

Combating Gender Privilege and Recognizing a Woman's Right to Privacy in Public Spaces: Arguments to Criminalize Catcalling and Creepshots

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INTRODUCTION

This comment explores two permutations of entitlement to women's attention and bodies in public: street harassment ("catcalling") and upskirt and down-blouse photography (collectively, "creepshots"). Part I is devoted to discussing street harassment—its harms (on an individual and societal scale), legal solutions, and the limits of the law. Part II is devoted to creepshots—their harms, the evolution of the perpetrator, and legal solutions. Both catcalling and creepshots disproportionately impact women. As such, an acknowledgement of gender privilege¹ is a necessary prerequisite to exploring the harms and possible remedies of street harassment and up-skirt photography. There have been various attempts by men (and some women) to delegitimize these harms,² but this is best understood as a failure and refusal to acknowledge gender privilege. While the causes of this behavior are up for debate, the harms of catcalling and creepshots are undeniable—ranging from anxiety to escalated incidents of sexual assault and stalking.³ Accordingly, these behaviors should be criminalized, regardless of any First Amendment issues they may raise.

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1. For the purposes of this note, I reject the nomenclature of "male privilege" because it excludes folks that identify or present as masculine of center, but not male, that nonetheless benefit from gender privilege.

2. See, e.g., author Steve Santagati said in CNN interview that "[p]olitical correctness has gone too far. If you don't like it as a woman, turn around and tell him to shut up. Stand up for yourself. Act like a strong woman." Abby Ohlheiser, *That Time CNN Asked a 'Bay Boy' Expert to Give His Thoughts on Catcalling*, WASH. POST (Nov. 3, 2014), <http://www.washingtonpost.com/blogs/style-blog/wp/2014/11/03/that-time-cnn-asked-a-bad-boy-expert-to-give-his-thoughts-on-catcalling/>.

3. See *infra* pp. 186–89 and 197–99.

PART I: "STATE V. STREET HARASSER"

[S]treet harassment occurs when a woman in a public place is intruded on by a man's words, noises, or gestures. In so doing, he asserts his right to comment on her body or other feature of her person, defining her as object and himself as subject with power over her.⁴

Recently, a video titled "10 Hours of Walking in NYC as a Woman" went viral and brought much-needed attention to the issue of street harassment.⁵ Spanning one minute and fifty-six seconds, the video features numerous men harassing a young woman as she walks through New York City.⁶ Created by Hollaback!, an anti-street harassment movement and organization, the video has been heralded as bringing to light an important women's rights issue. But it has not been without controversy: namely that it edited out white men that harassed the actress, leaving mostly black and Latino men to play the on-screen villains.⁷ Regardless of the merits of the marketing and editing errors, its impact is unquestionable, logging over 37.5 million views.⁸ Now that people are talking about the problem, what can we do to address the issue?

A. THE HARMS OF STREET HARASSMENT

Before delving into solutions, we must first look at the harms resulting from the conduct to verify the need for criminalization. According to Cynthia Bowman, two broad themes in women's accounts of street harassment are invasion of privacy and fear of rape.⁹ However, in exploring experiences, it is important not to make generalizations or

4. Deborah Tuerkheimer, *Street Harassment as Sexual Subordination: The Phenomenology of Gender Specific Harm*, 12 WIS. WOMEN'S L.J. 167, 167 (1997); see Deirdre Davis, *The Harm That Has No Name: Street Harassment, Embodiment, and African American Women*, 4 UCLA WOMEN'S L.J. 133, 138–40 (1994) (street harassment has five characteristics: (1) it occurs in public, (2) involves unacquainted members of the opposite sex, (3) a response that is expected is unacceptable to the harasser, (4) remarks involve parts of the body not available for public examination, and (5) comments are often derogatory).

5. Rob Bliss Creative, *10 Hours of Walking in NYC as a Woman*, YOUTUBE (Oct. 28, 2014), <https://www.youtube.com/watch?v=b1XGPvbWn0A> [hereinafter *10 Hours of Walking*]. See also *The Daily Show With Jon Stewart: Jessica's Feminized Atmosphere* (Comedy Central broadcast Oct. 2, 2014), available at <http://thedailyshow.cc.com/videos/5ndnit/jessica-s-feminized-atmosphere>; *You Won't Believe How Many Times This Woman Gets Harassed in 10 Hours*, HOLLABACK! (Oct. 27, 2014), www.ihollaback.org/blog/2014/10/27/new-street-harassment-psa/.

6. *10 Hours of Walking*, *supra* note 5.

7. Hanna Rosin, *The Problem with that Catcalling Video: They Edited Out the White Guys*, SLATE (Oct. 29, 2014, 4:37 PM), http://www.slate.com/blogs/xx_factor/2014/10/29/catcalling_video_hollaback_s_look_at_street_harassment_in_nyc_edited_out.html.

8. Doug Gross, *YouTube's Most Popular Video of 2014 Was . . .*, CNN (Dec. 9, 2014), <http://www.cnn.com/2014/12/09/tech/web/top-youtube-videos-2014/>.

9. Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 535 (1993).

oversimplify experiences—there is no monolithic experience, and other women may have different experiences. For example, Deirdre Davis explains that the experiences of African-American women differ from experiences of white women:

[D]uring and as a result of slavery, African American women have experienced the pre-existing context that enables street harassment to be a factor in [their] sexually terroristic environment. Consequently, the psychological oppression of street harassment has a different—not a double—impact on African American women given their embodiment as indivisible beings. Street harassment evokes the institutional memory of slavery.¹⁰

Alternatively, for a woman that does not identify as heterosexual, street harassment “may function to deny her sexual identity”; i.e., she is forced to be the object of male desire when she has no interest in doing so.¹¹ Of course this issue becomes more complicated for queer-identified folks of color.

1. Individual Experiences

Taken in isolation, a single instance of street harassment may harm a victim physically or emotionally.¹² “Physical reactions to street harassment range from increased muscle tension, stopped breathing, numbness, dizziness, nausea, constriction of the throat, trembling, rise in bile in the throat and pounding heart.”¹³ But in addition to these temporary physical pains, street harassment has escalated into life-threatening attacks, resulting in the death of a woman in Detroit,¹⁴ a man slashing a woman’s throat in Queens,¹⁵ and a man stabbing another man nine times in San Francisco after being asked to stop harassing the victim’s girlfriend.¹⁶

Street harassment causes mental and emotional harm because it makes the victim “angry, frustrated, confused, [and] humiliated.”¹⁷ Subsequent efforts to “mask feelings of invasion, anger, humiliation, and fear [result in]

10. Davis, *supra* note 4, at 163.

11. Tiffanie Heben, *A Radical Reshaping of the Law: Interpreting and Remediating Street Harassment*, 4 S. CAL. REV. L. & WOMEN’S STUD. 183, 193 (1994).

