another;” or “[a] place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance.”¹⁰²

Despite the broad wording of the statute, the court held that it did not reach the defendants’ conduct. The court explained that casual intrusions occur frequently in public and, “[t]herefore, public places could not logically constitute locations where a person could reasonably expect to be safe from casual or hostile intrusion or surveillance.”¹⁰³ Although the defendants “engaged in disgusting and reprehensible behavior,” the court held that the voyeurism statute did not cover intrusions of privacy in public places and therefore did not prohibit upskirt photography in public locations.¹⁰⁴

E. Common Trends

The cases described above highlight courts’ trouble in applying traditional rules and doctrine to the ever-changing field of photography. When viewed as a whole, though, they present trends that reflect the values courts find important. This Section lists those trends and analyses their merits.

1. Reasonable Expectation of Privacy

Courts often conclude that an individual loses her reasonable expectation of privacy when she enters the public arena.¹⁰⁵ This

101. WASH. REV. CODE § 9A.44.115(2) (2003) (emphasis added). Washington’s voyeurism statute is modeled after the Video Voyeurism Prevention Act, 18 U.S.C. § 1801 (2000). The Act makes it a crime to photograph the private areas of an individual on federal land without her consent “under circumstances in which [she] has a reasonable expectation of privacy.” *Id.*

102. WASH. REV. CODE § 9A.44.115(1)(c)(i)–(ii).

103. *Glas*, 54 P.3d at 150.

104. *Id.* at 154. Other courts have reached different outcomes, *see* *State v. Morris*, 644 N.W.2d 114, 118 (Minn. Ct. App. 2002), but it is not the majority approach. Under civil law, as one scholar put it, victims of upskirt photography can “emphatically not” have an expectation of privacy in a public place. CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE 202 (2000) (“Can a person have an expectation of privacy in a public place? Unfortunately for some of the victims of upskirt voyeurism, the answer under civil law initially appears to be an emphatic no.”).

105. *See supra* Part III.

conclusion is misplaced. The conventional understanding of privacy, comparative perspectives on the right to one's image, and ingrained social norms all suggest that "expectation of privacy" should not be defined in spatial terms.¹⁰⁶

The conventional understanding of privacy does not distinguish between public and private spheres.¹⁰⁷ A widely accepted definition of privacy, set forth by Professor Alan Westin,¹⁰⁸ reads, "Privacy is the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others."¹⁰⁹ While no one enjoys the absolute privacy that Westin describes, if an individual lost her reasonable expectation of privacy upon entering the public sphere, it would render this definition meaningless. When a person steps outside the four walls of her home, she still expects to control what personal "information" gets conveyed to the public.¹¹⁰ To provide a basic example, garment choices dictate how much the world sees of a person's body.¹¹¹ Such control over one's body is essential to one's privacy.¹¹² As the Supreme Court asserted in 1891, "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person."¹¹³

Once a photographer captures a subject on film, the photographer controls how the subject's image "is communicated to others." In *Nussenzweig*, for example, the photographer made the decision to display Nussenzweig's image at the art gallery and in advertisements for his exhibition. As a direct result of this initial "communication," the photograph reached the Internet and control over Nussenzweig's likeness became even more dispersed. Now,

106. McClurg, *supra* note 9, at 1028–29.

107. *Id.* at 1029.

108. See Oscar H. Gandy, Jr., *Legitimate Business Interest: No End in Sight? An Inquiry into the Status of Privacy in Cyberspace*, 1996 U. CHI. LEGAL F. 77, 117 (calling Professor Westin's definition "the most well known definition of information privacy").

109. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967); see also Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421 (1980) (providing a variety of definitions of "privacy"); Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 34 (2006) ("[W]e cannot deny that in the current social context, some right of privacy is implicated when one loses personal control over whether one's own body is exposed. We cannot be forced to uncover . . . ourselves against our will.").

