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Appropriate(d) Moments

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Cover Page Footnote

My thanks go to Bryan Choi, Ari Waldman and Jake Sherkow—faculty colleagues who joined with me every week over lunch for an informal “IP Salon.” Their comments as this project unfolded were invaluable. I also extend my deep appreciation to Ed Purcell of the New York Law School faculty, and to Girardeau Spann and Michael Seidman, my colleagues for many years at Georgetown University Law Center, for reading, thinking about, and commenting with deep wisdom on drafts of this Article. Finally, the wonderful group comprising the Family Law Scholars of New York City provided a range of superb comments at one of its regular monthly gatherings at Benjamin N. Cardozo School of Law on May 7, 2015.

Appropriate(d) Moments[‡]

Richard Chused*

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[‡] A companion website for this Article containing images referred to in the text is located at <http://www.rhchused.com/Moments.html> [<http://perma.cc/KL84-XEYD>]. Footnotes that contain an image from this website will have a star (*) symbol next to the footnote reference number. Each page has links to the previous and next pages, allowing you to simply move through the site as you read. In general, pictures that this Article suggests create serious privacy issues—including those of the Fosters—are not on the website. However, links to places where they are shown are given at various points in the Article.

* Professor of Law, New York Law School. My thanks go to Bryan Choi, Ari Waldman and Jake Sherkow—faculty colleagues who joined with me every week over lunch for an informal “IP Salon.” Their comments as this project unfolded were invaluable. I also extend my deep appreciation to Ed Purcell of the New York Law School faculty, and to Girardeau Spann and Michael Seidman, my colleagues for many years at Georgetown University Law Center, for reading, thinking about, and commenting with deep wisdom on drafts of this Article. Finally, the wonderful group comprising the Family Law Scholars of New York City provided a range of superb comments at one of its regular monthly gatherings at Benjamin N. Cardozo School of Law on May 7, 2015.

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INTRODUCTION

Quietly reading a book by a window in your apartment isn't necessarily a "private" act. Many living in densely packed locations like Manhattan inevitably wonder whether eyes peering through telescopes or watching digital camera screens find them, linger for a time, capture images or generate fantasies about who and what they are.¹ That appropriation reality popped into public view in 2013 when Martha and Matthew Foster discovered images of themselves and their children, Delaney and James, in Arne Svenson's photography exhibition *The Neighbors* mounted at the Julie Saul Gallery in the Chelsea district of Manhattan.² The Fosters lived in a modern glass walled building—The Zinc—in northern TriBeCa.³ Arne Svenson lived across the street in a second

¹ As a resident of a fourteenth floor apartment across Broadway from two large residential buildings to the east, such thoughts certainly cross my mind.

² The gallery is located at 535 West 22nd Street. A book of photos from the exhibition was recently released. ARNE SVENSON, *THE NEIGHBORS* (2015) (indicating that the pictures will be shown at the Museum of Contemporary Art Denver in 2016). For pictures displayed in the show, see *The Neighbors*, JULIE SAUL GALLERY, <http://www.saulgallery.com/artists/arne-svenson/neighbors> [<http://perma.cc/L5AJ-LS DN>] (last visited Sept. 28, 2015). A number of stories about the show have been published. See, e.g., Ellen Gambermon, *The Fine Art of Spying*, WALL ST. J. (Sept. 12, 2013, 8:31 PM), <http://online.wsj.com/news/articles/SB10001424127887324094704579065123679605360> [<http://perma.cc/AN8L-EC2W>]; Barbara Pollack, *When Does Surveillance Cross the Line*, ARTNEWS (Sept. 9, 2014), <http://www.artnews.com/2014/09/09/privacy-and-surveillance-art> [<http://perma.cc/ZBD2-RMYZ>].

³ See Pollack, *supra* note 2. TriBeCa (local parlance for "triangle below Canal Street," even though the neighborhood's shape is a trapezoid) is located in the southwest part of Manhattan just north of the Financial District. Much of it is now designated and controlled as historic. It is filled with old industrial loft buildings that have become some of the poshest apartments in the city. The Zinc is one of a number of recently constructed buildings erected on empty or non-historic parcels.

floor loft at 125 Watts Street.^{4*} He used a telephoto lens equipped digital camera to take pictures of the Fosters and others living in The Zinc while staying in the shadows of his own abode.⁵ The Fosters sued Svenson and the Julie Saul Gallery, making privacy and intentional infliction of emotional distress claims.⁶ They sought damages and an injunction requiring removal of two pictures of their family from public and electronic display.⁷ “According to the Fosters,” Barbara Pollack wrote in *ARTnews*, “Svenson is nothing more than a Peeping Tom, invading their privacy and exploiting their profiles for commercial gain.”⁸ The Fosters lost their motion for preliminary relief in the trial court, a result recently affirmed on appeal.⁹

^{4*} Amanda Gorence, *Arne Svenson Takes a Voyeuristic Look Inside the Apartments of His Tribeca Neighbors*, FEATURE SHOOT (Apr. 26, 2013), <http://www.featureshoot.com/2013/04/arne-svenson-takes-a-voyeuristic-look-inside-the-apartments-of-his-tribeca-neighbors> [<http://perma.cc/DJF8-YXTP>]. For an image of the buildings, see Richard H. Chused, *The Zinc Building and Svenson’s Loft*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments01.html> [<http://perma.cc/JW6S-2T8V>] (last visited Sept. 28, 2015).

⁵ See Gorence, *supra* note 4.

⁶ The emotional distress claim did not play much of a role in the first round of proceedings. The Fosters alleged intentional infliction of emotional distress as a cause of action in their complaint, dated May 20, 2013, as a result of the photographing and subsequent promotion of images of their children. See Complaint at 7–8, *Foster v. Svenson*, No. 651826/2013, 2013 WL 3989038 (N.Y. Sup. Ct. Aug. 5, 2013). In the Memorandum the Fosters filed in support of their motion to enjoin Svenson’s actions, they argued that Svenson violated various New York civil and criminal statutes, but they did not mention the emotional distress claim. See Plaintiffs’ Memorandum of Law in Support of Temporary Restraining Order and Motion for Preliminary Injunction at 6–11, *Foster*, 2013 WL 3989038 (No. 651826/2013). They mentioned statutes barring unlawful surveillance (N.Y. PENAL LAW § 250.45(1), (3) (McKinney 2014)); child endangerment (PENAL § 260.10(1)); and violation of publicity rights (N.Y. CIV. RIGHTS LAW §§ 50, 51 (McKinney 2014)). See Plaintiffs’ Memorandum of Law, *supra*, at 1, 6–7. The defendant’s response, filed in early June, paid scant attention to the emotional distress claim. See Defendant’s Memorandum of Law in Support of His Motion to Dismiss and in Opposition to Plaintiff’s Motion for Preliminary Injunction at 19–22, *Foster*, 2013 WL 3989038 (No. 651826/2013). That makes sense. There is scant, if any, evidence that the level of intentionality and grievous emotional impact required to win this sort of tort claim was present. This Article deals only with the privacy issues.

⁷ See sources cited *supra* note 6.

⁸ Pollack, *supra* note 2.

⁹ See *Foster*, No. 651826/2013, 2013 WL 3989038, at *1 (N.Y. Sup. Ct. Aug. 5, 2013), *aff’d*, 128 A.D.3d 150 (N.Y. App. Div. 2015).