12. *Id.* at 204.

13. *Id.* at 201.

14. Danielle Young, *Shot Down: Mother of Three Killed Because She Said No to a Man’s Advances*, MICH. CHRON. (Oct. 8, 2014), <http://michronicleonline.com/2014/10/08/shot-down-mother-of-three-killed-because-she-said-no-to-a-mans-advances/>.

15. Aaron Feis, *Woman’s Throat Slashed After Rejecting Man’s Advances*, N.Y. POST (Oct. 8, 2014, 5:48 AM), <http://nypost.com/2014/10/08/womans-throat-slashed-after-rejecting-mans-advances/>.

16. Vivian Ho, *S.F. Man Stabbed by Catcaller Has History of Kind Acts*, SFGATE.COM (Nov. 20, 2014), <http://www.sfgate.com/crime/article/S-F-man-stabbed-by-catcaller-has-history-of-kind-5906877.php>.

17. Tuerkheimer, *supra* note 4, at 189.

emotional distress and feelings of disempowerment.”¹⁸ The negative feelings and inability to escape them creates a “cycle of victimization and silence” that is impossible to escape.¹⁹ In addition, street harassment “can remind women of their vulnerability to rape, and it can feel retriggering to survivors of sexual assault and rape.”²⁰ This fear of future rape is not unfounded, because street harassment is sometimes used as rape-testing.²¹

While harms to individuals are significant, this micro-lens has its own limitations and minimizes the prevalence of street harassment. Individual instances of street harassment do not occur in a vacuum; a simple “interaction between one man and one woman on the street [nonetheless] implicates gender and hierarchy[,]”²² and failure to acknowledge and address this reinforces the objectification and subordination of women.²³ Accordingly, street harassment is best understood as a gender-specific harm.

2. Street Harassment as Gender-Specific Harm

According to one survey of 2000 people,

Sixty-five percent of women reported experiencing at least one type of street harassment in their lifetimes, [m]ore than half (57%) of all women had experienced verbal harassment, and 41% of all women had experienced physically aggressive forms, including sexual touching (23%), following (20%), flashing (14%), and being forced to do something sexual (9%).²⁴

Given the prevalence of street harassment against women,²⁵ street harassment is best understood as a gender-specific harm, rather than

18. Tuerkheimer, *supra* note 4, at 190.

19. *Id.* at 191.

20. Maryland Coalition Against Sexual Assault, *Street Harassment Fact Sheet*, http://www.mcasa.org/_mcasaWeb/wp-content/uploads/2011/07/Street-Harassment.pdf; see also Olatokunbo Olukemi Laniya, *Street Smut: Gender, Media, and the Legal Power Dynamics of Street Harassment or “Hey Sexy” and Other Verbal Ejaculations*, 14 COLUM. J. GENDER & L. 91, 92 (2005) (“... although I’m not physically raped, psychically I am, and I ache from it.”).

21. “[A] rapist typically will target a victim who is expected to show the least amount of resistance. A potential rapist may use tactics such as abusive language, vulgar gestures, and invasion of the woman’s personal space to determine whether or not a woman will fight her attacker.” Laniya, *supra* note 20, at n.64.

22. Tuerkheimer, *supra* note 4, at 182.

23. See generally Tuerkheimer, *supra* note 4, at 183. See also Davis, *supra* note 4, at 140 (suggesting that sexual harassment plays a role in sexual terrorism, and that “[s]exual terrorism and violence play crucial roles in the ongoing process of female subordination.”).

24. STOP STREET HARASSMENT, UNSAFE AND HARASSED IN PUBLIC SPACES: A NATIONAL STREET HARASSMENT REPORT 6 (2014) [hereinafter STOP STREET HARASSMENT REPORT].

25. *Id.* (acknowledging that men can and do fall victim to street harassment, but street harassment disproportionately affects women. In comparison to 65% of women that have experienced street harassment, 25% of men have experienced street harassment.).

unrelated and isolated incidents.²⁶ Indeed, it is also best understood as a form of social control that results in “exclusion, domination, invasion, and oppression—demonstrat[ing] street harassment’s genderization of the street.”²⁷

B. A LEGAL SOLUTION TO CATCALLING

The harms and widespread nature of street harassment make it a good candidate for criminalization. While many states already have anti-stalking and harassment statutes, the primary weakness of these laws is that they require a pattern, which is difficult to establish given the nature of street harassment. Street harassment by its very definition is an interaction that occurs between strangers.²⁸ Given the prevalence of the harms of street harassment and the inapplicability of anti-stalking and general harassment statutes to the crime of street harassment, a law that specifically targets street harassment is necessary.

One example of an early adopter is Kansas City. On October 2, 2014, Kansas City’s City Council adopted an anti-street harassment ordinance:

(b) No person shall, for the purpose of intimidating or injuring any person riding a bicycle, walking, running, or operating a wheelchair or for the purpose of intimidating or injuring such person’s service animal:

...

(2) Threaten such person; or

(3) Sound a horn, shout or otherwise direct loud or unusual sounds towards such person or toward such person’s service animal; or

(4) Place such person in apprehension of immediate physical injury; or

(5) Engage in conduct that creates a risk of death or serious physical injury to such person or such person’s service animal.²⁹

Kansas City’s ordinance may serve as a model for other cities or states. States and local governments can rely on their police power to restrict undesirable and dangerous behavior.³⁰ There is limited information on how

26. See generally Tuerkheimer, *supra* note 4, at 167.

27. Davis, *supra* note 4, at 142.

28. STOP STREET HARASSMENT REPORT, *supra* note 24, at 8.

29. Kansas City, Mo., § 50-205 Harassment of a Bicyclist, Pedestrian or Wheelchair Operator (Oct. 2, 2014), available at <http://cityclerk.kcmo.org/liveweb/Documents/Document.aspx?q=F3p9KIyRAP9N1MB5W6WTmybwD2DrU5iPCWsS10rB11fiFEVoGKjGsHKEW4P%2BxBH%2BBi4qArUYxRDg5S7bIZ21DQ%3D%3D>.

30. The police power belongs to the states or the people, through their local governments given that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. CONST. amend. X.

effective the law is, but Kansas City's City Attorney's Office already anticipates difficulties with prosecuting offenders because "victims will still have to help police identify the violators, including providing driver's licenses and other evidence."³¹ A driver that harasses a bicyclist or pedestrian is not likely to stick around and cooperate. Indeed, the offender is likely relying on the bicyclist or pedestrian's inability to catch up.

C. THE LIMITS OF THE LAW

While advocates of an anti-catcalling statute are considering the possibilities, many people have critiqued the idea as ineffective and discriminatory.

