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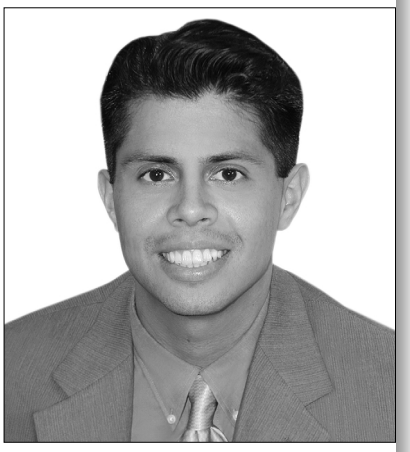
Keeping Tom From Peeping

New Law Will Not Protect All Victims of High-Tech Voyeurs

PRIVACY ISSUES



HARRY A. VALETK

Next week, New York will join the ranks of states that criminally prohibit secret surveillance of unsuspecting victims.

The state's new voyeurism statute, known as Stephanie's Law, goes into effect on Monday and comes at a time when voyeurism concerns are on the rise. Last month, for example, an Atlanta woman sued retailing giant Toys "R" Us, after noticing a hidden camera above her stall in the ladies' restroom.[1]

Stephanie's Law was named for Long Island resident Stephanie Fuller, who was secretly videotaped by her landlord. He had installed a tiny video camera in the smoke detector above her bed.

Because Ms. Fuller rented a private dwelling, her landlord could only be charged under existing law with trespassing, He was fined $1,500, and sentenced to 280 hours of community service.[2]

Before enacting Stephanie's Law, New York regulated voyeuristic acts under Article 26, §395-b of the General Business Law, which prohibited installing a video recording device. Under this statute, violators faced minimal penalties: a $300 fine, 15 days imprisonment, or both. Additionally, section 395-b did not prohibit installing a viewing device for secret surveillance in private dwellings.

Stephanie's Law takes a completely different approach. Under the new voyeurism statute, hi-tech peeping Toms could face two new felony offenses: criminal unlawful surveillance and dissemination of an unlawful surveillance image.

In a nutshell, Stephanie's Law amends §250 of New York's Penal Code, and holds a person guilty of unlawful surveillance in the second degree when:

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

Unfortunately, Stephanie's Law has one major flaw: It only prohibits secret surveillance in places where a victim has a 'reasonable expectation of privacy.'

Second degree unlawful surveillance is a Class E felony, punishable by up to four years imprisonment.[3] Repeat offenders within a 10-year period automatically fall under the definition of first-degree unlawful surveillance, which is a Class D felony, and face up to 7 years in prison.[4]

Major Flaw

Unfortunately, Stephanie's Law has one major flaw: It only prohibits secret surveillance in places where a victim has a "reasonable expectation of privacy."

The statute defines a private place as a "bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a motel, hotel, or inn without the victim's consent."

But, by only protecting privacy expectations in private places, New York has failed to outlaw emerging surveillance schemes — like up-skirt voyeurism — that can thoroughly invade individual privacy in public places.

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

Voyeurs then sell the revealing images to pornography Web sites. Once the anonymous images reach the borderless realm of cyberspace, few sanctions exist — legal, social, or otherwise — against exploiting them.

In most states, victims of up-skirt voyeurism face indescribable frustrations dealing with outdated statutes that overemphasize location, and overlook individual privacy in its most basic form.

Washington's Statute

New York's narrow approach to protecting privacy based on physical location is not uncommon.[5]

Last fall, the Washington state Supreme Court examined its voyeurism statute, and held that it did not offer residents privacy protections in public places.

Much like New York, Washington's statute

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outlawed voyeurism in places where a person would have a reasonable expectation of privacy. Specifically, section 9A.44.115 of the Revised Code of Washington, classified voyeurism as a felony that occurs when a person:

> [f]or the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films another person, without that person's knowledge and consent, while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy.

The Washington statute limited the places where individuals could expect privacy to places where a reasonable person would believe that (i) he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another; or (ii) a place where one may reasonably expect to be safe from casual or hostile intrusion or surveillance.

