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Joanna L. Grossman

Maurice A. Deane School of Law at Hofstra University

Lawrence M. Friedman

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Verdict

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Joanna L. Grossman and Lawrence M. Friedman

Click Away: A Texas Law on “Improper Photography” Bites the Dust



Ronald Thompson was arrested in Texas and charged with 26 counts of “improper photography” in 2011. He was seen taking pictures of kids underwater at Sea World. After parents complained, he was arrested. A search of his camera revealed 73 photos of children in swimsuits, with the focus on their breasts and buttocks.

His behavior, according to the authorities, violated a provision of the Texas criminal code on “improper photography” (Tex. Penal Code, sec. 21.15). This provision outlawed photographs taken “without the other person’s consent,” and “with intent to arouse or gratify the sexual desire of any person.” Thompson’s defense: this law violated his rights under the First Amendment—rights to freedom of speech and expression. The Texas Court of Criminal Appeals agreed with him. An 8-1 majority of the Court of Criminal Appeals, in *Ex Parte Thompson*, held that the statute went too far and violated Thompson’s constitutional rights.

Upskirting, Creepshots, and Other Hazards of Public Spaces

Why was Thompson arrested? First of all, it was because parents at Sea World had complained. Did the parents know what was in the Texas Penal Code? Almost certainly not. They complained because a weird guy was behaving around children in a way that made them scared, angry, and uncomfortable.

In fact, Thompson’s actions were of a kind certain to disturb parents of kids. But his behavior did not fall into certain well-known and widely disliked categories. He was, for example, not an “upskirter,”—someone who surreptitiously takes photographs or videotapes up a woman’s skirt. Or a “downblouser,”—a person who prefers the top-down shots. Or a taker of “creepshots,” defined by the Urban Dictionary as pictures of “the butts of women in yoga pants,” taken without the knowledge or consent of these women.

There’s no catchy name for Thompson’s behavior. But the behavior he was charged with has a family resemblance to these other invasions of (a kind of) privacy. And, like them, technical developments—tiny and powerful cameras—made his actions possible. It has become easier and easier to take photos and videos when subjects are unaware. One might add that it also gets easier and easier to disseminate these photos rapidly and to a huge potential audience.

This was not always the case. A milestone in the history of photography was the invention of the candid camera,

in the late 19th century. Now for the first time, the camera could capture motion. No longer did people have to sit stock-still and pose for their portraits. But, by the same token, it was now possible to take a photo of a person without his or her consent. Brandeis and Warren, in their classic article on the right of privacy (1890), specifically mentioned this fact: the candid camera made invasions of privacy possible, in new and alarming ways. Since then, each “advance” in camera technology—zoom lenses, for example—has increased the danger.

Creepy People

The law is a pretty blunt instrument. One lesson of the *Thompson* case is how hard it is to legislate against, well, “creeps.” Civilized life depends on norms, customs, understandings, rules of etiquette and politeness—ideas about how people are supposed to behave, in public and in private. Most of us follow these rules, almost without thinking.

A woman, say, gets on a bus. A man sits across from her, and stares at her, without saying a word, for half an hour. This makes her very uncomfortable; but of course he has broken no *formal* law, only a “law” about the way “normal” people behave—a rule of (customary) behavior. He has, in a way, invaded her privacy. Of course, she is in public, riding on a public bus. But even in public, we more or less assume that we carry with us a kind of cocoon of personal space, a space of anonymity if not privacy, and one which is not to be violated, even by staring eyes. And because this man broke a rule of (customary) behavior, we become suspicious. What is he up to? Is there something wrong with this guy? Is he mentally ill? Is he dangerous? Can something be done?

Our man on the bus used only his eyes. Suppose he used a camera; and snapped photo after photo of the woman on the bus. This would make her, we suppose, even more uncomfortable. He was violating some sort of rule, some sort of expectation. She would have to wonder: why is he doing this? What is he after? Is he some sort of “pervert?”

The statute in *Thompson*, taken literally, could well apply to our man on the bus with the camera. Texas Penal Code § 21.15(b), aimed at “improper photography or visual recording,” made it an “offense” when a person

1. photographs or by videotape or other electronic means records, broadcasts, or transmits a visual image of another at a location that is not a bathroom or private dressing room:
 1. without the other person’s consent; and
 2. with intent to arouse or gratify the sexual desire of any person.