Most of the pictures in *The Neighbors* exhibition are, at least in the eyes of this viewer, aesthetically pleasing.¹⁰ The emotional responses of some of those in Svenson's photographs, however, were understandably testy. The Fosters were not the only upset residents. Mariel Kravetz, also a resident of The Zinc, invited Jennifer Bain, a *New York Post* reporter, to come to her apartment in The Zinc building to snap pictures of Svenson's abode across the street.¹¹ Though Svenson was not visible during the photo shoot, a medical model in his window was.^{12*} A photo taken during Bain's visit later appeared in the newspaper. She reported that Kravetz found the effort to be sweet revenge because Kravetz was "horri-fied" to find out that she appeared in two displayed photos in Svenson's show. Kravetz was also concerned he took more pic-tures of daughter: "'What does he have that we haven't seen?'" Kravetz asked Bain. 'He probably took thousands or more. I have a young daughter. It's more than me. Does he have any of her? That's my biggest concern.'"¹³

Svenson's explanation of his actions—framed from a perspec-tive denying the authenticity of any privacy claims—may have stoked the anger and anxiety of the Fosters and Kravetz. In a blog about *The Neighbors* exhibit published shortly before the show opened, he was quoted as saying:

¹⁰ I include in the aesthetically pleasing category the two images picturing members of the Foster family.

¹¹ See Jennifer Bain, *A Sneak Peek into Tribeca Peeping Photographer's Apartment*, N.Y. POST (May 23, 2013, 4:00 AM), <http://nypost.com/2013/05/23/a-sneak-peek-into-tribeca-peeping-photographers-apartment> [<http://perma.cc/2Z6K-8EDU>].

^{12*} Serendipitously, before either the photograph controversy or Bain's visit to Kravetz's apartment, the interior of Svenson's apartment was featured in a *New York Times* article about interior design. Joyce Wadler, *Inviting in the Ghosts*, N.Y. TIMES: ON LOCATION, Dec. 5, 2012, at D6. The model was still in the window when I walked by on March 16, 2015. A picture I took is available at *Svenson's Loft*, APPROPRIATE(D) MOMENTS, www.rhchused.com/Moments02.html [<http://perma.cc/6JP3-WKY9>] (last visited Sept. 28, 2015), next to a picture that originally appeared in an online slideshow that accompanies Wadler's article, Trevor Tondro, *Lions and Tigers and Bears, Oh My*, N.Y. TIMES: ON LOCATION, <http://www.nytimes.com/slideshow/2012/12/06/great-homesanddestinations/20121206-LOCATION.html> [<http://perma.cc/3KC3-CDPQ>] (last visited Sept. 29, 2015).

¹³ Bain, *supra* note 11. During the trial court proceedings, Svenson indicated that he may have had about fifty pictures of the Foster apartment, though it later turned out that probably was an overestimate.

For my subjects there is no question of privacy; they are performing behind a transparent scrim on a stage of their own creation with the curtain raised high. *The Neighbors* don't know they are being photographed; I carefully shoot from the shadows of my home into theirs. I am not unlike the birder, quietly waiting for hours, watching for the flutter of a hand or the movement of a curtain as an indication that there is life within.¹⁴

The consequences of the dispute may be visible on-site. When I walked by the buildings on the afternoon of March 16, 2015, most of the window shades and curtains were drawn in the apartments facing Svenson's. A peek at a Google Street View image of the same site in June, 2011, however, shows that many of the windows were uncovered.¹⁵ Whether that is a result of Svenson's actions is impossible to know without speaking to the residents.^{16*} But it would hardly be surprising that some residents would respond by hiding themselves behind window coverings.¹⁷

¹⁴ Gorence, *supra* note 4. In a later interview after the litigation was filed, Svenson gave a similar, though somewhat less intrusive explanation, for his actions:

I shot for the tiny nuances of gesture and posture that define who we are, collectively. The subjects are to be seen as representations of humankind, non-identifiable as the actual people photographed. I was also intrigued by the way light struck the building/glass, how it diffused and flattened the subjects within, giving the photographs a unique palette and an almost painterly presence.

Ken Weingart, *An Interview with Photographer Arne Svenson*, PETAPIXEL (Mar. 16, 2015), <http://petapixel.com/2015/03/16/interview-with-photographer-arne-svenson> [<http://perma.cc/TP5J-SS2Q>].

¹⁵ GOOGLE MAPS, <http://www.maps.google.com> (search "125 Watts Street, New York, NY" (Svenson's apartment) in the search bar, enter "Street View," navigate screen to look across the street at The Zinc building, then click the clock icon and select "June 2011") [<http://perma.cc/3QK7-PCQ4>] (last visited Dec. 18, 2015)].

^{16*} I have not been successful in obtaining interviews with anyone. An image with most of the shades down on the lower floors of the Zinc Building is available at Richard H. Chused, *Zinc Apartment Shades Down*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments03.html> [<http://perma.cc/V5NV-ZEFF>] (last visited Sept. 28, 2015).

¹⁷ If that is happening it is a bit ironic, for some of the larger units in The Zinc are quite expensive. It is difficult to imagine that someone spending a large sum for a bright, airy apartment would be pleased when "forced" to lower their shades. According to StreetEasy, a two-bedroom, 1,675 square-foot apartment sold for \$3,180,000 in January, 2015. *The Zinc Building at 475 Greenwich Street*, STREETEASY, <http://streeteasy.com/>

This dispute raises a host of difficult social, cultural, and legal questions. All of the many friends and colleagues I chatted with about the Svenson exhibition expressed some form of anxiety, creepiness, or worry. But they also had difficulty articulating the basis for their concern. Some worried about the intrusive nature of such photography only to opine that it wasn't very different from being on a street or in a subway when a professional camera wielder clicks off shots for a coming gallery show. Others wondered why their likenesses should be the source of funds to an artist before commenting that professional photographers must have a great deal of leeway in picking their subjects and deciding what to publicly display. Many wanted to know if the pictures revealed moments of sexual intimacy or nudity. When I said they did not¹⁸ and added my opinion that many of them were quite beautiful, the reaction often was, "hmmmmmm" A few articulated feelings of creepiness only to partially retract them by opining that New Yorkers expect to be watched in their apartments by all types of eyes when their shades are up or their curtains are open. In short, puzzlement and consternation were routine. This Article is a preliminary effort to unravel some of the perplexity. It is only fair to say at the outset, however, that firm, bright line resolutions are difficult to discern.

I begin with an historical journey. The first stop is the famous Warren and Brandeis article, *The Right to Privacy*, published a century and a quarter ago in the *Harvard Law Review*.¹⁹ The authors complained about the ways photographers and newspaper reporters "invaded the sacred precincts of private and domestic life" and

building/the-zinc-building#tab_building_detail=2 [http://perma.cc/9SNK-5UTF] (last visited Sept. 28, 2015).

¹⁸ Though, other forms of intimacy are visible. In one picture, what appear to be a man and woman sit across from each other with their legs on the same footrest. SVENSON, *supra* note 2, at Neighbors #1. They are dressed in robes and the lower parts of their legs (but no upper bodies or faces) are displayed. In another, an obviously pregnant woman sits on the back of a sofa, again without her face showing. SVENSON, *supra* note 2, at Neighbors #8. A third shows the clothed rear end of what appears to be a woman, apparently cleaning a floor. SVENSON, *supra* note 2, at Neighbors #5. In one of the pictures the Fosters complained about, Martha is holding her son upside down. His face is right in front of the Foster's daughter who is dressed in a child's swimsuit. Many others also display intimate, wholly non-sexual, moments.

