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Verdict

October 2, 2012

Joanna L. Grossman and Lawrence M. Friedman

I See London, I See France: Upskirting and the Law



Prince William and his wife, Kate Middleton, were scandalized in recent weeks by photographs showing her sunbathing topless. William and Kate were not on a public beach. Rather, they were at a private villa in the south of France, where the young newlyweds were trying to have some quiet time. Moreover, the photos were taken from half a mile away, with a monstrously powerful zoom lens. When the couple learned of the photos, they brought a lawsuit against a French magazine that wanted to publish them, and succeeded in getting a French court to block publication of the pictures. By then, however, the photos were available on the Internet and in print in other countries.

William and Kate are, of course, international celebrities, whose every move is watched and photographed. Still, the French court felt that even a member of the royal family has a right to expect some privacy, and that the photographer had overstepped the bounds.

How Much Privacy Can—and Should—Celebrities Enjoy?

In a free society, among the many choices people may make are choices about what to keep secret and what to reveal. These choices can be a very individual matter. Some people would not tell how much money they make, even if you tortured them on the rack, while others are proud to brag about their wealth. Most people hide their bodies. Others—members of a nudist colony, for example—think that no one should be ashamed of his or her naked body. Other people go even further, eagerly riding in naked bike races and the like, and seem all too willing to show what they have in public.

Celebrities, alas, have fewer choices, and less privacy. Movie stars and politicians are hounded by cameramen. And, as Governor Romney found out to his dismay, a presidential candidate can never assume, even in a “private” setting, that nobody is listening, watching, or filming. Thus, the 47 percent heard what Romney said about them, as did most everyone who keeps up with the news.

Ordinary people have more privacy rights than celebrities. Partly this is because very little that they do is newsworthy. Nobody follows them around taking pictures, openly or secretly. Ordinary people have, in other

words, a good deal of what we might call “elective” privacy. That is, they have the right to choose to be left alone. Not to be photographed. Not to be interrogated. They have the right, too, to be anonymous: a member of the crowd, as unobtrusive as one minnow in a giant school of fish. So, if a stranger secretly takes photos or videos, up a woman’s skirt, you would suppose that this kind of behavior, occurring at, say, a shopping mall or county fair, would be a violation of the woman’s legal rights.

Yet the legal position on this issue is quite unclear with regard to “upskirting,” and its less common counterpart, “downblousing,” which may be a bit less awful. Courts have struggled to decide whether the law does or does not forbid this noxious behavior. The key question is whether upskirting, in a public place, collides with the woman’s expectation of privacy. Somewhat bizarrely, some courts have said no. In this column, we will look at recent decisions regarding upskirting; the effect (or non-effect) of voyeurism laws; and attempts to bring privacy law in line with modern technology.

“Upskirting” Scandals

There are many potential downsides to working in a law firm—stress, long hours, and lawyers who, if you believe lawyer jokes, are a humorless, nasty bunch. But for women at Jeremiah Johnson’s law firm in Olathe, Kansas, there was one more, and unexpected, downside: Johnson filmed them secretly, with a camera positioned under a desk. Johnson, according to allegations in a civil lawsuit and newly filed criminal charges, used the Cam-u-flage app on his smartphone to take “upskirt” footage of the women’s legs and underwear. According to the women, Johnson maintained a dress code policy: his female workers were strongly encouraged, if not required, to wear skirts and high heels at work. Johnson also, for no apparent reason, asked each of them to take turns working at one particular desk, which was designed to be suitable for upskirt surveillance and, as the women claim, was equipped with a camera.

The women’s civil lawsuit seeks damages for intentional torts like invasion of privacy as well as breach of fiduciary duty. (The complaint is available [here \(http://www.scribd.com/doc/99189312/Bashaw-Et-Al-v-Johnson-Complaint\)](http://www.scribd.com/doc/99189312/Bashaw-Et-Al-v-Johnson-Complaint).) Only time will tell whether these claims will stand up in court. The criminal charges are for “eavesdropping,” perhaps the only Kansas law the district attorney could try to pin on Johnson. Most states do not have statutes that fit the “upskirting” problem. And, as we discuss below, some existing voyeurism or privacy statutes have been held not to cover it.

Upskirting in a law firm may be a unique or at least very unusual problem. Most incidents occur in more public places—shopping malls, stores, county fairs, or just out on the street. For instance, police in Takoma Park, in Washington, D.C., have been looking for a man who upskirts on the streets near the Metro station. Police in Philadelphia have been looking for a serial upskirter who has surreptitiously filmed women in Bed, Bath and Beyond, at a mall, and in a clothing store dressing room. Target, Wal-Mart, Dollar Tree, and several other big-box stores have all had their own problems with upskirting.