1. Who needs laws anyway?

Some think that a statute is entirely unnecessary, and most criticisms fall in three categories: (1) opinions that criminalizing street harassment is too extreme, (2) questions about what enforcement would look like, and (3) whether enforcement would be effective. Some commenters suggest that criminalizing street harassment goes too far—"Hollaback is right to shine a light on these creepy comments from creepy strangers. We should be offended. Such behavior should be considered socially unacceptable. But let's not get the law involved. Because while calling a passerby 'sexy' may be uncouth, it shouldn't be illegal."³²

However, this failure to acknowledge or downplay harms to women as unworthy of attention or legislation is nothing new.³³ For example, domestic violence was long considered an inappropriate area for state intervention, as evidenced by a failure to criminalize and enforce laws once they were adopted:

The Anglo-American common law originally provided that a husband, as master of his household, could subject his wife to corporal punishment or "chastisement" so long as he did not inflict permanent

31. Lynn Horsley, *Kansas City Council Takes Aim at Threats Against Walkers, Cyclists*, KANSAS CITY STAR (Oct. 2, 2014), <http://www.kansascity.com/news/government-politics/article2416421.html>.

32. Lizzie Crocker, *Street Harassment Shouldn't Be a Crime*, DAILY BEAST (Oct. 29, 2014), <http://www.thedailybeast.com/articles/2014/10/29/street-harassment-shouldn-t-be-a-crime.html>.

33. Tuerkheimer, *supra* note 4, at 171–72 ("Women's distinctive, gender-specific injuries are and have in the recent past been variously dismissed as trivial (sexual harassment on the street); consensual (sexual harassment on the job); humorous (non-violent marital rape); participatory, subconsciously wanted, or self-induced (father/daughter incest); natural or biological, and therefore inevitable (childbirth); sporadic, and conceptually continuous with gender-neural pain (rape, viewed as a crime of violence); deserved or private (domestic violence); non-existent (pornography); incomprehensible (unpleasant and unwanted consensual sex); or legally predetermined (marital rape, in states with the marital exemption) . . . [this] is more than coincidental. The category of gender-specific injuries is comprised of harms that men do not experience, but either inflict or are somehow implicated in inflicting.").

injury upon her . . . [and even] after courts repudiated the right of chastisement, the American legal system continued to treat wife beating differently from other cases of assault and battery.³⁴

While the law originally conferred a man with the right to perpetrate domestic violence with impunity, in 2015 we have come to expect that domestic violence will be prosecuted rather than swept under the rug.³⁵ “If the law has an appropriate role prohibiting sexual harassment, violence and rape in our homes, workplace and universities, why not the street? Shouldn’t gender equality exist everywhere?”³⁶ Certainly, there are significant differences between domestic violence and street harassment, such as the relationship between the perpetrator and victim, and consequently the nature of the associated harms. Nevertheless, the relatively noncontroversial criminalization of domestic violence suggests that there is hope for someday developing a similar view of street harassment.

“Beyond the challenge of litigating stray comments, it is hard to see how the law could reasonably determine what is and what is not an appropriate come-on.”³⁷ Another significant question is how the line between striking up a conversation with a stranger and street harassment would be drawn. While targeting the type of speech, such as sexualized speech, may amount to viewpoint discrimination,³⁸ perhaps a line can be drawn at how objectively offensive the comments are and using how a reasonable woman feels about the comment as a benchmark. Using a strict and non-subjectivized reasonable person standard would likely result in the dismissal of many claims as merely complimentary.³⁹ However, “[p]urportedly ‘complimentary’ comments define a woman by her body’s value as a giver-of-pleasure to the male subject.”⁴⁰ Further, the relevant viewpoint is that of the victim, not that of the perpetrator, and “it is not possible for women to interpret obscenities and sexual propositions as complimentary.”⁴¹ While facially friendly comments such as “you’re

34. Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2118 (1996).

35. See, e.g., the story of Ray Rice assault on his former fiancée and current spouse. *Prosecutor’s Office: Correct Decision*, ESPN (Sept. 9, 2014), http://espn.go.com/nfl/story/_/id/11495795/prosecutor-office-defends-ray-rice-decision. A lengthier discussion of domestic violence is outside the scope of this comment.

36. Laura Beth Nielsen, *Street Harassment Law Would Restrict Intimidating Behavior*, *N.Y. TIMES* (Nov. 3, 2014), <http://www.nytimes.com/roomfordebate/2014/10/31/do-we-need-a-law-against-catcalling/street-harassment-law-would-restrict-intimidating-behavior>.

37. E.W., *Can Decency Be Regulated?*, *ECONOMIST* (Nov. 7, 2014), <http://www.economist.com/blogs/democracyinamerica/2014/11/catcalls-and-street-harassment>.

38. *Infra* p. 204.

39. See, e.g., Olheiser, *supra* note 2 (suggesting that the comments featured in *10 Hours of Walking* were merely complimentary).

40. Tuerkheimer, *supra* note 4, at 184.

41. Heben, *supra* note 11, at 212.

beautiful” or commands to “smile” are not facially derogatory, they are predicated on gender privilege, namely a man’s ability to access a woman’s body and attention. Even if they appear to be relatively benign in comparison to violent attacks, they are nonetheless offensive.

Professor Laura Beth Nielsen recently suggested that such a law could be consistent with our First Amendment jurisprudence⁴² and could take many forms. “Violation of the law could be a tort, meaning a woman could sue her harasser; an infraction, like a ticket with a fine; or even a misdemeanor.”⁴³ Of the three options offered by Professor Nielsen,⁴⁴ the tort cause of action appears to be the least effective. Providing a tort cause of action would allow victims to pursue justice on their own, but access to recovery would be limited to those that know they can sue and have the resources to bring and sustain a suit against a stranger. The effectiveness of the infraction or misdemeanor options depends on whether law enforcement is nearby or available to catch offenders in the act of catcalling. In turn, the strictness of enforcement will determine the deterrent effect of the law.

Presumably, such efforts to combat street harassment through a city ordinance would function like parking enforcement in the minds of perpetrators—the risk of returning to a sixty-dollar ticket affixed to one’s windshield is usually a sufficient deterrent to not violate the governing ordinance. However, there may be a disparity in the way that parking violations are handled and how street harassment violations could be handled because there are entire subsets of law enforcement dedicated to parking enforcement. Perhaps a similar fleet of street harassment officers could be dispatched.

Assuming *arguendo* that enforcement is wholly ineffective, merely having a law on the books that victims can point to could still help empower victims of street harassment.⁴⁵ “[A]rticulating a right to be free from street harassment may be understood to advance the development of a vision of true equality and personhood.”⁴⁶ A final question regarding enforcement is whether incidents will be reported because of distrust of the police and legal system.⁴⁷ However, “[e]ven if rarely enforced, the symbolism of a law weighing in on the side of equality would have powerful effects.”⁴⁸

42. See also Bunkosal Chhun, *Catcalls: Protected Speech or Fighting Words?*, 33 T. JEFFERSON L. REV. 273, 273–75 (2011).