110. ERVING GOFFMAN, *RELATIONS IN PUBLIC: MICROSTUDIES OF THE PUBLIC ORDER* 1–5 (1971).

111. For example, in certain cultures, women wear burqas to cover their heads, faces, and bodies.

112. Solove, *supra* note 12, at 1135.

113. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891).

anyone with access to a computer can control where and to whom the image goes. Nussenzweig lost the ability to “determine for [himself] when, how, and to what extent information about [him was] communicated to others.”¹¹⁴

Global perspectives on the relationship between control of a person’s body and use of her image demonstrate the divergence of American jurisprudence on the centrality of one’s likeness to one’s privacy. In France, an individual has a property right in his image that is viewed as an “extension of the rights that [he] has over his body, of which the image is a visual representation.”¹¹⁵ In some African cultures, one’s image is considered an extension of one’s soul. For example, “[l]aws against photographing the Masai tribe in East Africa stem from the tribe’s traditional belief that cameras capture their souls.”¹¹⁶ The cultural emphasis on control over one’s image in other countries suggests the important nature of the right at issue in these cases. By disallowing recovery for photographic invasions of privacy that occur in public, U.S. courts contravene a person’s widely recognized right “to the possession and control over his own person.”¹¹⁷ In summary, courts’ traditional conclusion that an individual cannot have a reasonable expectation of privacy in public is misguided.

In upskirt cases, a female has a reasonable expectation of privacy underneath her skirt, regardless of her physical location. The fact that she has made the conscious decision to wear clothing that covers certain parts of her body supports this conclusion. When an upskirt photographer takes a picture, the photographer, not the subject, dictates the way private information about the subject is communicated to others. Thus, the subject loses control over the exhibition of her body. Distinguishing between public and private physical spaces does not work in the context of upskirt photography.

2. Assumption of Risk

Courts also deny relief to plaintiffs in privacy cases by reasoning that when a person appears in public, she assumes the risk that she will be seen and possibly photographed by others.¹¹⁸ The

114. WESTIN, *supra* note 109, at 7.

115. Helen Trouille, *Private Life and Public Image: Privacy Legislation in France*, 49 INT’L & COMP. L.Q. 199, 204 (2000).

116. John Flinn, *Picture Imperfect; Masai, Tourists Set Dignity Aside to Capture Kodak Moments*, FORT WORTH STAR-TELEGRAM, June 21, 1998, at 7.

117. In part this departure from the international norm reflects the comparative value this country places on freedom of expression.

118. McClurg, *supra* note 9, at 1038.

argument that individuals assume the risk of being photographed when they enter public also misses the mark. According to Professor Andrew McClurg, “assumption of risk is grounded in the notion of consent.”¹¹⁹ The concept of assumption of risk, which has its roots in negligence law, is predicated on the notion that the plaintiff has consented to relieve the defendant of his obligation to exercise reasonable care.¹²⁰ To consent, an individual must be aware of the risk and voluntarily choose to assume it.¹²¹ Put differently, consent is a conscious and intentional act.

Plaintiffs in *Gill*, *Daily Times Democrat*, and *Nussenzweig* did not have “full knowledge of the risk” of being photographed and thus cannot have assumed it.¹²² While one could argue that they assumed the risk by stepping out of their homes, such reasoning leads to absurd results.¹²³ Professor McClurg highlights this absurdity by applying the theory to negligence law: “[I]t cannot be said that a pedestrian assumes the risk of being hit by a negligent driver simply because he knows such an event is possible.”¹²⁴ Furthermore, in cases like *Gill*, *Nussenzweig*, and *Daily Times Democrat*, even if the plaintiffs somehow consciously assumed the risk of being photographed, it seems even more unlikely that they assumed the risk of publication and distribution of their images.¹²⁵

While Professor McClurg’s argument is well taken, the assumption-of-risk rationale cannot be dismissed entirely. Assumption of risk operates on a sliding scale. Consider a situation in which the plaintiff clearly assumed the risk of being photographed. In *McNamara*, for example, the plaintiff competed in a well-attended soccer game. He knew that spectators would be watching, and it was reasonable for him to expect photographers at the event. Thus, by playing in the game, he assumed the risk of being photographed.¹²⁶ This case falls at one end of the spectrum.

Now consider the other end of the spectrum. In *Nussenzweig*, the plaintiff was walking down the street, literally doing nothing but

119. *Id.* at 1039.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1040.

124. *Id.*

125. *See id.* at 1039–40 (“[T]he court’s analysis [in *Gill*] was flawed for failing to distinguish between merely voluntarily appearing in a public place and voluntarily consenting to be stared at, photographed, and publicized.”).