Charged with violating section 9A.44.115, Sean Glas and Richard Sorrells were each convicted of voyeurism for secretly taking pictures underneath women's skirts.[6]

Mr. Glas was spotted in a local mall acting suspicious, and walking near two female employees with a small camera in his hand. Mr. Sorrells was spotted standing in a concession line videotaping underneath young girls' skirts.

Appealing their convictions, both Messrs. Glas and Sorrells argued that section 9A.44.115 was misapplied to them because the victims did not have reasonable privacy expectations in public places. The Washington court agreed, holding that section 9A.44.115 did not prohibit up-skirt photography in a public place:

> [P]ublic places could not logically constitute locations where a person could reasonably expect to be safe from casual or hostile intrusion or surveillance. [B]oth Glas and Sorrells engaged in disgusting and reprehensible behavior. Nevertheless, we hold that Washington's voyeurism statute does not apply to actions taken in purely public places and hence does not prohibit the 'up-skirt' photographs they took.

In reaching its decision, the court recognized up-skirt voyeurism as a reprehensible intrusion, but remained helplessly bound by the geographic emphasis imposed by section 9A.44.115.

Other Voyeurism Laws

California lawmakers realized the need for overhauling their outdated voyeurism laws soon after Orange County residents suffered a rash of incidents involving up-skirt photography in public places.[7]

Although California prohibited voyeurism in places where individuals had reasonable expectations of privacy, all the incidents proved immune from criminal prosecution.

One incident involved a man who followed several dozen women around trying to position a gym bag containing a small video camera between their legs while they shopped in crowded stores.

California responded by amending its voyeurism statute to specifically focus on the individual privacy invasion committed, not the place where that invasion occurred. Today, under §647(k)(1) of California's Penal Code, it is illegal for:

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

New York can do more to protect individual privacy. Members of any civil society understandthat privacy expectations go well beyond private places.

By prohibiting the act of recording "under or through the clothing" of the victim, California lawmakers recognized that a privacy violation may occur in public or private.

Still, this statute also has two major flaws. First, the victim must be identifiable. Skirting this requirement is a breeze, since few up-skirt voyeurs point their cameras at a victim's face. Second, proof that visual recordings were made for personal sexual gratification actually exempts employees of commercial Web sites or other entertainment enterprises.

Illinois does a much better job of protecting victims. Disposing of needless exemptions, Illinois's voyeurism statute does not have any requirement that the victim be identifiable or that the recording be made for personal sexual gratification. Specifically, under section 5/26-4 of Illinois's Criminal Code:

> It is unlawful for any person, using a concealed camcorder or photographic camera of any type, to knowingly and secretly videotape, photograph, or record by electronic means, another person under or through the clothing worn by that other person for the purpose of viewing the body of or the undergarments worn by that other person without that person's consent.

In this sense, at least, Stephanie's Law is similar to Illinois's voyeurism statute because it too does not require that the victim be identifiable or that the images be taken only for the voyeur's sexual gratification. Instead, the statute outlaws any images taken of the victim's "intimate parts," and prohibits visual recordings taken "for profit."

Conclusion

Still, New York can do more to protect individual privacy.

Members of any civil society understand that privacy expectations go well beyond private places.

As the court ruled in *Glas*: "People preserve their bodily privacy by wearing clothes in public, and undressing in private. It makes no sense to protect the privacy of undressing unless privacy while clothed is presumed."

(1) Woman Sues Toys 'R' Us Over Hidden Camera, USA Today, Marketplace, July 11, 2003.

(2) Deepti Hajela, Pataki Makes Video Voyeurism a Crime, Newsday, June 23, 2003.

(3) See also N.Y. Penal Law § 70.00(2)(e) (McKinney 2003).

(4) N.Y. Penal Law § 250.50 (McKinney 2003); N.Y. Penal Law § 70.00(2)(d) (McKinney 2003).

(5) See, e.g., Tenn. Code Ann. § 36-13-605 ("reasonable expectation of privacy"); Wis. State. § 942.08 ("reasonable expectation of privacy"); Va. Code Ann. § 18.2-130 ("reasonable expectation of privacy").

(6) *State v. Glas*, 147 Wash.2d 410 (2002).

(7) Lance E. Rothenberg, Re-Thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize Reasonable Expectation of Privacy in the Public Space, 49 AM. U. L. REV. 1127, 1159 (2000).