43. Nielsen, *supra* note 36.

44. *Id.*

45. See Heben, *supra* note 11, at 212.

46. Tuerkheimer, *supra* note 4, at 200.

47. Heben, *supra* note 11, at 215–18; see also Tatyana Fazlalizadeh, *Telling Our Stories to Change the Culture of Harassment*, N.Y. TIMES (Oct. 31, 2014, 5:52 PM), <http://www.nytimes.com/roomfordebate/2014/10/31/do-we-need-a-law-against-catcalling/telling-our-stories-to-change-the-culture-of-harassment> (“I don’t think this is an issue that will be solved by assigning it to the police. Because police sexually harass women, too. Some women are wary of bringing the police into their communities because of fears of brutality and profiling.”).

48. Nielsen, *supra* note 37.

2. Issues of Intersectionality: Gender vs. Race vs. Class

a. Pitting Women against Men of Color

One worry about the adoption of an anti-catcalling statute is that it would be used mostly against men of color. “The stereotype of oversexualized black and Latino men undergirds the street harassment issue.”⁴⁹ The “Ten Hours of Walking” video was critiqued because it “edited out nearly all of the harassment from white men.”⁵⁰ As one Twitter user inquired: “If we made street harassment illegal, wouldn’t enforcement disproportionately target black men?”⁵¹ The creation of any law raises questions as to whether it can be used as a tool to contribute to the incarceration of people of color and feed into the prison-industrial complex, but this larger issue is beyond the scope of this comment.

Sidestepping the issue of criminalization generally and returning to the context of street harassment, some suggest that “men of color are not able to reap the material and social rewards for their participation in patriarchy. In fact, they often suffer from blindly and passively acting out a myth of masculinity that is life-threatening. Sexist thinking blinds them to this reality. They become victims of the patriarchy.”⁵² Indeed, men who are racially or socioeconomically marginalized may lash out because of their own victimization and harass women in an attempt to reclaim a sense of power.⁵³

Men of color catcall vocally and visibly on the sidewalk because they have to—not that there’s ever excuse for harassment. They need the “Sexy!” and “Smile!” to create the illusion of dominance in shared public spaces that social constructs and institutional racism have never afforded them control over. White men, on the other hand, have no use for that sort of catcalling. They marked their territory centuries ago.⁵⁴

As a result, harassment by white men may not occur in the street because “[t]hey do it in bars, at parties, on the frat row at your local college campus, in boardrooms, and other places men of color are [rarely] privy to, at least not in positions of power.”⁵⁵

49. Monica Potts, *Street Harassment Is Universal and Age-Old*, VOGUE (Oct. 31, 2014), <http://www.vogue.com/3621015/street-harassment-universal-age-old/>.

50. *Id.*

51. Tweet from Jamil Smith (Nov. 1, 2014, 9:41 AM), <https://twitter.com/JamilSmith/status/528587546742513664>.

52. Davis, *supra* note 4, at 171–72.

53. Laniya, *supra* note 20, at 108–09.

54. Dee Lockett, *White Men Don’t Catcall. They Harass In Other Ways*, SLATE (Oct. 31, 2014), http://www.slate.com/blogs/xx_factor/2014/10/31/catcalling_what_hollaback_s_viral_video_reveals_about_white_men_and_street.html.

55. Lockett, *supra* note 54. This raises an important question: if white men mostly harass behind closed doors, rather than openly on the street, will they escape enforcement under

I maintain, however, that men of color nonetheless benefit from gender privilege, given the relativity of their social capital in comparison to women. Even if men of color cannot benefit from racial privilege, as men they are more likely to be perceived as comrades in street harassment than victims.

b. “Not All Men” and Class Privilege

In addition to the potential for under-enforcement against white men, there's potential for under-enforcement against men with class privilege. Some suggest that men with class privilege likely do not see themselves as perpetrators of sexual harassment.

The men who are sitting in their offices or in cafes watching this video will instead be able to comfortably assure themselves that they don't have time to sit on hydrants in the middle of the day and can't properly pronounce “mami.” They might do things to women that are worse than catcalling, but this is not their sin.⁵⁶

Further, recipients of comments from men with class privilege may not interpret those comments as street harassment.

The reality is that while men of all classes engage in harassing behavior, women are more likely to interpret behavior as “complimentary” when it comes from a well-dressed or attractive man from their own or a higher social class. It may be that this categorization “allows women to romanticize” these particular interactions. However, arguing that men of their own class give compliments while others harass, women “serve to protect their class interests rather than their gender interests.”⁵⁷

Indeed, catcalling is not entirely absent from the money meccas of the world.⁵⁸ While a single anti-street harassment statute cannot eradicate all forms of gender-based harassment, an anti-street harassment statute is a starting point to reclaim streets for women.

PART II: “STATE V. CREEPSHOT PHOTOGRAPHER”

A. INTRODUCTION

Two highly publicized cases, *Ex parte Thompson* in Texas and *U.S. v. Cleveland* in the District of Columbia, have pitted the right to free speech

new statutes altogether or will current statutes suffice?

56. Rosin, *supra* note 7.

57. Heben, *supra* note 11, at 200.

58. While it may look and sound different, it accomplishes the same thing. See Courtney Comstock, *15 Shocking Comments Men Allegedly Made In Wall Street Sexual Harassment Cases*, BUSINESS INSIDER (Mar. 20, 2011), <http://www.businessinsider.com/sexual-harassment-wall-street-comments-2011?op=1>.

against the right to privacy and revealed a shortcoming of laws addressing upskirt photography. Upskirt photography is a process by which a person uses a hidden device to gain access to and record or capture an image of a person's intimate areas. It can be understood as a subset of voyeurism, which "is a hostile act of revenge for being humiliated,"⁵⁹ and voyeuristic disorder is a condition that falls under the paraphilic disorder umbrella in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM").⁶⁰

This section explores the origins and evolution of the "peeping tom" and states' attempts and failures to keep up with changing technology. Upskirt photographers are often immune from prosecution because there are (1) outdated and consequently inapplicable laws and (2) upskirt-specific statutes have been struck down as unconstitutional. Part B explores the legal landscape and explains that various waves of anti-"creep" statutes have resulted in inconsistent and inapplicable state laws. Based on the findings in Part B, Part C outlines the evolution of "creeps." Part C deconstructs the free speech versus privacy argument to protect victims without creepshot-specific statute.