126. *See also* *Cohen v. Marx*, 211 P.2d 320, 321 (Cal. Ct. App. 1949) (prize fighter could not “hold others liable for commenting upon the acts which had taken place when he had voluntarily exposed himself to the public eye”).

walking. Even though he was in public, the very fact that he was among others could be said to have created an expectation of privacy.¹²⁷ In public, and especially on the crowded city street, he blended in.¹²⁸ He did not waive his right to privacy¹²⁹ because he never intended to remove his “cloak of anonymity.”¹³⁰

The same is true for upskirt photography. In those cases, the victim cannot reasonably be said to have assumed any risk of being photographed in such a manner. When they are in public, victims of upskirt photographers generally do not draw attention to themselves. Indeed, the fact that they are mixed into a crowd and not being watched by others is what makes them attractive targets. Upskirt victims also fall at the minimal assumption-of-risk end of the spectrum.

Gill falls in the middle of this spectrum. The photograph in *Gill* depicted a couple in an amorous embrace. The court reasoned that “[b]y their own voluntary action plaintiffs waived [the right to privacy].”¹³¹ The choice of the word “action” implies that the couple affirmatively did something to give up their right to privacy: they acted in a way that drew attention to themselves. Viewed in this context, *Gill* starts to look more like the conscious waiver in *McNamara*.

3. The Public-Record Argument

The *McNamara* court’s reasoning—that street photography cannot constitute an invasion of privacy because it merely records something already seen by the public—lacks merit.¹³² Camera lenses both magnify and freeze an image, thereby drawing attention to aspects of a scene that might not be observable to the naked eye.¹³³ *McNamara* exemplifies the perverse implications of this feature of photography.¹³⁴ The plaintiff in *McNamara* was playing soccer in a

127. See Blackman, *supra* note 6, at 325.

128. *Id.*

129. *Cf.* Barnhart v. Paisano Publ’ns, LLC, 457 F. Supp. 2d 590, 592 (D. Md. 2006) (woman lifted up her shirt at a motorcycle convention).

130. Blackman, *supra* note 6, at 325; see Gavison, *supra* 109, at 428 (conceptualizing privacy as a product of anonymity).

131. *Gill* v. Hearst Publ’g Co., 40 Cal. 2d 224, 230 (1953).

132. See 802 S.W.2d 901, 903 (Tex. Ct. App. 1991) (focusing on the fact that the photograph in question accurately depicted a public event).

133. McClurg, *supra* note 9, at 1042.

134. See also Jarrett v. Butts, 379 S.E.2d 583, 585 (Ga. Ct. App. 1989) (rejecting plaintiff’s invasion of privacy claim when a fourteen-year-old girl was required by her teacher to assume

stadium. Because he was moving and the spectators were watching from a distance, his exposed genitalia would have gone unnoticed but for the click of a camera.

Moreover, this reasoning ignores the secondary invasion of privacy inherent in photography. Even if the act of taking the photograph is no more invasive than an observation by the naked eye, subsequent dissemination exceeds the scope of an invasion that could occur on the street absent a camera.¹³⁵ A photograph allows the photographer to distribute the image to a much larger audience than would be present at the time it is taken.¹³⁶ Consistent with this enlarged scope, a distributed photograph will reach a wider variety of audiences than the subject initially intends.¹³⁷ Thus, photographs can significantly multiply original invasions of privacy.

Upskirt photography also helps to reveal the inherent weakness in the public-record argument. Cameras used to capture upskirt victims are usually sufficiently small and maneuverable that photographers can take pictures from angles and in proximities that observation by the naked eye might prohibit. Coupled with the magnification potential of lenses, these cameras can record images that the naked eye would never see.¹³⁸ An upskirt photograph is not a record of “a public sight which any one would be free to see.”¹³⁹

4. The First Amendment

When confronted with photographic invasions of privacy, courts face the critical dilemma of how to balance a plaintiff's privacy right with the First Amendment. The First Amendment provides perhaps the most compelling reason to uphold the photographer's right to take unauthorized photographs in public. Courts uphold First Amendment rights even in offensive invasions of privacy. Cases like *Daily Times Democrat*, *Gill*, *Nussenzweig*, and *McNamara* suggest that if the First Amendment applies, it automatically trumps the plaintiffs' right to privacy.¹⁴⁰ Accordingly, the courts focused their inquiries on whether

various poses, including sitting in a chair with her legs open, on the ground that the photographs did not reveal any aspect of her person that was not readily visible to the other students).

