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# Verdict

MARCH 12, 2014

JOANNA L. GROSSMAN AND LAWRENCE M. FRIEDMAN

## A Private Skirt in a Public Place: The Surprising Law of Upskirting



Raymond Boyd | Michael Ochs Archives

Transit police officers launched a sting operation to catch an alleged upskirter on a Boston trolley—a man who had been observed surreptitiously videotaping up the skirt of a woman sitting, facing him, across the aisle. A fellow rider watched as the “upskirter”—as people who do this are called—held his own smartphone at waist level and videotaped the crotch of the woman, who seemed unaware that she was starring in his film. The next day, a second rider reported the same activity—only this rider used her own cellphone to videotape the upskirt videotaping. Both riders reported the behavior to the transit police, who then sent an undercover female officer, in a skirt of course, to sit across from the

alleged upskirter.

Right on schedule, at the same time the next day, the upskirter focused his telephone camera on the crotch of the decoy officer, and held the phone steady for a minute. The red light on the phone gave away that it was videotaping. Transit police then approached the defendant, Michael Robertson, advised him to stop, engaged in a dispute about his turning over his phone, and ended up arresting him.

There was a problem with the undercover operation, however, and the court case that followed. What Robertson did was simply not a crime under Massachusetts law. In this column, we'll discuss the ruling in his case; the legislative response to an unpopular outcome; and the law and social norms relevant to upskirting.

### **The Unsuccessful Case Against Michael Robertson**

Robertson was charged with violating section 105(b) of the Massachusetts General Laws. That section provides:

Whoever willfully photographs, videotapes or electronically surveils another *person who is nude or partially nude*, with the intent to secretly conduct or hide such activity, when the other person *in such place and circumstance would have a reasonable expectation of privacy* in not being so photographed, videotaped, or electronically surveilled, and without that person's knowledge and consent, shall be punished by imprisonment in the house of correction for not more than 2 ½ years or by a fine of not more than \$5,000, or by both such fine and imprisonment. (emphasis added)

When Robertson, the subway creep, appealed his conviction, the Supreme Judicial Court of Massachusetts reversed the conviction and set him free. Robertson's lawyer had made two basic arguments under the statute. First of all, the women were not either "nude or partially nude." Quite the contrary, they were fully clothed. Second, he claimed, a public trolley is not a "place or circumstance" where a person "would have a reasonable expectation of privacy." Thus, he argued, even if Robertson did videotape up the skirts of female riders, without their consent, this was not a crime under the section quoted.

The highest court in Massachusetts agreed. A separate provision of the statute defines "[p]artially nude" as "the exposure of the human genitals, buttocks, pubic area or female breast below a point immediately above the top of the areola." The Commonwealth argued that the victim's private parts were "exposed" when Robertson created a photographic image of her private parts, even if covered by a layer of clothing. But the court obviously felt this was a strained reading of the statute: A woman in a subway car "who is wearing a skirt, dress, or the like covering these parts of her body is not a person

who is ‘partially nude,’ no matter what is or is not underneath the skirt by way of underwear or other clothing.”

The court did not have to go any further—this was enough to dispose of the case. But the court also considered Robertson’s second claim as well; and here too, the court agreed with him. The statute only applied to situations where the victim was in a private place—her home, for example—where she would “normally have privacy from uninvited observation.” But the trolley car was an extremely public place; it is, in fact, a place where users are routinely photographed and videotaped for security purposes. The Commonwealth argued that the “private” place was not the trolley car, but the “private” place on the body that was videotaped. But the court thought this was too much of a stretch. The law was drafted with Peeping Toms in mind. Hence, this element of the crime was also unsatisfied. Robertson would have to go unpunished.

### **Why *Robertson* Is Not an Outlier**

Most people—like the transit police in Boston—might assume that what Robertson did must be a crime. Even more so, perhaps, if he posted his videos on the Internet; and worst of all, if pictures of his victim’s face, making her identifiable, were included. But the law of upskirting is not at all clear. The problem is that the statutes, for the most part, were written in the good old days before upskirting (or “downblousing,” its counterpart) were technologically feasible. Hence, although the behavior is deeply offensive to common social norms, it often does not violate existing statutes on privacy or voyeurism.

These are usually Peeping Tom statutes; and they apply only if the voyeur has lewd intentions, and the victim is undressed. A Tennessee court dismissed the charges against upskirter Jesse Gilliland, who used a complicated contraption to hide a camera inside a shopping bag; he would then hold the contraption under a woman’s skirt to get a “good angle.” The statute in that state covered photographs that would “offend or embarrass an ordinary person;” but it also required that the photographs to be taken “in a place where there is a reasonable expectation of privacy.” A mall was a very public place; a place where no one could expect privacy, except maybe in a restroom or a dressing room.

The Washington State Supreme Court reached a similar conclusion with respect another mall-upskirter and a man who upskirted little girls in a concession line at the Seattle Center sports arena. The conduct was certainly disturbing, but the court, in *Washington v. Glas* (2002), came to the conclusion that a mall or an arena was a public place where “casual intrusions occur frequently when a person ventures out in public” and which could not “logically constitute” a location where a “person could reasonably expect to be safe from casual or hostile intrusion or surveillance.” A Virginia court relied on the same reasoning to dismiss a criminal complaint against a man who upskirted women at the

Fairfax County Fairgrounds.