B. THE HARMS OF UPSKIRT PHOTOGRAPHY

In an age of omniveillance,⁶¹ it is unreasonable to expect to not be recorded at all. The government, corporations,⁶² and individuals⁶³ have endless opportunities and means to capture images. However, knowledge that one may be recorded in passing is substantially different from having one's private parts recorded.

Some perpetrators assert that upskirting is a victimless crime.⁶⁴ However, this inaccurate framing does injustice to the victims of upskirt photography. There are salient harms associated with upskirting, including an immediate invasion of privacy and long-lasting anxiety in the victim, and subsequent or escalating violations by the perpetrator. These harms are discussed in greater detail below.

59. Stephen J. Betchen, *The Voyeur's Wife*, PSYCHOLOGY TODAY (July 31, 2012), <http://www.psychologytoday.com/blog/magnetic-partners/201207/the-voyeurs-wife>.

60. AMERICAN PSYCHIATRIC ASSOCIATION, PARAPHILIC DISORDERS (2013).

61. "Omniveillance is a form of omnipresent and omniscient digital surveillance in public places." Josh Blackman, *Article: Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image over the Internet*, 49 SANTA CLARA L. REV. 313, 314 (2005).

62. *E.g.*, Google Street View has caught people in "embarrassing positions." Blackman, *supra* note 63, at 331.

63. It is estimated that over 5 billion mobile phones are in use around the world and most of them are equipped with a camera. Felix Richter, *4.4 Billion Camera Phones . . .*, STATISTA (Oct. 13, 2012), <http://www.statista.com/chart/653/prevalence-of-selected-features-in-the-global-installed-base-of-mobile-phones/>.

64. *See, e.g.*, Lacey Burley, *Pervert Lands \$1100 Fine for Upskirt Filming*, CHRONICLE (July 16, 2009, 3:00 AM), <http://www.thechronicle.com.au/news/pervert-lands-1100-fine-for-upskirt-filming/273695/>.

1. Immediate Invasion of Privacy Harm

The upskirt photographer, upon recording a woman's undergarments, obtains a peek inside what is hidden from the world—"the hidden or undiscovered observer represents the quintessential privacy harm because of the unfairness of his actions and the asymmetry between his and the victim's perspective."⁶⁵

It is useful to remove the shroud of technology and boil the harms down. Without the help of a miniaturized recording or image-capturing device, a perpetrator could only reach the same result by lifting a woman's gown or placing his face squarely between her legs, which is unequivocally recognized as a violation of privacy.

Reaching up a person's gown, or into another's clothing, is invasive by definition and allowing an interpretation that gives access to a person's internal personal space, within a victim's clothing, is impermissibly beyond the scope of socially acceptable behavior.⁶⁶

We should resist technological exceptionalism and should treat upskirt photography with the same disdain.

In addition to the immediate invasion of privacy, upskirt photography causes long-term effects because upon discovery of the violation, the victims may suffer from lingering emotional distress.

[Such experiences leave] people with several years of wondering: Where exactly does safety lie in my life if I can't be safe in my own bedroom, in my own bathroom? And after this, how should I respond when a man looks at me? Because people can be returned to the same kinds of emotions that they experienced with a look or a comment or a gesture or a glance from just about any man.⁶⁷

2. A Precursor to Additional Violations and Increased Violence

Like street harassment, an act of voyeurism may escalate to something more harmful than a single photograph taken without permission. In a 1984 study by the FBI and the University of Pennsylvania of forty-one incarcerated serial rapists, research found that

65. M. Ryan Calo, *The Boundaries of Privacy Harm*, 86 IND. L.J. 1131, 1160 (2011).

66. Ramon Guillen, Jr., *The Twenty-Fifth Anniversary Edition: Note: Pushing Alice Down the Rabbit Hole: How Florida's Video Voyeurism Laws Protect Victims*, 23 U. FLA. J. L. & PUB. POL'Y 103, 114 (2012). Voyeurism can also be understood as a form of non-contact sexual abuse. See *Sexual Violence: Definitions*, CENTER FOR DISEASE CONTROL, <http://www.cdc.gov/violenceprevention/sexualviolence/definitions.html> (last updated Jan. 13, 2015).

67. NPR Staff, *Peeping Toms' Voyeurism Scars Victims' Psyches*, NPR (Aug. 29, 2012), <http://www.wbur.org/npr/160256476/peeping-toms-voyeurism-scars-victims-psyches?ft=3&f=160256476>. Another woman: "to this day, I cannot sit with my back exposed because I can still feel being watched." *Id.*

of the twenty-seven who partook in a paraphilia questionnaire, sixty-eight percent admitted to engaging in voyeuristic behaviors during childhood or adolescence. The researchers stated that the act of voyeurism does not have a direct cause-effect relationship with sexual assaults. However, their findings did suggest that the participants began with this type of sexual behavior and therefore, voyeurism must be considered one of the major building blocks of sexual predators.⁶⁸

This data suggests that there is a correlation between partaking in voyeuristic activities and escalation by predators. Admittedly, “not all voyeurs become serial rapists or killers—but all rapists have been involved in window peeping as they criminally evolved.”⁶⁹ Accordingly, the harms of upskirting are not simply a one-off violation and are better understood as a snapshot in a potential progression of violence against a particular person or in the perpetrator’s patterns.

C. FROM PEEPING TOM TO VIDEO VOYEUR TO SUBWAY UPSKIRTER

Through my research, I have found that there are generally three different types of statutes that were designed to combat the various generations of creeps: (1) old “Peeping Tom” laws, (2) location-based statutes, and (3) creepshot-specific statutes.⁷⁰ While the Peeping Tom is centuries old,⁷¹ the “trend toward [publicly] exhibiting secretive, hidden-camera images of women and men in various stages of undress, underwear, or sexual activity” is a recent development, dating back to 1997.⁷² It appears that the three types of statutes track the evolution of the creep himself, from (1) the classic Peeping Tom that uses the naked eye to gaze upon naked bodies in homes, to (2) the video voyeur of the 1990s and 2000s that used technology to obtain spatial and temporal distance from his

68. Mark A. Brenzinger, *Voyeurism: A Harmless Erotic Preference or a Sexual Predator in the Making?*, 14 CRIME & JUSTICE INT’L (1998), <http://www.cjmagazine.com/archives/cji4a10.html?id=612> (accessed through internet archive).

69. Rich Kinsey, *Not All Voyeurs Are Rapists, But All Rapists Have Been Voyeurs*, ANN ARBOR NEWS (Oct. 19, 2009, 6:02 AM), <http://www.annarbor.com/news/not-all-voyeurs-are-rapists-but-all-rapists-have-been-voyeurs/>. “As the [perpetrator] learns more and more about what makes him feel good, the paraphilias will escalate” and while not every Peeping Tom becomes a killer, virtually all of the most violent sexual predators’ killings are preceded by “relatively innocent beginnings.” JOHN DOUGLAS, *THE ANATOMY OF MOTIVE: THE FBI’S LEGENDARY MINDHUNTER EXPLORES THE KEY TO UNDERSTANDING AND CATCHING VIOLENCE CRIMINALS* 40 (2000).