135. See McClurg, *supra* note 9, at 1043 (finding a “large difference between merely observing a person and photographing the person”).

136. *Id.* at 1042.

137. *Id.* at 1043.

138. See Calvert & Brown, *supra* note 6, at 471 (“dime-sized spy cameras” and “high-powered lenses” make “recording others’ private activities both easier to capture and harder to detect”).

139. Prosser, *supra* note 39, at 391–92.

140. *Daily Times Democrat v. Graham*, 162 So. 2d 474, 478 (Ala. 1964); *Gill v. Hearst Publ'g Co.*, 40 Cal. 2d 224, 230 (1953); *Nussenzweig v. DiCorcia*, No. 108446/05, 2006 WL 304832, at *8

the First Amendment applied.¹⁴¹ In *Nussenzweig*, the court asked whether the photographs constituted “art” and thus fell within the ambit of First Amendment protection.¹⁴² Once the court determined that the photographs merited protection as art, it ended its inquiry without further consideration of their effect on *Nussenzweig*.¹⁴³ Similarly, in *Gill*, the court justified the outcome on the basis that the photograph had entertainment value and thus fell within the bounds of free expression.¹⁴⁴ In *McNamara*, the court asked whether the photograph accurately depicted a public, newsworthy event.¹⁴⁵ Upon the determination that it did, the court stopped there.¹⁴⁶ While the court reached a different outcome in *Daily Times Democrat*, it based its decision on the photograph not being newsworthy.

Courts have acknowledged the negative implications that the First Amendment may have for individuals’ privacy rights. In *McNamara*, the court noted that the First Amendment controls even though it produces results that are “offensive to ordinary sensibilities.”¹⁴⁷ Similarly, the *Nussenzweig* court remarked that the First Amendment controls “even in the face of a deeply offensive use of someone’s likeness” and even when it “may have unintended devastating consequences on the subject, or may even be repugnant.”¹⁴⁸

The recognition that certain forms of speech are outside the purview of the First Amendment lends support to the argument that certain forms of photographic speech should not be indiscriminately protected. For example, obscenity, libel, and slander are not protected by the First Amendment.¹⁴⁹ Likewise, the obscene and injurious nature of upskirt photographs suggest that they are not worthy of blanket protection under the First Amendment.

(N.Y. Sup. Ct. Feb. 8, 2006) (courts uniformly uphold First Amendment protection in right to privacy cases); *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901, 905 (Tex. App. 1991) (if the First Amendment applies it provides the defendant with immunity from liability).

141. *Daily Times Democrat*, 162 So. 2d at 478; *Gill*, 40 Cal. 2d at 230; *Nussenzweig*, 2006 WL 304832, at *8; *McNamara*, 802 S.W.2d at 905.

142. 2006 WL 304832, at *7. The threshold state action requirement of the First Amendment is satisfied in *Nussenzweig* because the plaintiff sued the defendants under New York state tort law. *See id.* at 5. State laws cannot infringe upon the First Amendment and thus, the defendant has a First Amendment defense.

143. *Id.*

144. *Gill*, 40 Cal. 2d at 229.

145. 802 S.W.2d at 905.

146. *Id.*

147. *Id.* at 904.

148. *Nussenzweig*, 2006 WL 304832, at *8.

149. *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (libel and slander).

Furthermore, while protection of valid forms of expression should not be diminished, inadequate protection of privacy may ultimately thwart the interests protected by the First Amendment. Inadequate protection may create a situation where individuals are reluctant to put themselves and their ideas forward due to the threat of unchecked ridicule and harassment. As Professor Josh Blackman persuasively argues, individual expression flows most freely when a person knows she has some degree of privacy.¹⁵⁰ Conversely, if a person feels she is being watched, she is more likely to monitor her behavior.¹⁵¹ Taking this proposition one step further, if an individual knows she is being recorded, she may be more reserved or “camera shy.”¹⁵² Protection of privacy goes hand-in-hand with protection of First Amendment freedoms.¹⁵³ An improper balance between the two interests yields a suboptimal level of discourse in society, working against the values the First Amendment is designed to protect.¹⁵⁴

