Laywers and Technology

'Up-Skirt' Cameras Hold No Privacy in Public

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It is Saturday afternoon, and you are shopping at the local mall with your teenage daughter. Riding up the escalator, you notice a flash of light and a shady character lurking behind her. A closer looks reveals that the man is holding a small, barely noticeable camera in his hand. Suddenly it hits you: He is snapping shots underneath your daughter's skirt!

As disturbing as this scenario is, a new breed of "up-skirt" voyeurs are taking advantage of easily concealed, microcamera technology to secretly film unsuspecting victims in compromising positions. Some of these unsavory opportunists then publish the images on Web sites featuring up-skirt, down-blouse, and other candid shots of women in public places.

Over the past decade, legislators have responded to voyeuristic tactics by enacting laws prohibiting surreptitious photography in places where individuals would reasonably expect privacy. But most statutes focus on privacy expectations in private places, and failed to foresee considerable privacy invasions in public spaces through the development of new technology.

This statutory hole begs the question of whether a reasonable person wearing a skirt - or any piece of clothing, for that matter - in public expects privacy underneath.

'Glas'

In September, the Supreme Court in Washington state examined this question, and held that no privacy expectations exist in public places.

In *State v. Glas*, the court overturned the criminal conviction of two defendants charged under Washington's voyeurism statute.[1]† The court focused on the plain language of the statute, finding it did not criminalize hostile intrusions of a person's privacy interests, but only images taken in a place where someone would have a reasonable expectation of privacy.

Enacted in 1998, section 9A.44.115 of the Revised Code of Washington, classifies 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.[2]†

This statute limits 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.[3]†

The case against Sean Glas and Richard Sorrells began after each was convicted of voyeurism for secretly taking pictures underneath women's skirts.

Mr. Glas was spotted in a local mall acting suspiciously while walking near two women. Both women reported seeing a flash, hearing a click, and noticing a small, silver camera in Mr. Glas' hand.

Mr. Sorrells's arrest came after witnesses reported seeing him standing in a concession line videotaping underneath the skirts of young girls.

Appealing their convictions, both Mr. Glas and Mr. Sorrells argued that section 9A.44.115 was misapplied to them because the victims did not have reasonable privacy expectations in public places.

The court agreed, finding section 9A.44.115 did not prohibit up-skirt photography in a public place:

Considering that casual intrusions occur frequently when a person ventures out in public, it is illogical that this subsection would apply to public places. Casual surveillance frequently occurs in public. Therefore, public 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.[4]†

Beyond Private Places

Although common sense dictates that most of us expect privacy underneath our clothing, the court's decision simply limits its analysis to the four corners of section 9A.44.115.

Indeed, the court recognized that the Washington Legislature intended to prevent up-skirt photography and other privacy intrusions in public, but found that the plain language of section 9A.44.115 failed to achieve this goal. The court reached its conclusion in *Glas* no thanks to the statute's outdated emphasis on location, rather than on what most of us consider private.

To prevent similar outcomes in other states, legislatures must rethink privacy in light of emerging technology, and realize that privacy expectations go beyond private places.

New York is a good example. The state's current voyeurism statute (archived under the General Business Law) prohibits surreptitious videotaping only in private places, such as fitting rooms, restrooms, and rooms assigned to guests or patrons in a motel, hotel or inn.[5]† No mention is made about basic privacy expectations in public.

But not all states take this limited view.

California's voyeurism statute stands out from most by specifically focusing on the individual privacy invasion committed, not the place where that invasion occurred. Specifically, under §647(k)(1) of California's Penal Code:

[A]ny person who uses a concealed camcorder, motion picture camera, or photographic camera of any type, to secretly videotape, film, photograph, 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.[6]†

By prohibiting the act of recording "under or through the clothing" of the victim, the statute recognizes that a privacy violation may occur in public or private. This statute also abandons traditional notions of privacy and space, and is more in step with technological advances in surveillance systems designed to detect concealed items and eliminate physical barriers.

Still, the California law's major loophole is that the victim must be identifiable. For voyeurs, skirting this requirement is easy, since most seldom point their cameras at a victim's face.

Proof that visual recordings were made for personal sexual gratification presents another loophole, since employees of commercial Web sites would not fall within its scope.

A Transparent Future?

Of course, the naked truth is that advances in infrared technology, coupled with the push to develop better security screening systems, may someday allow people to see through clothing in normal lighting. Stripped of our ability to determine when and to what degree to expose our bodies, privacy in the traditional sense will cease to exist.

This should not be. The law needs to evolve, adapt, and sensibly interact with technological advances if it is to protect our common decency and individual integrity from obscene intrusions.

Most of us go to great lengths to hide specific body parts from public view. No one should be allowed to flagrantly disregard this fundamental human instinct by using technology to demean and disrobe an unsuspecting victim.

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FootNotes:

[1] ††† State v. Glas, 54 P.3d 147 (2002).

[2] ††† RCWA 9A.44.115(2).

[3] ††† RCWA 9A.44.115(1)(b).

[4] ††† State v. Glas, 54 P.3d at 150, 154.

[5] ††† N.Y. Gen. Bus. Law § 395-b (McKinney 2002).

[6] ††† California Penal Code § 647(k)(1).

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