One imagines the “sexual desire” in question is usually the photographer’s. Of course, we would have to prove that the photographer had some sort of sex motive for taking these pictures. If he was taking photos of women in bikinis on the beach this would be easier, one supposes, than pictures of a woman on a bus.

To be sure, the human race would quickly die out, unless people were allowed to “arouse . . . the sexual desire” of other people; but there is a time and a place for everything, and that principle applies very much to sexual behavior. Rules monitor and control this behavior. The fundamental rule (legally and socially) is that sex depends on free, voluntary consent. This is the age of the sexual revolution; a permissive age; almost anything done *with* consent (by adults) is allowed. And “freedom of expression” means that almost anything (sexual) is allowed, in books, in art works, in the movies. As a result, sex talk and sex images are everywhere.

But this makes parents nervous. It makes women, in general, nervous, particularly about “weirdos” and “creeps”—people whose behavior violates the norms we expect from other people—even when we are out in public, on buses and trains, on the street, or taking the sun or swimming at a beach.

The Law Steps In

This sense of uneasiness lies behind the Texas statute. This same sense of uneasiness has led, in general, to a flurry of legislation, which is designed to put an end to behavior that makes people (justifiably) uncomfortable. In recent years, states have either tried to apply existing privacy laws to punish upskirters and the like or have passed new laws directly targeting these people. The efforts have met with mixed results.

In Massachusetts, for example, transit police set up a sting operation against an alleged upskirter on a Boston trolley; riders had seen a man videotaping up the skirt of a woman sitting across from him. The sting was successful; the man made the mistake of upskirting a woman who turned out to be an undercover officer. But the state’s highest court threw out the man’s conviction. The statute in question made it a crime to take photos or videos of a person who is “nude or partially nude” and who “in such place and circumstance would have a reasonable expectation of privacy. . . .” In *Commonwealth v. Robertson*, which we discuss in more detail [in another column \(http://verdict.justia.com/2014/03/12/private-skirt-public-place-surprising-law-upskirting\)](http://verdict.justia.com/2014/03/12/private-skirt-public-place-surprising-law-upskirting), the Supreme Judicial Court held that the statute on its face did not criminalize upskirting. Clothed women on public transit were not “nude or partially nude,” and a trolley is not a place where one should expect privacy. In fact, public transportation is a place where people should be expected to be photographed without explicit consent, for security purposes if for no other reason. At least, this was the court’s point of view.

Almost immediately, the Massachusetts Legislature passed a new law to make sure future upskirters could be prosecuted. The new provision speaks of images under or around a person’s clothing “when a reasonable person would believe that the person’s sexual or other intimate parts would not be visible to the public.” It shifts the expectation of privacy from a person’s surroundings—for example, a subway—to parts of the body.

In some cases in other states, police and even judges were surprised to find that their privacy laws did not cover upskirting. The highest court in Washington State concluded, in *Washington v. Glas* (2002), that a man who upskirted young girls at a sports arena was not guilty of invasion of privacy because he filmed up the skirts of people who had ventured out in public—and thus could not “reasonably expect to be safe from casual or hostile intrusion or surveillance.”

Whatever you think of the legal reasoning in these cases, they seem factually naïve. We might expect to be filmed and watched in public—entering a courthouse, for example—but do we expect someone to try to photograph intimate parts of the body? We expect certain behavior from other people in public places; and upskirting certainly does not fall into the category of behavior we reasonably expect—and tolerate.

Texas’s Law and *Ex Parte Thompson*

Unlike the statutes in *Robertson* and *Glas*, which were drafted to protect against invasions of privacy in *private* places, the Texas provision under which Thompson was charged contained no such limitation.

On its face, the law covered upskirting, downblousing, and creepshots; these images are always taken without consent. And the photographer surely does intend to arouse and satisfy his sexual desires. But the statute, in the court’s opinion, went far beyond upskirting and the like; it was much broader, and that was a fatal flaw.