## A Legislative Fix for an Unpopular Decision

The *Robertson* decision was widely reported; and it triggered a swift legislative response. In record time, the Massachusetts legislature introduced and passed **House Bill 3934** (<https://malegislature.gov/Bills/188/House/H3934>), *An Act relative to unlawful sexual surveillance*, to make clear that upskirting is, indeed, an unlawful invasion of privacy. The bill amends section 105 to include the following provision:

Whoever willfully photographs, videotapes or electronically surveils, with the intent to secretly conduct or hide such activity, the sexual or other intimate parts of a person under or around the person's clothing to view or attempt to view the person's sexual or other intimate parts when a reasonable person would believe that the person's sexual or other intimate parts would not be visible to the public and without the person's knowledge and consent, shall be punished by imprisonment in the house of correction for not more than 2 1/2 years or by a fine of not more than \$5,000, or by both fine and imprisonment.

Moreover, the bill amends the definition of “sexual or other intimate parts” to make clear that it applies whether the parts are naked or covered by clothing. Finally, the bill provides for enhanced penalties when the victim is a minor. The bill sailed through both houses of the legislature in a single day, and was signed by Governor Deval Patrick the next day.

The bill eliminates the two obstacles under prior law that had prevented the successful prosecution of upskirters. First, it makes clear that “intimate parts” can still be considered private when they are covered by clothing, as long as a reasonable person would believe that they were not visible to the public. Second, it clarifies that people can have a reasonable expectation of privacy even when they are in a public place. While this legislative move was prompted by one scandalous case, it brings the law more in line with our collective understandings of privacy.

## Upskirting and Social Norms about Privacy

Massachusetts now has tools to deal with the likes of Michael Robertson. And the lightning response of the legislature is good evidence, if evidence is needed, that Robertson's behavior was a violation of strongly-held social norms and understandings. Most people would simply label his behavior as disgusting; it was certainly behavior that women would consider deeply offensive.

Section 105, as originally formulated, included a crucial phrase: “reasonable expectation

of privacy;” and this is still part of the statute. In the law of privacy, that phrase represents a vital, foundational concept. Privacy is not and cannot be an absolute. It has to have limits. The phrase expresses one crucial limit. Yes, there is a right to privacy; but it has to be based on peoples’ reasonable expectations.

This norm, obviously, is worded in a very vague way. “Reasonable” is one of the law’s most notorious weasel-words. It hardly has any fixed or predictable meaning.

“Expectation” is even more problematic. It clearly refers to subjective feelings—what kind of privacy do people, on the whole, “expect?” And where do they expect to have it?

The phrase, legally speaking, stems from a Supreme Court case, ***Katz v. United States*** (<http://supreme.justia.com/cases/federal/us/389/347/case.html>) (1967), which had nothing to do with skirts, nudity, or (the not-yet-invented) smartphone. It had to do with wiretapping. Katz was in the habit of using a public phone booth to make phone calls about illegal wagering. The government bugged that phone; and used the results to arrest, convict, and sentence Katz. He appealed. Did this act of bugging amount to an illegal search and seizure, violating Katz’s constitutional rights? The Court said yes; and Justice Harlan, agreeing that this was an illegal search, talked about an “actual (subjective) expectation of privacy;” and one which “society is prepared to recognize as ‘reasonable.’”

The courts have wrestled with this notion ever since, especially in search-and-seizure cases. The Supreme Court has solemnly decided that there is no reasonable expectation of garbage privacy; the government can rummage through your garbage, without a warrant, looking for evidence of such crimes as drug use. One Billy Greenwood, of Laguna Beach, California, found this out to his grief in the 1980’s. And, in one startling case, authorities rented a private plane, and flew over the property of a man who was growing marijuana—he had put up a high fence, to keep out the nosy; but, of course, his crop was visible from the air. The Supreme Court was unwilling to say he had a reasonable expectation of privacy.

Obviously, expectations of privacy change over time, and quite dramatically. As the Massachusetts court said itself, we now know and accept surveillance cameras, watching us and filming us, on the subway, in banks, and in countless other places. Fifty years ago, the “expectations” might have been quite different.

Warren and Brandeis wrote their classic article on the right of privacy in 1890. The invention of the candid camera was one of the things that alarmed these two august, learned gentlemen. The new camera made it possible, for the first time, to take somebody’s picture without their permission—a fact that they found profoundly unsettling. Alas, cameras no long unsettle most people. They are, indeed, simply part of modern life—like metal detectors, pat-downs at airports, and the like. You can justify



most official invasions of privacy in terms of the fight on crime and on jihadists; and the public accepts these things.

But, again, there are limits. The human body is still a zone of privacy. Upskirting is not to be tolerated. Airport machines that take pictures of the body cause controversy; rummaging through suitcases does not. Emails at work, by and large, carry no privacy rights; and workplace surveillance is everywhere. But even here, sex and nudity have a special status. Peeping Tom statutes are, of course, common in the states. In California, you can be liable for “constructive invasion of privacy” if you try to record sounds or images of people who are engaged in a “personal or familial activity” so long as these people have a reasonable expectation of privacy. The statute is coyly worded, to be sure, but the phrase “personal or familiar activities” obviously does not refer to images of the family eating Wheaties or watching TV. And the California Labor Code specifically provides that whatever an employer’s other powers of supervision may be, that employer may not “cause an audio or video recording to be made of an employee in a restroom, locker room, or room designated by an employer for changing clothes, unless authorized by court order.”

So the human body is still a privacy frontier. You have a reasonable expectation of keeping it private—and hidden; from upskirters, hidden shower-room cameras, or the like. Of course, this is, in a way, up to you. If a woman decided to board a train or bus completely naked, it is not at all clear that she would be breaking any law (at least in some places). And if a woman actually did this, you can be sure that dozens of cellphone cameras would be clicking away the minute she was seen. Nor would these acts violate either the old or the new Massachusetts law, or the laws of any other jurisdictions.



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