70. An alternative framing suggests that the three categories are (1) Peeping Tom statutes, (2) Circumstances statutes, and Place statutes. Timothy J. Horstmann, *Protecting Traditional Privacy Rights in a Brave New Digital World: The Threat Posed by Cellular Phone-Cameras and What States Should Do to Stop It*, 111 PENN. ST. L. REV. 739, 742 (2007).

71. *Infra* note 73.

72. Clay Calvert & Justin Brown, *Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace*, 18 CARDOZO ARTS & ENT. L.J. 469, 471 (2002).

victim, and (3) the most brazen version of the creep that has been able to gain immunity from prosecution precisely because his crime scene is in a public place.

1. Ye Olde Peeping Tom

The notorious Peeping Tom finds his origins in British folklore—Tom was struck blind for daring to gaze upon Lady Godiva's naked body as she rode naked through England to protest heavy taxes.⁷³ The typical Peeping Tom case involves a perpetrator intruding on a victim's expectation of privacy by getting a glimpse of the victim's body through a window into an area where the victim had a reasonable expectation of privacy, primarily the home. A statute aimed at the low-tech Peeping Tom may provide that a person, "[w]ho, while loitering, prowling, or wandering upon the private property of another, at any time, peeks in the door or window of any inhabited building or structure, without visible or lawful business with the owner or occupant" is guilty of a misdemeanor.⁷⁴ The statute places an emphasis on protecting the victim's privacy interest, rooted in the victim's property interest. This worked well enough for Peeping Toms who had to trespass and get relatively close to their victims to achieve their goals, but these statutes became outdated with the expansion of technology in the 1990s and 2000s.

2. Video Killed the Need to Trespass

The early 1990s and 2000s equipped the Peeping Tom with an armory of gadgets to employ in their conquests. I call him "Peeping Tom 2.0."

Increasingly, voyeurs are discovering and using state of the art video technology to extend their paraphilia into private places never before accessible to the naked eye. Unsuspecting victims, relying on the usual and customary ways of protecting their privacy, are totally oblivious to the peering eye of a covertly placed, miniaturized video camera.⁷⁵

Indeed, "[m]iniaturisation has made surveillance technology easily accessible, relatively inexpensive and difficult to detect. The recording and storing of high-quality images, both still and moving, is greatly enhanced. It is now far easier to conceal a surveillance device in a private space and in household"⁷⁶

73. MERRIAM-WEBSTER DICTIONARY (2004), available at <http://www.merriam-webster.com/dictionary/peeping%20tom>.

74. CAL. PENAL CODE § 647(i) (West, 2014). See also N.C. GEN. STAT. § 14-202 (West, 2014) ("Any person who shall peep secretly into any room occupied by another person shall be guilty of a Class 1 misdemeanor.").

75. Robert I. Simon, *Video Voyeurs and the Covert Videotaping of Unsuspecting Victims: Psychological and Legal Consequences*, 42 J. FORENSIC SCI. 884, 884 (1997).

76. See generally JONATHAN CLOUGH, PRINCIPLES OF CYBERCRIME (2010).

Unlike the classic Peeping Tom that viewed only with his eyes, Peeping Tom 2.0 made use of newly available devices that allowed a lapse in time and space. The perpetrator did not have to be in the proximity of the victim nor view the victim instantaneously, providing him with more protection and lowering the risk of getting caught in the act. Popular culture shined the spotlight on Peeping Tom 2.0 with a Lifetime movie,⁷⁷ and many legislatures rushed to update their statutes to protect victims of Peeping Tom 2.0.⁷⁸ The statutes that criminalize video voyeurism are structured very similarly to the old Peeping Tom statutes, with an addition that includes places where a victim may reasonably have an expectation of privacy.

The old typical Peeping Tom statute provides that:

(b) No person shall intentionally view, photograph, film, or record in any format:

(1) the intimate areas of another person without that person's knowledge or consent while the person being viewed, photographed, filmed, or recorded is in a place where he or she would have a reasonable expectation of privacy; or

(2) the intimate areas of another person without that person's knowledge and consent and under circumstances in which the person has a reasonable expectation of privacy.⁷⁹

The typical 2.0 add-on provides that:

“Place and time when a person has a reasonable expectation of privacy” means a place and time when a reasonable person would believe that he or she could fully disrobe in privacy, without being concerned that the person's undressing was being viewed, recorded, or broadcasted by another, but not limited to, the interior of a residential dwelling, bathroom, changing room, fitting room, dressing room, or tanning booth.⁸⁰

The addition of this language recognized more areas where victims could find an expectation of privacy. Privacy no longer meant proprietary privacy that required trespass, though the language used still roots the reasonable expectation of privacy in a location. The attempt to recognize additional places that confer upon a victim an expectation of privacy suffers from the same flaw as the original Peeping Tom statutes—by

77. VIDEO VOYEUR: THE SUSAN WILSON STORY (Lifetime Television 2002).

78. See Clay Calvert, *Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of Death*, 27 SEATTLE U. L. REV. 721, 726–27 (2004) (discussing efforts in New Jersey and New York).

79. 13 VT. STAT. ANN. tit. 13 § 2605(b)(1) (West 2014) (emphasis added).

80. See, e.g., FLA STAT. ANN. § 810.145(2) (West 2014); see also MISS. CODE ANN., § 97-29-63 (West 2014).

rooting privacy in a place rather than a person, creeps need only to move their crime to a different place to escape prosecution, something that the subsequent creep generation of upskirters has exploited.

3. Creeps Commandeer Public Space

As creeps have gotten more brazen, they have become more difficult to prosecute because relocating the crime scene to a public venue has decreased a victim's reasonable expectation of privacy.

Voyeurs have a new weapon in their assault on individuals' privacy. Armed with tiny cellular phones that now come equipped with increasingly powerful cameras, these technological Peeping Toms have left their hiding places in the shadows and entered the community, snapping inappropriate pictures of men and women in public places once assumed to be safe.⁸¹

Upskirt photographers avoid the traps laid for their forefathers in places that equipped victims with a reasonable expectation of privacy by working in broad daylight and in public places, such as subways and tourist destinations. In addition to allowing perpetrators escape prosecution under inapplicable and outdated statutes,⁸² some courts have struck down upskirt-specific statutes on the ground that the photographer has a First Amendment right.⁸³

This exposes the fatal flaw of rooting a sense of privacy in a place, rather than a person: when the person enters a public forum, she is stripped of her privacy interests and the perpetrator may snap inappropriate pictures with impunity under the guise of free expression.