¹⁹ Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

overstepped “the obvious bounds of propriety and of decency.”²⁰ The distant echoes of Warren and Brandeis’ lament resound in the protests made by Kravetz and the Fosters to Svenson’s *The Neighbors* exhibition. But almost one hundred twenty-five years passed between the publication of *The Right to Privacy* and the mounting of *The Neighbors*. Any inquiry into the legal cogency of the Foster claims therefore must venture into the ways photographic technology, artistic trends, and cultural changes have influenced the creative presentation of moments “appropriated” from the lives of strangers. That is the second step in this Article’s journey. I conclude in the third and final part by using the historical inquiries as a baseline for thinking about the ways legal norms changed over the course of the last one hundred and twenty five years and for meditating on the wisdom of changing those norms again.

I. WARREN AND BRANDEIS

The famous Warren and Brandeis^{21*} article is a fascinating document. The literature on the piece is enormous and continues to appear.²² In some ways, that is very difficult to explain. For the piece is a time warp. A careful reading today should produce a “what’s the big deal” reaction from most readers. It may best be described as a screed against media gossip—the seemingly insatia-

²⁰ *Id.* at 195–96.

^{21*} Images of Warren and Brandeis may be found at Richard H. Chused, *Samuel Warren and Louis Brandeis*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments04.html> [<http://perma.cc/XYF6-W7SZ>] (last visited Sept. 28, 2015).

²² A small sample of some of the more interesting work discussing the article includes: HELEN NISSENBAUM, *PRIVACY IN CONTEXT: TECHNOLOGY, POLICY, AND THE INTEGRITY OF SOCIAL LIFE* (2010); DON R. PEMBER, *PRIVACY AND THE PRESS: THE LAW, THE MASS MEDIA, AND THE FIRST AMENDMENT* (1972); DANIEL SOLOVE, *UNDERSTANDING PRIVACY* (2008); James H. Barron, *Warren and Brandeis: The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890); *Demystifying a Landmark Citation*, 13 *SUFFOLK U. L. REV.* 875 (1979); Benjamin E. Bratman, *Brandeis and Warren’s “The Right to Privacy and the Birth of the Right to Privacy,”* 69 *TENN. L. REV.* 623 (2002); Amy Gajda, *What If Samuel D. Warren Hadn’t Married a Senator’s Daughter?: Uncovering the Press Coverage That Led to “The Right to Privacy,”* 2008 *MICH. ST. L. REV.* 35 (2007); Dorothy Glancy, *Privacy and the Other Miss M*, 10 *N. ILL. U. L. REV.* 401 (1989); William L. Prosser, *Privacy*, 48 *CALIF. L. REV.* 383 (1960); Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy at 50: A Mixed Legacy*, 98 *CALIF. L. REV.* 1887 (2010).

ble desire of the press to disturb “propriety and . . . decency”²³ by parading the lives and peccadilloes of others before the general public. The authors’ dyspepsia with newspaper gossip columns would be met by most today with a shrug. On the other hand, the article is an intriguing signal about the sorts of social and cultural dynamics that can produce disarray in theories of privacy. The combination of forces that led to the article’s penning mirror similar forces at work today—the rapid spread of new forms of media, cultural fascination with the rich and famous, and the invention of new and potentially intrusive technologies allowing for much broader appropriation of moments in the daily lives of unsuspecting or publicly prominent citizens. Taking a brief look at these two, dichotomous, views of the famous work of Warren and Brandeis will set the stage for a broader look at the social, cultural and technological developments that made the present-day dispute between the Fosters and Svenson possible.

A. Time Warp

Warren and Brandeis used strong words to condemn the impact of gossip on society.

The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilization, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual; but modern enterprise and invention

²³ Warren & Brandeis, *supra* note 19, at 196.

have, through invasions upon his privacy, subjected him to mental pain and distress, far greater than could be inflicted by mere bodily injury. Nor is the harm wrought by such invasions confined to the suffering of those who may be made the subjects of journalistic or other enterprise. In this, as in other branches of commerce, the supply creates the demand.²⁴ Each crop of unseemly gossip, thus harvested, becomes the seed of more, and, in direct proportion to its circulation, results in a lowering of social standards and of morality. Even gossip apparently harmless, when widely and persistently circulated, is potent for evil. It both belittles and perverts. It belittles by inverting the relative importance of things, thus dwarfing the thoughts and aspirations of a people. When personal gossip attains the dignity of print, and crowds the space available for matters of real interest to the community, what wonder that the ignorant and thoughtless mistake its relative importance. Easy of comprehension, appealing to that weak side of human nature which is never wholly cast down by the misfortunes and frailties of our neighbors, no one can be surprised that it usurps the place of interest in brains capable of other things. Triviality destroys at once robustness of thought and delicacy of feeling. No enthusiasm can

²⁴ My colleague, Ed Purcell, noted to me after reading a draft of this Article that there was some irony in this adoption by Warren and Brandeis of the highly controversial, traditional Say's Law, stated more fully in JEAN-BAPTISTE SAY, *A TREATISE ON POLITICAL ECONOMY; OR THE PRODUCTION, DISTRIBUTION AND CONSUMPTION OF WEALTH* 134–35 (Clement C. Biddle ed., C. R. Prinsep trans., 6th ed. 1855) (“It is worth while to remark that a product is no sooner created than it, from that instant, affords a market for other products to the full extent of its own value. When the producer has put the finishing hand to his product, he is most anxious to sell it immediately, lest its value should diminish in his hands. Nor is he less anxious to dispose of the money he may get for it; for the value of money is also perishable. But the only way of getting rid of money is in the purchase of some product or other. Thus, the mere circumstance of creation of one product immediately opens a vent for other products.”).

flourish, no generous impulse can survive under its blighting influence.²⁵

For some time, much of the writing about the Harvard article remained fairly constant—continuing speculation about what led the authors to write it, rather than analysis of the distressing influence of gossip. It certainly is true that disparaging others can be destructive. The concept of *lashon hara* (לשון הרע, literally *bad* or *evil tongue*) in Jewish theology attempts to counter the cultural tendency to speak about others in ways that may be harmful even if true. A wonderful Chasidic tale describes a young man who regularly gossiped about others. Feeling remorseful he went to speak with a rabbi about atoning for his deeds. The rabbi told him to get a pillow, cut it open, and let the feathers scatter in the breeze. Though he thought the request odd, he did as he was told. When he returned to the rabbi to tell him he had completed the task, the rabbi told him to go retrieve the feathers. His efforts to do so, of course, failed. When he returned to the rabbi and admitted his inability to start, let alone complete, retrieving the feathers, he was told “your words are like the feathers. Once they leave your mouth, you can never get them back again.”²⁶

But even if displeasure with gossipy media may sometimes be warranted, it was difficult to understand why Warren and Brandeis were so distressed. It was not clear that newspapers printed anything about either of them in the years before the article appeared that warranted their wrath. The standard account for many years was William Prosser’s 1960 statement that Samuel Warren, Louis Brandeis’ law partner when the article was written, was piqued by media coverage of his daughter’s marriage.²⁷ That idea was debunked after a bit of genealogical research demonstrated that Warren could not have had a daughter of marriageable age by the time the Harvard article was published.²⁸ Given the problems with

²⁵ Warren & Brandeis, *supra* note 19, at 196.

²⁶ Shoshannah Brombacher, *A Pillow Full of Feathers*, CHABAD, http://www.chabad.org/library/article_cdo/aid/812861/jewish/A-Pillow-Full-of-Feathers.htm [<http://perma.cc/KN7P-4KWU>] (last visited Sept. 28, 2015) (containing a more complete telling of this wonderful story).