Professor Blackman illustrates the importance of privacy to the First Amendment (and vice versa) by looking at two extreme situations.¹⁵⁵ First, he considers a world with no privacy protections and unrestricted free speech.¹⁵⁶ Such a place, he contends, would stifle free expression because individuals would not express themselves “for fear of embarrassment, ridicule, humiliation, or retribution.”¹⁵⁷ Second, he considers a world with maximum privacy protection and no free speech.¹⁵⁸ This situation would also chill freedom of expression because individuals would not be able to express their true opinions.¹⁵⁹ To achieve an “optimal level of expression,” an individual’s right to privacy must be sufficiently protected but not overprotected.¹⁶⁰

Although the First Amendment value of upskirt photography might not be readily apparent, some have suggested upskirt

150. Blackman, *supra* note 6, at 326–27.

151. *Id.*

152. *Id.*

153. *See id.* at 326 (“Privacy and free speech can be thought of as two sides of the same coin.”); Sean M. Scott, *The Hidden First Amendment Values of Privacy*, 71 WASH. L. REV. 683, 723 (1996) (“[T]he right to privacy and the First Amendment both serve the same interest in individual autonomy.”).

154. *See* Blackman, *supra* note 6, at 326–27 (“When properly balanced, [privacy and speech] yield optimal results.”).

155. *Id.* at 327.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* (“[P]rivacy and free speech complement one another when properly balanced to provide a symmetry to optimize people’s desire to express themselves, and at the same time, minimizes any apprehension that such an expression may cause.”).

photography warrants constitutional protection merely due to its status as photography.¹⁶¹ In fact, some courts have suggested that upskirt photographs are constitutionally protected forms of speech.¹⁶² This notion is not an isolated one; courts consistently have upheld photographers' rights on First Amendment grounds, even when the photograph at issue has questionable First Amendment value.

In the upskirt context, however, overprotection of injurious speech through the First Amendment can produce unsettling results. To illustrate the potential application of the First Amendment to upskirt photographs, consider a variation on *Nussenzweig*. Instead of positioning his camera on scaffolding, assume that the photographer placed a small camera in street grating below his subjects and took pictures up their skirts as they walked by. Assume further that the photographer collected the photographs and displayed them in an art gallery.¹⁶³ Setting obscenity standards aside as beyond the scope of this Note, the photographer's collection would presumably fall within the protection of the First Amendment. As *McNamara* showed, the fact that a photograph exposes its subject's intimate areas does not carry much weight if the photograph falls within the scope of the First Amendment.

But the use of the First Amendment to defeat privacy claims for upskirt photography is more troubling than in *McNamara* for several reasons. First, the act of obtaining an upskirt photograph is bothersome. As opposed to a traditional photograph, which generally is taken from a distance, an upskirt photographer must interject himself into his subject's personal space.¹⁶⁴ Second, in cases like *McNamara*, the photographer did not intend to capture his subjects' anatomy on film. In contrast, the sole purpose of upskirt photographs is to reveal intimate parts of subjects' bodies.¹⁶⁵ Allowing the First

161. CALVERT, *supra* note 104, at 214 (finding a "voyeurism value of free expression"); Calvert, *supra* note 13, at 730 (a camera "involves images and thereby raises freedom of expression concerns").

162. See *State v. Stevenson*, 114 P.3d 699, 704 n.7, 707 (Wash. Ct. App. 2005) (finding defendant guilty of the crime of voyeurism and distinguishing *State v. Glas*, 54 P.3d 147, 154 (Wash. 2002), on the grounds that "photography may be considered a medium of speech").

163. This hypothetical is not that far-fetched. In fact, one artist—Richard Kern—assembled a collection of twenty-five upskirt photographs, which he took on the New York City subways of willing participants, and showcased them in a Manhattan art gallery. Tracy Clark-Flory, *Porn in a Flash: A Troubling Surge in Creepy "Upskirt" Photography Has Lawmakers in a Twist - And Body Parts of Women Posted all over the Internet*, SALON.COM, Nov. 25, 2008, <http://www.salon.com/mwt/feature/2008/11/25/upsirting/index.html>.