The upskirters seem to have common techniques: Some crouch down pretending to get something from a lower shelf, while they point a camera up the skirt of an unsuspecting woman standing nearby; some have shoe cameras; some stitch cameras into shopping bags that can be brushed against someone without necessarily triggering suspicion. There are how-to websites for upskirting wannabes, and hundreds of websites where anyone can watch the fruits of various upskirting expeditions. Modern technology plays into the hands of these fetishists: smart-phones, with quiet, high-quality cameras built in, make it much easier for an upskirter to go about his business undetected.

Is Upskirting Illegal? Not Under Some Traditional Laws

Many states have a statute that makes it a crime to watch, photograph, or videotape someone who is in private place. But these “peeping Tom” statutes often apply only if the voyeur has lewd intentions and/or if the victim is in a state of undress. Would such a statute protect a woman who is upskirted on a city street?

The answer from some courts is no. Take the case of Jesse Gilliland of Nashville, Tennessee, for whom upskirting was a definite hobby. Jesse had “created a contraption whereby a camera was attached to the inside of

a binder with Velcro.” Jesse would then put the binder inside a shopping bag, and if he held the bag under a woman’s skirt at a “good angle,” he hoped to get the pictures he wanted. He was pursuing his hobby at the Cool Springs Mall in the Nashville area, when somebody called the police, and he was arrested. Worse luck followed: the police got a warrant to search his house for uploaded copies of the recordings he made at the mall, and there the police found evidence of another hobby, in the form of “a white, zippered, plastic bag” full of marijuana.

The marijuana was big trouble for Jesse. But, he argued, the police had no right to use the bag of marijuana as evidence against him, since the warrant itself was illegal. And why was the warrant illegal? Because, he said, his practice of “upskirting” was the excuse for the warrant; but “upskirting” (he claimed) was not a crime.

Under the local statute, it was an offense to photograph a person if this would “offend or embarrass an ordinary person,” and if the photo was taken “for the purpose of sexual arousal or gratification.” This conduct, however, had to occur “in a place where there is a reasonable expectation of privacy” (emphasis added). The Tennessee court overturned Jesse’s conviction. The “place” in question was not “under the woman’s skirt,” but in “the mall,” a very public space where no one could expect privacy, except maybe in a restroom or a dressing room. Since the women had no “reasonable expectation of privacy,” they had not been victimized by Jesse Gilliland. Jesse was therefore in luck—the marijuana found in his apartment could not be used by prosecutors, because the police never had probable cause to believe a crime had been committed. The search, then, was improper; and what was found could not be admitted into evidence.

Somewhat surprisingly, other courts have reached similar conclusions. In Washington State, in 1999, Sean Glas “took pictures up the skirts of two women . . . at the Valley Mall in Union Gap, Washington.” A woman “working in the ladies’ department at Sears” saw him “squatting or sitting on the floor,” with a “small, silver camera in his hand.” He also took pictures of the “undergarments” of Shantel Phillips, another employee of the mall. The court in this case had consolidated two cases of “upskirt voyeurism.” The other case involved one Richard Sorrells, who took films up the dresses of little girls in a concession line at the Seattle Center, an arena.

In both cases, the men claimed they had committed no crime. In Washington State, as in Tennessee, the local statute was limited to situations where the person filmed was “in a place where he or she would have a reasonable expectation of privacy.” The state supreme court, in *Washington v. Glas* (2002), reversed the conviction of these two men. Mall and area were public places, the court felt, and “casual intrusions occur frequently when a person ventures out in public.” A “public place,” therefore, could not “logically constitute” a location where a “person could reasonably expect to be safe from casual or hostile intrusion or surveillance.” Not that the court approved of the “disgusting” and “reprehensible” behavior of the defendants; but that behavior did not, in their view, violate the statute.

And, finally, in a Virginia case, one Charles L. C’Debaca practiced his “upskirting” at the Fairfax County Fairgrounds. His behavior was “contemptible,” the court felt, but it did not violate the law. The victim “had no reasonable expectation of privacy while standing on the public fairgrounds.”

Legislatures Step In: Laws Against Video Voyeurism

Most ordinary people would find the results of these three cases shocking. In a mall, you expect sales people to pay attention to you; but you do not expect to be accosted, photographed, or stalked—and you definitely do not expect some dubious creature to take pictures of your underwear.

Why, then, did the courts see otherwise? The courts read the wording of the relevant statutes quite narrowly. Courts tend to do this with criminal laws, to avoid punishing people for doing things they did not know were illegal at the time they did them. Yet these cases seem to involve clearly offensive conduct, which the perpetrators should, and likely did, know was morally wrong.

The cases we mentioned, and others like them, did prompt some legislatures to act. New provisions expanded the notion of privacy to include private parts of the body, even when they were covered by clothes, and even in public places.

What was wrong with the original laws and decisions was the focus on the place, and the emphasis on whether it was public or not.