D. A CREEP'S RIGHT TO FREE SPEECH VERSUS A VICTIM'S RIGHT TO PRIVACY

1. Does the U.S. Constitution Protect Upskirt Photography?

The First Amendment of the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."⁸⁴ But how exactly does that imbue creeps with the right to wedge an image-capturing device between a woman's legs?

To begin, photography is recognized as a form of expression.⁸⁵ Street photography in particular is a recognized genre of photography and according to one street photographer, the medium "has come to mean a great deal more than simply making exposures in a public place."⁸⁶ As

81. Horstmann, *supra* note 70, at 739.

82. *See supra* notes 79 and 80.

83. *Ex parte* Thompson, 442 S.W.3d 325, 330 (Tex. Crim. App. 2014).

84. U.S. CONST. amend. I.

85. *See Kaplan v. California*, 413 U.S. 115, 119 (1973).

86. Nick Turpin, *Street Photography?*, IN-PUBLIC (2000), http://www.in-public.com/information/what_is.

such, it is difficult to categorically exclude upskirt photography from First Amendment protection—as discussed below, it is not obscene, cannot be separated from the process that creates it, and restrictions on upskirt photos may be deemed viewpoint discrimination.

a. Upskirt Photography is Not Patently Offensive

Upskirt photographs, assuming that they do not depict minors,⁸⁷ are not categorically unprotected by the First Amendment because they are not obscene under the applicable Miller test, which establishes obscenity if the material in question (1) appeals to a prurient interest, (2) is patently offensive, and (3) lacks serious literary, artistic, or scientific value.⁸⁸ While the first element is likely met, the second is not. Upskirt photos are not patently offensive because they do not involve “offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated” or “offensive representations of masturbation, excretory functions, and lewd exhibition of the genitals.”⁸⁹ Upskirt photography typically captures an image of a person’s intimate parts covered by their undergarments and therefore do not depict “ultimate sexual acts”—at most they depict a state of existence—and because the intimate areas are covered, they do not constitute a lewd exhibition. Further, “nudity alone is not enough to make material legally obscene under the Miller standards.”⁹⁰

b. Upskirt Photography May Be Inextricably Intertwined with the Expressive Product

One way to remove First Amendment protection from upskirt photography is to frame the activity as nonexpressive conduct, rather than speech. Nonexpressive conduct is outside the realm of First Amendment protection.⁹¹

Assuming that the end-product photograph itself is inherently expressive, however, this forecloses a nonexpressive conduct argument. In *Anderson v. City of Hermosa Beach*, the Ninth Circuit acknowledged that

neither the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded. Although writing and painting can be reduced to their

87. “[C]hild pornography . . . is unprotected by the First Amendment.” *New York v. Ferber*, 458 US 747, 764 (1982).

88. *Miller v. California*, 413 U.S. 15, 24 (1973).

89. *Id.* at 26.

90. *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974).

91. *See, e.g., Wisconsin v. Mitchell*, 508 U.S. 484, 484 (1993) (“To be sure, our cases reject the ‘view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.’”) (quoting *U.S. v. O’Brien*, 391 U.S. 367, 367 (1968)).

constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation. Thus, we have not drawn a hard line between the essays John Peter Zenger published and the act of setting the type.⁹²

In *Anderson*, the Ninth Circuit addressed whether a city's ban on tattoo parlors violated the First Amendment.⁹³ The court concluded, "as with writing or painting, the tattooing process is inextricably intertwined with the purely expressive product (the tattoo), and is itself entitled to full First Amendment protection."⁹⁴

Under the reasoning of *Anderson*, even if creepshot photography is reduced to the mechanical process of clicking a button to set off a series of events that result in a photograph, it likely cannot be framed as mere conduct without First Amendment protection because the process of taking a photograph is integral in creating the end product. Indeed, the Texas Court of Criminal Appeals rejected a similar argument by the State of Texas that "[p]hotography is essentially nothing more than making a chemical or electronic record of an arrangement of refracted electromagnetic radiation (light) at a given period of time" and argued that the "act of pushing the button on the camera to take a picture was not necessarily communicative."⁹⁵

c. Restricting Upskirt Photography May Amount to Viewpoint Discrimination

Attempts to use the sexual nature of upskirt photography as grounds to distinguish it from other forms of street photography may amount to viewpoint discrimination, which has been described as "'censorship in its purest form,' and requires particular scrutiny."⁹⁶ The argument goes: distinguishing photographs of a sexual nature from photographs of an inspirational nature, for example, amounts to viewpoint discrimination because the state gets to "pick and choose" what type of photography to prosecute, punishing one type, but not another. As a result, the state essentially engages in thought control.⁹⁷

2. Does a Victim of Upskirting Have a Reasonable Expectation of Privacy in Public?

Another way that courts have struck down creepshot specific statutes is by honing in on, and overemphasizing, the "reasonable expectation of privacy" language leftover from legislative attempts to address the video

92. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010).

93. *Id.* at 1055.

94. *Id.* at 1062.

95. *Thompson*, 442 S.W.3d at 331.

96. *R.A.V. v. St. Paul*, 505 U.S. 377, 430 (1992) (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting)).

97. *See, e.g., Thompson*, 442 S.W.3d at 339.

voyeur of yesteryear.⁹⁸ As noted above, moving the crime scene from an enclosed space and to a public forum strips the victim of a reasonable expectation of privacy.

In the highly publicized case *Ex parte Thompson*, the Texas Court of Criminal Appeals flatly rejected the idea that anyone could have an expectation of privacy in public, and went further to characterize Texas's attempts to combat creepshots as paternalistic:

And with respect to photography or visual recordings of people in public, we do not find the State's asserted privacy interests to be particularly substantial Privacy interests fade once information already appears on the public record. Protecting someone who appears in public from being the object of sexual thoughts seems to be the sort of paternalistic interest in regulating the defendant's mind that the First Amendment was designed to guard against.⁹⁹

However, the outcome may be a result of poor legislative drafting rather than an unsympathetic court:

We agree with the State that substantial privacy interests 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 §21.15(b)(1) contains no language addressing privacy concerns.¹⁰⁰

While the Texas statute sought to resolve the location restriction by broadening it to "a location that is not a bathroom or a private dressing room," the statute was overbroad because it was not rooted in a privacy interest. Rather, it required only that the image be captured "(A) without the other person's consent; (B) with intent to arouse or gratify the sexual desire of any person."¹⁰¹

In an evidentiary ruling for another case, a D.C. district court judge found that victims of a creepshot photographer that frequented the Lincoln Memorial had no expectation of privacy: "no individual clothed and positioned in such a manner in a public area in broad daylight in the presence of countless other individuals could have a reasonable expectation of privacy."¹⁰²

98. See discussion *supra* pp. 201–02.

99. *Thompson*, 442 S.W.3d at 343–44 (internal quotations omitted).