²⁷ See Prosser, *supra* note 22, at 423.

²⁸ See Barron, *supra* note 22, at 892–93.

Prosser's theory and the failure of scholars to find much 1880s press coverage of Warren, Brandeis, or their families, there was little to go on. In the early 1970s, Don Pember managed to find some support for the pique in correspondence between Warren and Brandeis and in the memories of descendants of Warren.²⁹ Both letters and interviews confirmed his aggravation with the media.³⁰ With the publication of Barron's article on the history of *The Right of Privacy* in 1979³¹ and of Amy Gajda's meticulously researched 2007 essay describing the gossipy media coverage of Samuel Warren and his family during the 1880s, it became possible to more fully explain the origins of the article.³² Gajda discovered that Warren and his family were mentioned fairly often after his marriage to Mabel Bayard—the daughter of Senator Thomas F. Bayard of Delaware—in early 1883.³³ It now is generally accepted that Warren was upset at the operation of the press and was the prime mover behind the Harvard piece.³⁴

But that hardly justifies the wide attention the article has continuously garnered. While gossip often is unattractive, undignified, sensationalized, and silly, and sometimes decidedly harmful, the contemporary market for it is intense and cultural tolerance of its distribution is quite high. Surely current media freedom norms moot most, if not all, of the behavior Warren and Brandeis decried.

²⁹ See PEMBER, *supra* note 22, at 24–25.

³⁰ Pember described Brandeis' recollections of Warren's "abhorrence" of privacy invasions by the press and of the memories of Warren's dislike of gossip columns described by his grandson. *Id.*

³¹ Barron, *supra* note 22.

³² Gajda, *supra* note 22, at 37–40. Gajda's summary of the prior literature on the problem also is very meticulous. She writes about Prosser's error, the prior literature, and the uncertainty about Warren's relationship with the press of the items. *Id.* Some of the items Gajda referred to were previously revealed by Barron, *supra* note 22, at 893–94, 902–07. One of the examples described by Gajda was about coverage of Mrs. Warren's friendship with Frances Folsom, the quite young wife of President Grover Cleveland. Folsom was the daughter of the Secretary of State, an ex-law partner of Cleveland. They had known each other since she was a young child. Their relationship was confirmed when she was only eighteen years old, twenty-eight years his junior. See Gajda, *supra* note 22, at 51–53.

³³ Gajda, *supra* note 22, at 36 (explaining that the article examines approximately sixty newspaper stories from Boston, New York, and Washington, D.C. that reported on the personal lives of Warren and his family).

³⁴ See *id.* at 37 & n.8.

Theirs was not dyspepsia about distribution of false information, highly disparaging remarks, deeply intrusive fact gathering techniques, or profoundly unflattering and insulting observations—grounds that might support defamation, emotional distress, or privacy tort claims today. They simply did not want others to control discourse about them.³⁵ Though the newspaper coverage Barron and Gajda discovered is considered tame today—gossip columns about visits by or with family and friends, dinner parties, marriages, dress habits, and funerals—it is clear that the articles got under the skins of the Harvard authors.³⁶

Though the core of their claim involved antipathy to forms of gossip that would hardly cause a ripple today, they also couched their argument in somewhat broader prose that, when carefully analyzed, might support what we now call a right to publicity.

Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right “to be let alone.” Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that “what is whispered in the closet shall be proclaimed from the house-tops.” For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons; and the evil of the invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer. The alleged facts of a somewhat notorious case brought before an interior tribunal in New York a few months ago, directly involved the consideration of the right of circulating

³⁵ See Warren & Brandeis, *supra* note 19, at 196.

³⁶ See Barron, *supra* note 22, at 914–28. Barron strongly drives this notion home. Claiming that Warren and Brandeis were patrician sorts, deeply uncomfortable with burgeoning economic shifts and quickly urbanizing American culture, he argues that the article reflects much more about their desire to define the nature of “proper” journalism than to protect their personal privacy. *Id.*

portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration.³⁷

The footnoted sources referenced by Warren and Brandeis in this brief, but important, excerpt provided remarkably thin, if any, support for their gossip claims, but they revealed a great deal about the authors to us. All, save the reference to Cooley's treatise,³⁸ dealt with the roles of newspapers, gossip, and—of particular importance for this Article—photography in the second half of the nineteenth century. Two involved newspaper reports of threatened or pending litigation.³⁹ The other three were brief essays with references to some aspect of privacy.⁴⁰ The two court cases⁴¹ are fas-

³⁷ Warren & Brandeis, *supra* note 19, at 195–96 (citing THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed., 1880); Joseph A. Jameson, *The Legal Relations of Photographs*, 8 AM. L. REG. (n.s.) 1 (1869); George B. Corkhill, Editorial, *Portrait Right*, 12 WASH. L. REP. 353 (June 7, 1884); Watkin Williams, Letter to the Editor, *The Sale of Photographic Portraits*, 24 SOLIC. J. & REP. 4–5 (1879); E.L. Godkin, *The Rights of the Citizen: To His Reputation*, 8 SCRIBNER'S MAG. 65, 67 (July 1890); Marion Manola v. Stevens & Myers, N.Y. TIMES, June 15, 18, 21, 1890 (N.Y. Sup. Ct. 1890)). The authors' reference to the *Manola* case added,

[T]he complainant alleged that while she was playing Broadway Theatre, in a role which required her appearance in tights, she was, by means of a flash light, photographed surreptitiously and without her consent, from one of the boxes, by defendant Myers, a photographer, and prayed that the defendants might be restrained from making use of the photograph taken. A preliminary injunction issued *ex parte*, and a time was set for argument of the motion that the injunction should be made permanent, but no one then appeared in opposition.

Id. at 195 n.7.

³⁸ This reference by Warren and Brandeis points to an oft noted line from Cooley's treatise discussing "Personal Immunity" stating, "The right to one's person may be said to be a right of complete immunity: to be let alone. The corresponding duty is, not to inflict an injury, and not, within such proximity as might render is successful, to attempt the infliction of an injury." See COOLEY, *supra* note 37, at 29. While Warren and Brandeis obviously were intrigued by the phrase "right . . . to be let alone," Cooley only discussed traditional rules of assault and battery in the section. It did not support any claim about personal privacy as we have to think of it.

³⁹ See Corkhill, *supra* note 37, at 353; Marion Manola, *supra* note 37.

⁴⁰ Jameson, *supra* note 37; Williams, *supra* note 37; Godkin, *supra* note 37.

⁴¹ See *infra* notes 42–52 and accompanying text (discussing the legal action that followed the publication of stolen images of a few high-society women in Brooklyn) and notes 53–61 and accompanying text (discussing the legal conflict that occurred when a

cinating. Each presented settings in which some form of secretive use of photography and distribution of images led to objections from those in the pictures.

The first, briefly summarized in the 1884 *Washington Law Reporter* editorial cited by Warren and Brandeis, involved contemplated suits

[T]o enjoin the publication, commenced by one of the daily papers, of portraits of a number of ladies in society in Brooklyn, on the ground that they were, or are to be copied from photographs supposed to have been procured surreptitiously by the publisher, from the possession of a photographer who had taken photographs of these ladies in the ordinary course of his business.⁴²

While admitting the existence of a copyright in the photographs, the editorial goes on to opine that the right of the subject of a photograph “to object to the reproduction of copies is quite another question” and that recognizing “the proprieties of life” required drawing a line between well known figures “deemed in some sense public property” and others retaining a right to object to “undesired publicity.”⁴³

The editorial referenced by Warren and Brandeis provided only scant information about the story, but a little digging produced the details. On June 1, 1884, the Sunday edition of the *New York World* published woodcut images of Brooklyn⁴⁴ society women, along

photographer snapped a picture of actress Marion Manola in a revealing costume during a performance).