Yes, a mall is a public place—indeed a very public place. But in a mall people think they have, at the very least, a “reasonable expectation of anonymity.” A person shops and strolls among strangers; and then goes home, expecting to be unremembered. Certainly, no one comes home from the mall expecting to be remembered by a crotch shot posted on the Internet for all the world to see. (Notably, many upskirters also include footage of the victim’s face before or after the upskirt shots.) The defendants upset their victims’ expectations, of at least a certain kind of privacy. Moreover, the upskirters acted as they did for “sexual gratification,” which is what Peeping Tom and voyeurism statutes were meant to punish. The body is private. Underwear is private. Whether to reveal “private parts” or their underwear is something a person has a right to choose for herself.

Newer, amended laws capture this notion of privacy more effectively. They still emphasize the notion of a “reasonable expectation of privacy,” but focus on the type of invasion instead of simply the place where it occurred. In Washington, for example, the legislature expanded its voyeurism law in 2003, the year after the ruling in *Glas*, to ban filming “the intimate areas of another person without that person’s knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.” This revised law is now clearly broad enough to cover the typical upskirting scenario.

In Tennessee, too, the legislature changed the definition of voyeurism. The law had spoken of “a place with a reasonable expectation of privacy”; but in 2010, an amendment simply dropped the reference to “a place.” It thus shifted the emphasis from the location to the nature of the intrusion. And the statute was now violated even if the individual was not “readily identifiable” in the images.

The Virginia legislature went right to the point: photos and films were illegal if they were “created by placing the . . . recording device in a position directly beneath or between a person’s legs for the purpose of capturing an image of the person’s intimate parts or undergarments when those intimate parts or undergarments would not otherwise be visible to the general public.”

Voyeuristic scandals also awakened the sleeping congressional giant. A federal law, the **Video Voyeurism Prevention Act of 2004** (<http://www.govtrack.us/congress/bills/108/s1301>), makes it a crime to “capture an image of a private area of an individual,” without that person’s consent, under “circumstances in which a reasonable person would believe that a private area of the individual would not be visible to the public, regardless of whether that person is in a public or private place.”

A person’s “private area” was defined to mean “the naked or undergarment clad genitals, public area, buttocks, or female breast;” and “female breast” was further defined as “any portion of the female breast below the top of the areola.”

The statute does not apply to invasions of privacy except for those that have a sexual tinge. And the statute exempts “any lawful law enforcement, correctional, or intelligence activity.”

There are similar or analogous statutes in a number of states. In California, for example, it is a crime to “secretly videotape, film, photograph, or record by electronic means” a person’s body or underwear, without that person’s knowledge or consent, in order to “gratify the lust, passions, or sexual desires” of the person recording, under “circumstances in which the other person has a reasonable expectation of privacy.”

In Canada, also, the criminal code prohibits observing or recording, secretly, images of a person who is “nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity,” if the situation gives rise to “a reasonable expectation of privacy.”

Every state in Australia, meanwhile, has specifically outlawed upskirting.

Judicial attitudes, too, may be changing. In a recent Ohio case, the defendant, Paul Dennison, took “nude photographs of men” in the locker room of the YMCA in Bryan, Ohio. The Ohio law made it a crime to “surreptitiously invade the privacy of another . . . in a state of nudity,” if done for sexual gratification.

Dennison's argument was that the men in the locker room, who changed clothes, showered, and the like, had no "reasonable expectation of privacy;" they "knowingly disrobed in front of him;" and the locker room was anyway a "public place." But the court refused to buy this argument.

Yes, the men undressed and showered in the YMCA, but they certainly did not expect to be filmed there, and did not want to be. Of course, the "victims" here were men; and a locker room is much less public than a mall. But the court's reasoning would cover most, if not all, cases of upskirting.

Conclusion

People who go out in public, on the streets, in malls, and the like, of course do open themselves up to "casual intrusions," which they may not like. Construction workers heckle and whistle at women; many men stare brazenly at women's (clothed) breasts. This can be uncomfortable, and disturbing. These behaviors might violate a social norm, but they are not against the law.

What makes upskirting "reprehensible," and now, in many jurisdictions, illegal, is not only the intimate areas captured in the image, but also the fact that photos are permanent. And a shameless upskirter can, if he wishes, share these images with the world, on the Internet, or on YouTube. Indeed, there are just such videos there, available for anyone who wishes to see.

Even in an age in which some people choose to live their lives on camera, most of us still value our privacy and the right to be left alone, even in crowded places. Most women would consider it a gross violation of privacy to be groped in a supermarket aisle. But these same women—and people in general—accept a kind of groping at airports, as they go through security. Customers might consider it intrusive if Macy's demanded the right to look into, or X-ray purses and briefcases; but perhaps not so intrusive at the entrance to a courthouse. Security is a catch-all excuse for certain violations of privacy; and it is one that people tend to accept.

The upskirters, however, have no such defense to fall back on. They may still have some freedom of action in states that lack laws against voyeurism, or those that rely on a stark distinction between public and private places. But the legal trend is against them and their habit. So, to those of you who might be tempted to try your hand (and your camera) at upskirting, we can only say: Watch out!



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