164. For example, the defendant in *Glas* took photographs while squatting on the floor just a few feet behind his subjects. 54 P.3d at 149.

165. Clark-Flory, *supra* note 163.

Amendment to encompass upskirt photography would greatly undercut privacy rights.

If courts allow upskirt photographs to be taken without remedy, they will inadequately protect societal values on individual human dignity. Society has taken great strides to hide certain aspects of life.¹⁶⁶ For example, people dress to cover up their naked bodies.¹⁶⁷ This ingrained social practice reflects a desire to keep certain aspects of an individual's life restricted to the private sphere regardless of the individual's physical location.¹⁶⁸ When an individual's intimate areas are photographed for others to see, it creates "severe and sometimes debilitating humiliation and loss of self-esteem."¹⁶⁹ As such, "[t]he fact that the exposure occurred in a public place should [be] treated as relatively unimportant."¹⁷⁰

IV. STREET SHOOTINGS AS BATTERY

This Part proposes that victims of street shootings should be able to obtain relief under the tort doctrine of battery. It first analyses several themes that reveal shortcomings with the current doctrinal approach.

After scrutinizing courts' reasoning in photographic invasion-of-privacy cases, several themes emerge. First, courts frequently rule against plaintiffs who suffer legitimate photographic invasions of privacy under the justification that an individual does not have a right to privacy in public. Recognizing the problem with this rationale, Professor McClurg has proposed an expansion of the tort of intrusion to encompass public invasions of privacy.¹⁷¹ Specifically, he argues for a new definition of the tort of intrusion that explicitly states that an individual can have a cause of action for an intrusion that occurs in a public place.¹⁷² He also suggests seven factors that should be considered in evaluating the offensiveness of the intrusive conduct: (1) the defendant's motive, (2) the scope of the intrusion, (3) the physical location of the plaintiff at the time of the intrusion, (4) whether the defendant asked for plaintiff's consent, (5) whether the plaintiff took any actions to suggest she wanted privacy, (6) whether the defendant disseminated information concerning the plaintiff that was obtained

166. Solove, *supra* note 12, at 1148.

168. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. See McClurg, *supra* note 9, at 1055–66.

172. *Id.* at 1088.

during the intrusion, and (7) whether the subject of the intrusion is a matter of legitimate public concern.¹⁷³ The rise of upskirt photography since McClurg proposed this expansion provides further support for his conclusion that traditional notions of privacy should be redefined to encompass invasions that occur in public.

Second, victims of photographic invasions-of-privacy cases do not lack a cause of action. In several of the cases examined in Part III, plaintiffs had viable tort claims but were unable to recover because, after balancing the competing interests, courts found that plaintiffs' privacy rights did not outweigh the societal interest in protecting freedom of expression.¹⁷⁴ This result suggests a potential shortcoming of Professor McClurg's seven-factor balancing approach: courts are already weighing these considerations. Thus, to the extent that outcomes in photographic invasion-of-privacy cases are troubling, it is unclear that they would come out differently under a balancing test.

Third, the recent surge of upskirt photography highlights the danger of overextending traditional rationales for denying right-to-privacy claims. Even when they are in public places, individuals have a reasonable expectation of privacy beneath their skirts. Moreover, upskirt victims generally do not assume the risk of being photographed, and they certainly do not assume the risk of being photographed in the invasive manner of upskirt photography. Upskirt photographs reveal anatomical areas that have been intentionally covered and that would not be observable by others but for the photograph. In upskirt cases, photographers affirmatively intend to invade their subjects' privacy. Other forms of street photography lack this element. Additionally, and perhaps most critically, if future courts find First Amendment value in upskirt photographs, the practice would be permanently protected from the reach of both civil and criminal law.¹⁷⁵

Fourth, the line between objectionable photographs and photographs that deserve protection even when the outcomes may be "offensive"¹⁷⁶ may be blurry. In formulating a legal response to upskirt street shootings, the challenge is to develop a practical treatment that discourages burgeoning photographic invasions of privacy without unduly chilling the forms of street photography that have legitimate First Amendment value.

173. *Id.* at 1057–58.

174. *See supra* Part IV.

175. *See, e.g.*, *State v. Stevenson*, 114 P.3d 699, 704 n.7, 707 (Wash. Ct. App. 2005) (noting that upskirt photographs are a form of expression).