⁴² Corkhill, *supra* note 37, at 353.

⁴³ *Id.*

⁴⁴ It’s worth noting that according to the 1880 census, Brooklyn was the third largest city in the United States with 566,663 people, following only New York and Philadelphia. *1880 Fast Facts*, U.S. CENSUS BUREAU, http://www.census.gov/history/www/through_the_decades/fast_facts/1880_fast_facts.html [https://perma.cc/GB4Z-6ZLC] (last visited Sept. 20, 2015). The boroughs were not merged to form New York City as we know it now until 1898. See Phillip Lopate, *The Greatest Year: 1898*, N.Y. MAG. (Jan. 9, 2011), <http://nymag.com/news/features/greatest-new-york/70466> [https://perma.cc/TBK8-6U92]. Brooklyn had all the cacophony, problems, highly competitive newspapers, and gossip of the late-nineteenth century. Today, it is the most populous of the five boroughs that make up New York City. *Borough Trends & Insights*, N.Y. ECON. DEV.

with some comments about them, over the headline “Brooklyn Belles.”⁴⁵ The *Brooklyn Daily Eagle* reported that the “Belles” article “dealt very personally with wives and daughters of some of the most highly esteemed citizens of Brooklyn.”⁴⁶ Members of the effected families expressed outrage at the events, though the commentary was quite tame. Under a woodcut image of Miss May Whitbeck, for example, a brief paragraph described her as “stylish, attractive, free-hearted and a favorite upon her first entrance into the ball-room or reception parlor. At the banquet table she is particularly vivacious, and her wit flows like sparkling wine. She is one of the most fascinating girls in Brooklyn society.”^{47*}

The images apparently were stolen from the photograph gallery of Alva Pearsall, turned over to the *New York World*, and used as a basis for making the woodcuts. Alva Pearsall was a well-known daguerreotype photographer with a thriving studio at the corner of Fulton and Flatbush Avenues.^{48*} His brother, Frank Pearsall, was an important cameramaker and inventor.⁴⁹ The women whose images were taken from the gallery represented some elite Brooklyn

CORP., <http://www.nycedc.com/resource/borough-trends-insights> [<http://perma.cc/26GN-C7YY>] (last visited Sept. 28, 2015).

⁴⁵ The full headline was *Brooklyn Belles, Ladies Who Grace and Adorn the Social Circle*, N.Y. WORLD SUPPLEMENT, June 1, 1884, at 1. The story that unfolded in the press after the *New York World* article appeared, told as a tale of scandalous gossip, showed up in *Local Belles: A Fierce Storm in Fourteen Brooklyn Families*, BROOK. DAILY EAGLE, June 4, 1884, at 4; *The Belles: Indignation Concerning the Stolen Photographs Unabated*, BROOK. DAILY EAGLE, June 5, 1884, at 4; and an untitled note in *The Independent*, June 5, 1884, at 18.

⁴⁶ *Local Belles: A Fierce Storm in Fourteen Brooklyn Families*, *supra* note 45, at 4.

^{47*} The Whitbeck image and description may be seen at Richard H. Chused, “*Brooklyn Belles*” Article, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments05.html> [<http://perma.cc/SYK5-X264>] (last visited Sept. 28, 2015).

^{48*} The details on Pearsall’s life, as well as a picture of his gallery on Fulton, are available at *Alva Pearsall*, HISTORIC CAMERA, http://historiccamera.com/cgi-bin/librarium2/pm.cgi?action=app_display&app=datasheet&app_id=2027 [<http://perma.cc/MUV8-FXK7>] (last visited Sept. 29, 2015). The gallery picture also is shown at Richard H. Chused, *The Pearsall Gallery*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments06.html> [<http://perma.cc/B7XL-PPDT>] (last visited Sept. 29, 2015).

⁴⁹ A compact, fold-up camera he developed in 1883 is pictured at *Compact Camera, c. 1883*, ANTIQUE & 19TH CENTURY CAMERAS, <http://www.antiquewoodcameras.com/Pearsall-Camera.html> [<http://perma.cc/WN5B-RBX9>] (last updated Sept. 28, 2015).

families.⁵⁰ Pearsall, after being publicly chastised by an anonymous *Daily Eagle* letter writer “indignant at this outrage,”⁵¹ responded that he “would be a fit subject for a lunatic asylum to part with the photographs of my lady patrons for illustration in a paper and expect at the same time to keep their patronage.”⁵² Though the *Washington Law Reporter* editorial cited by Warren and Brandeis focused on the undesired gossip and publicity foisted upon the society women of Brooklyn, one can surmise that a court would have sympathized with any effort to suppress the commercial use of pictures obtained surreptitiously without the consent of either the photographer or the subjects. But, despite the gloss put on the tiff by the *Washington Law Reporter* and the other newspaper commentators on the dispute, it was less a “privacy” dispute in modern terms than a kerfuffle about access to and control of flattering gossip, as well as conversion and copyright ownership of pictures.

The other case referenced by Warren and Brandeis—involving the famous singer and comic opera performer Marion Manola—has been the subject of wide discussion, both during and after their era.⁵³ While performing in *Castles in the Air* for the De Wolf Hop-

⁵⁰ They included the families of General A. C. Barnes, General James Jourdan, and Mr. John A. Nichols. Barnes, a veteran, was a prominent member of the National Guard and an important officer of the American Book Company, a large publishing house. See JAMES DE MANDEVILLE, HISTORY OF THE 13TH REGIMENT 175 (1894); *Gen. A. C. Barnes Dead*, THE SUN, Nov. 29, 1904, at 2; *General A. C. Barnes*, CORNELL DAILY SUN, Nov. 29, 1904, at 1. Jourdan also was involved in the military as the Colonel of the 13th Regiment, and served as the Police Commissioner of Brooklyn and head of the Brooklyn Gas Company. He was on the boards of other gas companies, as well as banks and railroads. *General Jourdan Dies in 79th Year*, N.Y. TIMES, Nov. 2, 1910, at 11. Nichols was a prominent lawyer, a member of the Union League Club of New York and the Hamilton Club of Brooklyn, and an important personage in the Episcopal Church. 2 THE EAGLE AND BROOKLYN: THE RECORD OF THE PROGRESS OF THE BROOKLYN DAILY EAGLE 1068 (Henry W.B. Howard & Arthur N. Jervis eds., 1893).

⁵¹ A letter to the editor with this phrase and signed by “An Interested Party” appeared the day before Pearsall’s letter was published. Letter to the Editor, BROOK. DAILY EAGLE, June 4, 1884, at 4.

⁵² Alva Pearsall, Letter to the Editor, BROOK. DAILY EAGLE, June 5, 1884, at 4.

⁵³ The best source by far is Dorothy Glancy’s article, *Privacy and the Other Miss M*, *supra* note 22. Glancy compares the stories of Marion Manola and Bette Midler, both famous singers and performers who brought publicity rights cases against those seeking to use aspects of their personalities for commercial purposes. As described in great and glorious detail by Glancy in her article, Manola objected to the use of a flash picture taken during one of her performances in advertisements for the play. *Id.* at 402–19. Midler won

per Company in 1890,⁵⁴ a photographer snapped a picture of her from a box seat at the behest of those staging the performance. This probably was not done with a small device. Though some cameras were compact enough at that time to be concealed, the use of a bulky flash surely was both visible and clamorous. Manola stomped off the stage at the affront and filed an action seeking to bar use of the picture to advertise the show. The description of the events in the New York papers and the way they were used by Warren and Brandeis differed in subtle but important ways. Here is the brief report of the affair in the June 15, 1890 issue of the *New York Times* referred to by Warren and Brandeis:

The alleged difficulty of the management of the De Wolf Opera Company in having its prima donna, Marion Manola, photographed in tights was overcome at the Broadway Theatre last evening. A photographer was placed in one of the boxes, and when an opportunity occurred during the performance a flash light was used and a photograph of the actress was secured.