The court began by explaining that photographs were in general protected speech: they were as “expressive”—and just as much under the wing of the First Amendment—as books, plays, movies, and paintings. The State argued that, even if a photo or videotape is “expressive,” the *act* of taking a photo or videotape is not. And the statute does not criminalize the photo or videotape; only the act of taking them—if this is done without consent and with the intent to arouse or gratify sexual urges. The court dismissed this argument. The right to disseminate “speech” necessarily includes the process of *making* the speech or expression—creating a tattoo, drawing the picture, and so on. “The camera,” the Texas court wrote, “is essentially the photographer’s pen or paintbrush.” Like “applying pen to paper,” the “process of creating the end product cannot reasonably be separated from the end product for First Amendment purposes.” So, the act of taking a photo deserves the same protection as the photo itself.

The State also argued that the clause about intent to arouse or gratify the sex urge somehow took the behavior out from under the protection of the First Amendment. But there is intent and intent. The intent to convey a message of protest through flag burning actually adds to the expressive nature of the conduct—and brings it even more obviously within the ambit of the First Amendment. And while intent to threaten or intimidate can do the opposite—yelling “fire!” in a crowded theater is not protected speech—the mere existence of an intent requirement does not take behavior out of the orbit of the First Amendment. The intent requirement here was especially bad: it is an attempt to regulate thought, which the government must not do.

The ultimate question, then, is under what conditions can the state prohibit an act which involves behaviors normally protected by the First Amendment. The court decided the restriction in the statute was “content-based.” (It did not prohibit all photographs without the subject’s consent, but only those taken with the intent to arouse of gratify sexual desire.) For this reason, the court applied “strict scrutiny;” and under this heightened standard of review, the statute could not survive. Content-based regulations of speech are presumptively invalid and can only be sustained if the government proves the regulation is the “least restrictive means of achieving the compelling government interest in question.”

The court conceded that the state has a legitimate right to protect “the substantial privacy interests” that are “invaded in an intolerable manner when a person is photographed without consent in a private place, such as the home, or with respect to an area of the person that is not exposed to the general public, such as up a skirt.” But the statute is not restricted to these invasions and contains no language requiring that a person’s privacy be invaded at all. The provision applies, broadly, to “any non-consensual act of photography or visual recording, as long as it is accompanied by the requisite sexual intent.”

The court concluded that less restrictive alternatives could promote the state’s interests in protecting privacy equally well. It could, as other states have, designate specific places and manner—such as “in a private home” or “underneath a person’s clothing.” (The recently adopted Massachusetts statute might be a model for reform.) Or the provision could condition violation on an actual invasion of privacy. But, as written, the statute regulated expressive conduct too broadly; and failed its constitutional test. The statute court, the court observed, “easily be applied to an entertainment reporter who takes a photograph of an attractive celebrity on a public street.” And given our complete embrace of celebrity culture, we could not accept a law with such breadth.

So Ronald Thompson goes free. Free, presumably, to go to some other swimming pool or beach, and take his photos (unless he has learned a lesson). Texas, too, could change its statute, and make such things as upskirting illegal; this behavior is very clearly an invasion of privacy, and the statute would probably be upheld. Could it draft a statute that would make Thompson’s behavior illegal? Maybe. Could it draft a statute that would make it illegal to snap photo after photo of a pretty girl on the bus? Less likely. Dirty minds are beyond the power of the law to reach.

The real issue the case suggests is this: can the law in any practical way outlaw behavior that is weird, that “creeps people out,” that makes them uneasy, and, indeed, behavior that strongly suggests some underlying pathology. There are laws against “loitering”—in certain places, like near schools, or in public restrooms, or generally on the streets, in a suspicious way. The parents of the children that Thompson photographed were no doubt disgusted by the court’s decision; and it would be hard to blame them. They wanted him put in jail. One father, in San Antonio, in 2013, noticed a convicted sex offender taking photos and videos of cheerleader. He alerted the police, and the man was arrested. This father thought the decision in Thompson’s case was “not right”; people shouldn’t “think they can get away with” that kind of behavior.

But apparently they can get away with it, at least for now. A law that reaches behaviors like Thompson’s without crossing over the invisible boundary of freedom of expression is very hard to draft. The Texas statute simply did not pass this test.



Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of [Inside the Castle: Law and the Family in 20th Century America](#) (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of [Gender Equality: Dimensions of Women's Equal Citizenship](#) (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

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Lawrence M. Friedman is the Marion Rice Kirkwood Professor of Law at Stanford University and an internationally renowned legal historian. Professors Grossman and Friedman are co-authors of [Inside the Castle: Law and the Family in Twentieth Century America](#) (Princeton University Press 2011) and working together on a social history of privacy law.

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