100. *Id.* at 348.

101. TEX. PENAL CODE ANN, § 21.15(b) (West 2013).

102. See Order to Suppress Physical Evidence and Statements, *U.S. v. Cleveland*, No. 10 DVM 1341 (filed Sept. 2, 2014); see also Joce Sterman, *Judge Rules Man Who Took Photos Up Ladies' Skirts at Lincoln Memorial Didn't Violate Their Privacy*, ABC NEWS (Oct. 10, 2014, 12:30 AM), <http://www.wjla.com/articles/2014/10/judge-rules-man-who-took-photos-up-ladies-skirts-at-lincoln-memorial-didn-t-violate-their-privacy-10.html>.

In *Arguellez v. State*, the defendant was found taking photographs of people at a public pool.¹⁰³ The court concluded, “[t]aking photographs of people at such public venues is not unusual, suspicious, or criminal” because “[p]hotographs are routinely taken of people in public places, including at public beaches, where bathing suits are also commonly worn, and at concerts, festivals, and sporting events.”¹⁰⁴ This reasoning implies that victims assume the risk of being photographed by stepping foot outside their homes.

Even if one should expect to be photographed in public, it does not follow that one should expect to have areas that are normally inaccessible to the human eye to be viewed. While women may implicitly consent to having their image captured in the background of a photograph, that does not amount to consent to having their private parts captured. “We may hold a slight antipathy for the bulk of observation that takes place in public, for instance, but be very upset by the prospect of observation in an intimate location or during an embarrassing moment.”¹⁰⁵

Further, wearing anything at all is a signal to the world that the person expects the garment to shield that particular area from the world, inferring a reasonable expectation of privacy. Indeed, one would expect that this would suffice to protect women from prying eyes; “the skirt itself [is] a physical barrier . . . [and] it would be impracticable for a human being to lay down on the ground in such a manner to gaze up the skirts of clothing worn by women.”¹⁰⁶ As discussed above, we should avoid technological exceptionalism. Surely we would reject an argument that a man has a right to place himself between a woman’s legs to gaze upon an intimate area that she has gone to great lengths to cover. Why are we doing legal gymnastics to allow a man to commit such an act merely because he employs an electronic device? Indeed, the use of an electronic recording device is more invasive because it allows the perpetrator to capture and share the image endlessly across the internet.

3. Glimmers of Hope

While I have primarily focused on cases that have struck down anti-upskirt statutes, some courts have upheld their state’s respective statutes, and some legislatures have responded swiftly to correct flaws in the language.

a. Borrowing Analysis

In interpreting a Minnesota statute that includes language that restricts violations to a “place where a reasonable person would have an expectation of privacy,”¹⁰⁷ the Minnesota Court of Appeals reasoned that

103. *Arguellez v. State*, 409 S.W.3d 657, 664 (Tex. Crim. App. 2013).

104. *Id.* at 664.

105. Calo, *supra* note 65, at 1144.

106. Guillen, *supra* note 66, at 114.

107. MINN. STAT. ANN. § 609.746(1)(d) (West 2014).

[t]he area under a skirt (or, for that matter, a Scotsman's kilt; the statute is gender neutral) is a place or location. It is spatial, not conceptual. By reason of the act of wearing of a covering, the person has defined a spatial location, associated with his or her intimate parts, as a zone of privacy.¹⁰⁸

Rather than finding that the victim in that case could not have an expectation of privacy in the shopping mall where the crime took place, the court found there was a zone of privacy that was attached to the victim.¹⁰⁹ If other courts adopt this reasoning, it would resolve the issue of creeps being able to get away with crimes as long as they are committed in a public space and would end the need for creepshot-specific statutes. However, given that statutory interpretation can vary from court to court, creepshot-specific statutes remain the safest choice.

b. Borrowing Language

One solution is to include "intimate areas" in the language of the statute. Arizona's voyeurism statute has specific language to address creepshots, providing that a person's privacy is invaded if the person has a reasonable expectation not to be recorded and is subsequently recorded "[i]n a manner that directly or indirectly captures or allows the viewing of the person's genitalia, buttock or female breast, whether clothed or unclothed, that is not otherwise visible to the public."¹¹⁰

Another strategy is to explicitly recognize that violations can occur in public. Maine's violation of privacy statute disallows

visual surveillance in a public place by means of mechanical or electronic equipment with the intent to observe or photograph, or record, amplify or broadcast an image of any portion of the body of another person present in that place when that portion of the body is in fact concealed from public view under clothing and a reasonable person would expect it to be safe from surveillance.¹¹¹

By explicitly recognizing public places at potential crime scenes, cities may close the loophole that allows the most brazen creeps to escape prosecution.

c. Potential Pitfalls

In finding suitable language, we must be cognizant of potential pitfalls. One potentially problematic statute can be found in California:

Any person who uses a concealed camcorder, motion picture camera, or photographic camera of any type to secretly videotape,

108. *State v. Morris*, 644 N.W.2d 114, 117 (Minn. Ct. App. 2002).

109. *Id.* at 118.

110. ARIZ. REV. STAT. ANN. § 13-1424 (West 2014).

111. ME. REV. STAT. tit. 17 § 511 (West 2014).

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.¹¹²

Aside from being verbose, the statute employs a phrase that could greatly limit its applicability: “identifiable person.” The requirement that the person be identifiable could greatly reduce enforcement because many creepshots focus on a subject’s intimate parts, and consequently excludes the subject’s face.¹¹³ Just because a person cannot be identified in a particular photograph does not mean that the photographer has not harmed the subject. These photographs are nonetheless violative because they are obtained without the subject’s consent. If the photographs were to include an identifiable characteristic, that should amount to an additional violation. California’s use of “identifiable person” greatly limits its applicability and should be avoided.

PART III: CONCLUSION

To employ a popular protest mantra: “I can’t believe we’re still protesting this stuff.” It is 2015 and men can still access women’s bodies against their will and with impunity. Street harassment and upskirt photography, though different in many ways, boil down to the same harms—a systematic tolerance of sexual violence against women. It takes away from a woman’s autonomy and ability to move through the world. Given the inability of nonspecific statutes to solve the problems of street harassment and upskirt photography, it is time to adopt statutes to criminalize those behaviors. State and local governments should adopt statutes to protect their constituents from these harms, and organizers should harness the outrage and momentum to hold politicians’ feet to the fire. It will take more than a few statutes to eradicate street harassment and upskirt photography, but it is a great starting point.

112. CAL. PENAL CODE § 647(j)(2) (West 2014).

113. Surely, there are other ways to identify a person, such as tattoos, piercings, birthmarks, etc.