When Miss Manola realized what had been done she threw her mantle over her face and ran off the stage. She returned, however, to finish her performance. The photographer made no attempt to conceal his presence in the box, but on the contrary, seemed to do all he could to attract the attention of the audience. In this he succeeded fully.

It is alleged that Miss Manola refused to be photographed in tights owing to her modesty. The management, however, wanted such a photograph for lithograph purposes,⁵⁵ and resorted to this device to

a famous case against Ford Motor Company for using one of her ex-backup singers to mimic her voice in TV ads for the Mercury Sable, first introduced to the market in 1985. *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *1986 Mercury Sable TV Commercial*, YOUTUBE (Mar. 4, 2007), <https://www.youtube.com/watch?v=BjIstCzsppA> [<http://perma.cc/2EQA-YA5H>].

⁵⁴ The musical comedy opened on May 5, 1890. It was performed 105 times and closed on August 16, 1890. GERALD MARTIN BORDMAN & RICHARD NORTON, *AMERICAN MUSICAL THEATRE: A CHRONICLE* 117 (4th ed. 2010).

⁵⁵ This was a common technique for making advertising copy.

obtain it. Who will say that the average theatre manager does not know how to advertise his company?⁵⁶

It is reasonably clear from this little news item, as well as an array of other circumstances, that Manola's modesty was not the real issue. Other pictures of her in tights, including the 1890 Newsboy "cabinet card"⁵⁷ and another taken when dressed in her *Castles in the Air* costume, were in circulation at the time.^{58*} Newsboy published many cabinet cards during the Manola era. They were used as premiums and giveaways when other products, like cigarettes, were purchased. Manola surely agreed to have this picture, as well as the *Castles in the Air* pose, taken. And it is hard to believe that money was not exchanged. Modesty was not the problem.⁵⁹ Control of the pose and compensation were. In short, it was what we now call a publicity rights case—one in which Manola claimed the right to decide how and when her image would be used for commercial purposes. That notion is given additional credence by the sensationalized way the picture was taken from a box seat, the slow sale of tickets for *Castles in the Air*, and the reputation of Manola as a temperamental personage.⁶⁰ Those running the production needed a publicity boost and found a way to get it. They eventually agreed not to use the picture.

⁵⁶ *Photographed in Tights*, N.Y. TIMES, June 15, 1890, at 2 (cited in Warren & Brandeis, *supra* note 19, at 195 n.7).

⁵⁷ For a brief history of the "cabinet card," see *Cabinet Card*, CITY GALLERY, http://www.city-gallery.com/learning/types/cabinet_card/index.php [<http://perma.cc/K6UX-HGUM>] (last visited Sept. 29, 2015). The Manola cabinet card is available in the Ohio State University graphics collection at *Marion Manola*, OHIO ST. U., <http://hdl.handle.net/1811/47628> [<http://perma.cc/6ARF-L5GC>] (last visited Sept. 28, 2015).

^{58*} To view the *Castles in the Air* image, see Glancy, *supra* note 22, at 403, and Richard H. Chused, *Manola Castles in the Air Costume*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments08.html> [<http://perma.cc/VA3L-5L5U>] (last visited June 8, 2015).

⁵⁹ Glancy suggests that a particular modesty issue was part of the story. Manola had a young daughter, Adelaide, in Catholic school. Protecting her from negative portrayals of her mother, Glancy argues, was an issue. If that is right, it could only have been because of the way in which a particular scene in a picture taken by surprise appeared to a viewer. That probably would not be an issue of modesty, however, so much as a manifestation of a desire to control both visual perspective and business dealings. See Glancy, *supra* note 22, at 414–15.

⁶⁰ See *id.* at 407–11.

But when Warren and Brandeis described the Brooklyn society lady and Manola disputes, they left a somewhat different impression about the nature of the issues at stake. They didn't discuss issues of theft, conversion, appropriation, commercial exploitation, or publicity rights. As noted above, they opined that the two cases "directly involved the consideration of the right of circulating portraits; and the question whether our law will recognize and protect the right to privacy in this and in other respects must soon come before our courts for consideration."⁶¹ For them the issue was not about commercial exploitation, but the ways in which the distribution of pictures and gossip interfered with the ability of citizens to construct a commodious existence on their own terms. In short, the actual disputes in the cases they referred to simply didn't support the gossip theory they wrote about.

The other three sources used by Warren and Brandeis did not involve litigation—threatened or otherwise. Two had virtually nothing to do with their notions of privacy.⁶² They, like the use of the Brooklyn society pictures and the Manola dispute, are not helpful in defining the nature of the privacy interests Warren and Brandeis wished to protect. Rather, the references simply confirm the lack of serious legal precedent supporting the claims they made. Only one—the essay by E.L. Godkin⁶³—deserves any extended attention. In some ways, it is the most interesting and least persuasive of the lot.^{64*} As James Barron convincingly noted almost four

⁶¹ Warren & Brandeis, *supra* note 19, at 195–96.

⁶² Jameson, *supra* note 37; Williams, *supra* note 37.

The *American Law Register* item is an essay almost entirely about the evolution of evidence rules for the use of photographic images. Only on the last page is there a very brief foray into clandestinely taken pictures that are either defamatory or used for commercial purposes. Jameson, *supra* note 37, at 8. Jameson was an important lawyer and judge in Chicago. He died the year Warren and Brandeis published their article. E.O. JAMESON, *THE JAMESONS IN AMERICA: 1647–1900* 373–75 (1901).

The *Solicitors' Journal* item is from a British publication. It is a short snippet about the impact of introducing copyright protection into English law beginning in 1862. See Williams, *supra* note 37. The issue was ownership of the negative and the photograph given the presence of legal rules about both intellectual property and tangible property. It has very little, if anything, to do with the claims made by Warren and Brandeis.

⁶³ See Godkin, *supra* note 37, at 58.

^{64*} An image of Godkin is available at Richard H. Chused, *E.L. Godkin*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments09.html> [<http://perma.cc/Z9LA-WVEK>] (last visited Sept. 28, 2015).

decades ago, much of the Warren-Brandeis article was anticipated in Godkin's essay, *The Rights of the Citizen: To His Own Reputation*, published in *Scribner's Magazine* the same year.⁶⁵ Godkin linked the idea of privacy to the growth of civilization. "Privacy," he wrote, "is a distinctly modern product, . . . unknown in primitive or barbarous societies."⁶⁶ In prose reeking with class elitism, Godkin claimed, "To have a house of one's own is the ambition of nearly all civilized men and women, and the reason which most makes them enjoy it is the opportunity it affords of deciding for themselves how much or how little publicity should surround their daily lives."⁶⁷ He concluded this segment of the essay with attitudes sure to draw disdain from many in contemporary western society.