176. *Nussenzweig v. DiCorcia*, No. 108446/05, 2006 WL 304832, at *6–7 (N.Y. Sup. Ct. Feb. 8, 2006).

If, as this Part argues, the tort of battery is broad enough to encompass street shootings, victims may have a source of civil redress that accounts for these considerations. A defendant may be liable for battery regardless of where he acts. Thus, the fact that a street shooter captured his victim in public would not prohibit recovery. Moreover, a victim could recover for an invasion of her privacy under battery without impinging on a photographer's First Amendment rights. Because the act of taking a photograph would be actionable in and of itself, any First Amendment value in a resulting photograph would still be preserved. While the First Amendment could still serve as a defense against a battery claim, characterizing street shootings as battery might mitigate the problems that result when privacy rights are pitted against the right to freedom of expression. Specifically, instead of balancing the right to privacy against the First Amendment, upskirt claims could be based in deeply rooted common law notions of battery.¹⁷⁷

Battery is defined as "a harmful or offensive contact with a person, resulting from an act intended to cause the plaintiff or a third person to suffer such a contact, or apprehension that such a contact is imminent."¹⁷⁸ The purpose behind the tort of battery is to safeguard a "plaintiff's interest in protection of his or her bodily well-being and dignity from intentional invasion."¹⁷⁹ In upskirt photography, the displacement of an individual's naked self from the private sphere to the public one offends human dignity.¹⁸⁰ Additionally, the actual act of shooting an upskirt photograph bears similarity to conduct the tort of battery seeks to deter. The upskirt photographer gains access to a private area of his victim's body by an intentional and contemptible act. While the photograph may not expose the individual at the time the photograph is taken, any subsequent viewing creates the same result.

One could argue, as Dean Prosser might, that upskirt photography cannot fall within the purview of battery because it does

177. See Ramachandran, *supra* note 109, at 35 (discussing the importance of public presentation of the physical body and describing claims for battery as deeply-rooted); see also *id.* at 37 ("Regardless of the private or public nature of the context we are in, certain rights to bodily integrity and privacy are generally protected by state criminal law and the common-law torts of battery and assault. The sense that other persons should not, except in unusual circumstances, intrude on what we do with our own bodies is quite strong, even in the private context.")

178. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 9, at 39 (5th ed. 1984).

179. KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 22 (1997).

180. See Bloustein, *supra* note 11, at 973-74 (discussing the fundamental desire for privacy with respect to one's body).

not satisfy the “contact” requirement.¹⁸¹ This argument fails, though, for at least three reasons. First, a battery can exist without actual physical contact. The essence of a battery claim lies in the “offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body.”¹⁸² As such, courts have long held that a battery can be established without actual physical contact.¹⁸³ To capture an upskirt photograph, a photographer must get reasonably close to his victim and will often brush up against his victim’s skin or clothing.¹⁸⁴ Moreover, courts have held that certain types of “invasions of one’s personal space” are as offensive as actual contact with the body.¹⁸⁵

Second, courts have allowed recovery under the tort of battery in particularly offensive cases, even where traditional physical contact was lacking. For example, in *Leichtman v. WLW Jacor Communications*, the court held that allegations that the defendant intentionally blew cigar smoke in the plaintiff’s face “for the purpose of causing physical discomfort, humiliation, and distress” sufficiently stated a cause of action for battery.¹⁸⁶ The court reasoned that tobacco smoke is a “particulate matter” and therefore has the physical properties capable of making contact.¹⁸⁷ This willingness to extend the tort of battery to nontraditional forms of contact lends support for classification of upskirt photography as a battery. Moreover, there is a colorable argument that when photographers use flashes, the photons emitted from the flash—like the particulate matter in secondhand smoke cases—has similar physical properties capable of making contact.¹⁸⁸

181. KEETON ET AL., *supra* note 179, § 9, at 39.

182. RESTATEMENT (SECOND) OF TORTS § 18, cmt. c at 31 (1965).

183. *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) (“[I]t has long been settled that there can be a battery without an assault, and that actual physical contact is not necessary to constitute a battery, so long as there is contact with clothing or an object closely identified with the body.”).