Of course, the importance attached to this privacy varies in individuals. Intrusion on it afflicts or annoys different persons in different degrees. It annoys women more than men, and some men very much more than others. To some persons it causes exquisite pain to have their private life laid bare to the world, others rather like it; but it may be laid down as a general rule that the former are the element in society which most contributes to its moral and intellectual growth, and that which the state is most interested in cherishing and protecting.⁶⁸

Needless to say, gossipy media was the enemy of privacy to Godkin. Those who craved attention and sought out press coverage were "depraved!"⁶⁹ Nonetheless, he did not conclude that the law could provide a remedy for the problem. Short of defamation, it was difficult to legislate a solution. The only remedy, he claimed, was "to be found in attaching social discredit to invasions of it [privacy] on the part of the conductors of the press."⁷⁰ Here, of course, is the point where Warren and Brandeis "improved" upon

⁶⁵ Barron, *supra* note 22, at 886-88.

⁶⁶ Godkin, *supra* note 37, at 65.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 66-67.

⁷⁰ *Id.* at 67.

Godkin's theory by seeking creation of a tort remedy where none existed. But, they did so in ways that closely tracked Godkin's ideas—not only in the way they described the issues, but also in defining the scope of the rule they wished to establish. Publication of material “of public or general interest” was not barred,⁷¹ and oral gossip, where injury ordinarily was deemed “trifling,” was excluded from coverage altogether in the absence of some form of special damage.⁷² The focus clearly was on personal gossip displayed in the press.

Like Godkin, Warren and Brandeis associated with the Mugwumps—often described as members of the upper class led by fear of “social and economic displacement” to support “independent politics and conservative reforms.”⁷³ According to Barron, the Warren and Brandeis article therefore can be read as a Mugwumpian effort to protect society from the “debilitating effects of gossip” by defending a “traditional, ‘patrician’ perception of what was ‘news,’ what was of public interest and therefore publishable.”⁷⁴ To the extent this is an accurate portrayal of the motivations of Warren and Brandeis, it simply reaffirms the notion that the core of their article has little to say about either publicity rights or present-day privacy debates. Its continuing popularity, therefore, may have much more to do with their magical incantation of the word “privacy” than with any important substantive claim. Single lines in the piece, abstracted from the norm they wished to create, took on a life of their own. And so “the right to be let alone”⁷⁵ has become a talisman—one that resonated for the Fos-

⁷¹ Warren & Brandeis, *supra* note 19, at 214.

⁷² *Id.* at 217 (citing Godkin, *supra* note 37, at 66).

⁷³ Barron, *supra* note 22, at 915.

⁷⁴ *Id.* at 916. It might be worth speculating that this notion of a distinction between what was private and what was worthy of public discourse mirrored the similar late nineteenth-century efforts to distinguish between private and public in an array of other arenas. The former, such as economic preferences and contractual terms, were none of the government's business. Involvement of the public was only appropriate when regulation, or perhaps revelation of information, was designed to protect the general welfare. Compare, e.g., *Lochner v. New York*, 198 U.S. 45 (1905) (holding that the regulation of hours of male bakers violated substantive due process), *with Muller v. Oregon*, 208 U.S. 412 (1908) (holding that the supposed need to protect women from the demands of market forces justified regulating the length of their work day).

⁷⁵ Warren & Brandeis, *supra* note 19, at 193.

ters even though its most famous theoretical roots may have little to do with their problem.

B. Predictions of the Future

Lawrence Friedman put a subtly different cultural gloss than Barron and Godkin on the mood of some parts of elite society in the late nineteenth-century.⁷⁶ He suggested that the same notions that Warren and Brandeis used to urge controls over gossip arose from efforts to suppress distribution of unfavorable information, in part to provide room for those of the middle and upper classes to fail and later redeem themselves.⁷⁷ Protection of reputation, rather than merely suppression of gossip, was viewed as a way to guard society from the unnecessary harm that might be caused to all by the “fall” of important, typically male, figures working generally for the betterment of society.⁷⁸ As a result, Friedman concluded,

[O]ne can detect two concerns in American law in the nineteenth century These concerns seem to contradict each other. The law expressed and enforced a strict code of traditional morality. Yet the law also protected the reputations of respectable people—even when they strayed somewhat from the straight and narrow path. . . . At many points the concept of *privacy* underlay the central argument—the idea that certain things (notably, the sexual side of life) had to be kept secret, kept private. Protecting reputation in an important sense meant protecting privacy, protecting the sanctity of the private realm, warts and all, especially or primarily for elite

⁷⁶ See LAWRENCE FRIEDMAN, *GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY AND PRIVACY* 6–10 (2007). For a lengthy review of and commentary on Friedman's work, see Paul M. Schwartz, *From Victorian Secrets to Cyberspace Shaming*, 76 U. CHI. L. REV. 1407 (2009).

⁷⁷ FRIEDMAN, *supra* note 76, at 6–10.

⁷⁸ *Id.* at 6–7. Efforts to protect the elite from controversy, of course, were not always successful. Perhaps the best known is the Beecher-Tilton Controversy and subsequent trials over allegations that the famous pastor Henry Ward Beecher had an affair with Theodore Tilton's wife, Elizabeth. The story behind the scandal that first erupted into public view in 1872 is beautifully told in BARBARA GOLDSMITH, *OTHER POWERS: THE AGE OF SUFFRAGE, SPIRITUALISM, AND THE SCANDALOUS VICTORIA WOODHULL* (1998).

and respectable people. The actual law of “privacy,” explicitly using the word, is largely a creation of the twentieth century.⁷⁹

It is not surprising, therefore, that a notion of the “private realm” blossomed in the late nineteenth century—not as protection from unreasonable intrusions, but as a system to protect the burgeoning middle class from threats to reputation. As the middle and upper classes grew, travel became easier, and the press proliferated, Warren, Brandeis, and their peers claimed an entitlement to control how the public learned about reputation. The shift did not represent a change in the underlying and long-standing sense among many of the elite that their lives should be largely inaccessible by others, but in the felt need to warn an increasingly intrusive world of the need to observe traditional boundaries. The rapid increase in the number, circulation, and competitive instincts of the press in the late nineteenth century surely added to the concerns among the upper crust.⁸⁰ That, perhaps, is why extrapolation of the concerns of Warren and Brandeis into contemporary life is warranted. Though Warren and Brandeis bemoaned the deleterious effects of published—often trivial—gossip, some of the examples they cited involved the taking and distribution of pictures, and their text enunciated great concern about the spread and use of the then modern contraptions like concealed cameras.⁸¹ Publication of images of Brooklyn socialites and a comic opera singer in tights, though having little if anything to do with gossip, became symbols to the authors, and later, readers, of the overreaching, intrusive characteristics of the media that might cause permanent harm. So did the use of cameras.

⁷⁹ FRIEDMAN, *supra* note 76, at 213.

⁸⁰ See, e.g., GERALD J. BALDASTY, *THE COMMERCIALIZATION OF NEWS IN THE NINETEENTH CENTURY* 113–46 (1992). The number of daily newspapers in the United States peaked in the very early 1900s. Circulation reached its first peak around 1920 before leveling off in the 1930s and rising to its all time peak during World War II. See Matthew Gentzkow, Edward L. Glaeser, & Claudia Goldin, *The Rise of the Fourth Estate: How Newspapers Became Informative and Why It Mattered*, in *CORRUPTION AND REFORM: LESSONS FROM AMERICA’S ECONOMIC HISTORY* 187, 191–92, 196 (Edward L. Glaeser & Claudia Goldin, eds., 2006).

⁸¹ Warren & Brandeis, *supra* note 19, at 211.