184. *See Morgan v. Loyacombo*, 1 So. 2d 510, 511 (Miss. 1941) (“To constitute an assault and battery, it is not necessary to touch the plaintiff’s body or even his clothing; knocking or snatching anything from plaintiff’s hand or touching anything connected with his person, when done in an offensive manner, is sufficient.”).

185. *See, e.g., Fisher*, 424 S.W.2d at 629 (“The intentional snatching of an object from one’s hand is as clearly an offensive invasion of his person as would be an actual contact with the body.”).

186. 634 N.E.2d 697, 698, 700 (Ohio Ct. App. 1994).

187. *Id.* at 699.

188. This argument is bolstered by the existence of claims for light trespass. *See, e.g., Amanda Hess Corp. v. Havener*, No. 355418 (KCL), 2009 WL 323369, at *7 (Mass. Land Ct. 2009). Light trespass occurs when unwanted light enters another’s property. For example, light trespass occurs when spill light from a streetlight enters a window and illuminates the inside of

Finally, upskirt photography itself illustrates why the tort of battery should not always require proof of “contact.” Even when upskirt photographers do not actually come into contact with their victims, permitting recovery for these types of invasions serves the normative goal of preventing the more egregious conduct that may result if photographers are allowed to test the limits of noncontact physical proximity without fear of liability.

Assuming that plaintiffs could dispose of the contact element under one of these theories, a reviewing court would then ask whether the contact was harmful or offensive.¹⁸⁹ Permitting courts to engage in this inquiry would more accurately align judicial outcomes with societal values regarding invasions of a person’s inviolability. For example, in a case like *Nussenzweig*, a court would most likely not find the contact harmful or offensive. By contrast, in a case like *Glas*, a court probably would find the contact offensive. An element of intent distinguishes these cases. In upskirt cases like *Glas*, photographers intend to invade their subjects’ privacy. Other forms of street photography lack this element. For example, the photographer in *McNamara* had no intention of invading his subjects’ privacy when he captured his image. The photographer did not know that he would capture the plaintiff in an exposed state; as previously discussed, the questionable content of the photograph could not have been seen by the naked eye.¹⁹⁰ Intent, then, can inform a court’s inquiry into the offensiveness of the act.

V. CONCLUSION

Notwithstanding the particularly disturbing consequences of street shootings, numerous doctrinal hurdles currently prevent individuals from recovering for photographic invasions of their privacy: deeply rooted conceptions regarding an individual’s expectation of privacy, assumption of risk, the public-record aspect of photography, and freedom of expression. In many cases, disallowing recovery may be desirable—for example, if an individual assumed the risk of being photographed or if the resulting photograph had unquestionable First Amendment value. However, analysis of photographic invasion-of-privacy cases shows that there is no clear line between acceptable and unacceptable intrusions. Advancements

a person’s home. The recognition of such claims suggests that light has physical properties and can be invasive.

189. RESTATEMENT (SECOND) OF TORTS § 18, cmt. c at 31 (1965).

190. See *supra* Part II.A.

in technology will only exacerbate this problem by causing an increase in both the number and offensiveness of invasions of privacy.

At a time when offensive uses of photographic technology threaten basic precepts of human dignity, reexamination of invasions of privacy is necessary. As Professor Clay Calvert observed, “Continuous review is necessary so that evolutions in technology do not . . . outstrip developments in the law of voyeurism.”¹⁹¹ To this end, this Note joins the body of scholarship that advocates for an expansion of the right to privacy to account for invasions that occur in public places. However, it argues that current approaches cannot adequately protect victims of invasive photography because of the heavy weight courts place on the First Amendment value of photographs.

This Note thus proposes an expansion of the tort of battery to include offensive forms of street shootings. Such an approach allows recovery even in the face of many of the concerns courts have expressed in denying photographic invasion-of-privacy claims. By focusing on the offensiveness of the act of photographing itself, recovery under the tort of battery does not undermine the values protected by the First Amendment and further obviates the need to rebut arguments such as the public-record theory. Reconceptualizing certain street shootings as a form of battery also eliminates the need to determine whether a right to privacy exists in the public sphere, as battery can occur in both private and public places. In addressing these concerns, this approach permits courts to refocus their inquiry on the offensiveness of the invasion in order to reach results that are more consistent with societal conceptions of dignity.

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191. Calvert & Brown, *supra* note 6, at 474.

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