As noted above, Warren and Brandeis bemoaned the arrival of “instantaneous photographs” that have “invaded the sacred precincts of private and domestic life.”⁸² Even here the focus is on private and domestic life—gossip about luncheon dates, weddings, and funerals. What was important to Warren and Brandeis may be mundane to us, but that surely does not negate the possibility that use of modern tools to appropriate intimate moments and distribute them widely raises a host of boundary issues for citizens of today’s world that are related to but quite different from the lines drawn by Warren and Brandeis. Clearly, there are many contemporary instances of malicious, digital, online discussions of peoples’ lives, and extremely harmful, viral displays of personal images facilitated by ubiquitous cell phone single-shot and video cameras.⁸³

There were at least three characteristics of late nineteenth-century newspaper gossip that upset Warren and Brandeis and their elite colleagues—the authoring of stories about middle and upper class citizens without review by the subjects and the publication of information without consent; the personal, domestic and family nature of the published information; and the difficulty in questioning or second-guessing the content of the information revealed. The invention of photography, increasingly smaller cameras, rapid methods of communication such as the telegraph, and speedy printing techniques made the media seem threatening to them. What previously was kept within the boundaries of class based oral discourse became fodder for public display in the published media. What previously was kept fenced in by the desire of middle and upper class men to protect themselves and their peers became subject to comment and criticism among the broader and supposedly less well-mannered body politic. The analogous con-

⁸² *Id.* at 195; *see supra* discussion Part I.A.

⁸³ *See, e.g.,* Marcy Peek, *The Observer and the Observed: Re-imagining Privacy Dichotomies in Information Privacy Law*, 8 NW. J. TECH. & INTELL. PROP. 51 (2009); DANIELLE CITRON, *HATE CRIMES IN CYBERSPACE* (2014); DANIEL SOLOVE, *THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET* (2007). This observation is not intended to refer only or even to defamation. Online statements or images of people can have deleterious consequences when not harmful in ways cognizable in now traditional privacy litigation settings. The recent “reemergence” of Monica Lewinsky as a spokesperson for the sort of online shaming that can easily spread online is only one of many examples. Jessica Bennett, *In Her Own Voice: Monica Lewinsky Is Back, but This Time It’s on Her Terms*, N.Y. TIMES, Mar. 19, 2015, at ST1.

cerns felt by the Fosters were the surreptitious nature of Svenson's picture-taking, the ubiquity of tiny cameras and other devices capable of quickly catching intimate moments, the use of images of people without their consent, the domestic, home-bound nature of the places depicted in the pictures, the display of the pictures in a public gallery space, and the distribution of images online.⁸⁴ The Fosters did not complain about gossip. But they did want to reduce the impact modern technology has on the ability of unsuspecting citizens to control the way they were depicted to others.⁸⁵ That, in modern terms, is at least partly analogous to what drove Warren and Brandeis to protest in the pages of the *Harvard Law Review*.

II. THIS HISTORICAL JOURNEY: PHOTOGRAPHY, ART, AND CULTURE

The camera is the common theme. It has been a revelatory tool for almost two centuries—glancing into and preserving fleeting moments of our deeply flawed memories or aiding the construction of deceptively lifelike portrayals in paintings and drawings. Photography, once the domain of specialists and artists, is now a routine and often spontaneous or happenstance event.⁸⁶ In the last century photographs have morphed from a symbol of public gossip disturbing to the elite into a ubiquitous witness and intruder in the daily lives of the masses. But as change occurred in the technology, use, and distribution of photographs over the century and a half after the invention of compact cameras, several things remained constant—the potential for taking pictures without the knowledge of the human subject, the ability to preserve pictures for significant periods of time, and the capacity to display images to many people. The historical developments in these arenas are the next steps in working through the issues in the *Foster/Svenson* dispute. What has been the history of surreptitious photography, art, and the “right to

⁸⁴ See *supra* text and sources accompanying notes 6–8.

⁸⁵ See *supra* text and sources accompanying notes 6–8.

⁸⁶ I can't help but recall the “Zapruder film.” While innocently capturing President Kennedy's motorcade as it passed through Dallas, Abraham Zapruder ended up with images of the assassination. If you are desperate to watch it, see *Zapruder Film Slow Motion (HIGH QUALITY)*, YOUTUBE (Oct. 1, 2011), <https://www.youtube.com/watch?v=iU83R7rpXQY> [<http://perma.cc/UA5U-8WE3>], for a sequence of the film.

be let alone?” What sorts of controversies, debates, or disputes, if any, arose about use of cameras and photography?

A. *The Camera*

It is generally agreed that what we now call the camera first appeared in the 1820s. The “camera obscura”⁸⁷ was known for centuries before the first true cameras materialized. Light passing through a small aperture into a darkened space would exit the other end and produce an inverted image on a surface or wall.⁸⁸ Artists used the phenomenon, along with mirrors to right the appearance, to produce pictures and develop understanding of perspective.⁸⁹ It also was known for centuries that certain silver salts darkened when exposed to light. It was not until the Frenchman Joseph Nicéphore Niépce, after years of experimentation, put the imaging and chemical processes together to produce the first photographs. A few years after his successful experiments, Niépce teamed up with another Frenchman studying photography—Louise Jacques Mande Daguerre—in efforts to improve the process. After Niépce died in 1833, Daguerre perfected what came to be called “daguerreotypes”—exposures on metal plates covered with silver iodide and bathed in mercury vapor after exposure to light that produced highly detailed images.⁹⁰ The process, announced in 1839, was used to produce many pictures that retain their fine appearance today.⁹¹ Once the process became public, improvements rapidly

⁸⁷ This is a Latin phrase literally meaning “dark chamber.” *Camera Obscura*, OXFORD UNIV. PRESS, http://www.oxforddictionaries.com/us/definition/american_english/camera-obscura [<http://perma.cc/P56B-YBKJ>] (last visited Nov. 13, 2015).

⁸⁸ TODD GUSTAVSON, CAMERA: A HISTORY OF PHOTOGRAPHY FROM DAGUERRETYPE TO DIGITAL 2–4 (2009).

⁸⁹ Indeed, Tim Jemison claimed in the 2013 documentary film *Tim’s Vermeer* that Johannes Vermeer used a camera obscura to make his famous seventeenth-century paintings. For a review of the film, see David Itzkoff, *Tim Jenison, an Inventor, Paints “The Music Lesson,”* N.Y. TIMES, Nov. 27, 2013, at AR21.

⁹⁰ GUSTAVSON, *supra* note 88, at 6.

⁹¹ *Id.* at 46; *see also* BEAUMONT NEWHALL, THE HISTORY OF PHOTOGRAPHY: FROM 1839 TO THE PRESENT 18–19 (1982). Others had previously managed to produce images in the dark that deteriorated when exposed to light. Preserving them was the true dividing line between image creation and what we now know of as photography. It also appears that an Englishman, William Henry Fox Talbot, invented a quite similar process to daguerreotypes at about the same time. *See* NEWHALL, *supra*, at 19–21.

accumulated.⁹² Commercial studios opened to take pictures and sell portraits, and camera enhancements emerged.⁹³ Having daguerreotypes made became a fad, especially in France, England, and the United States; millions of individual and family portraits were created.⁹⁴ Dozens of studios opened in major cities. But it was a time consuming and somewhat laborious process to get a high quality daguerreotype. Those wanting a picture had to sit perfectly still for over thirty seconds.⁹⁵ While mass production, assembly line type businesses produced images in less than half an hour, the finer studios took significantly more time. Daguerreotypes also were fragile and required encasement behind glass. In addition, the lack of easily portable cameras and equipment to produce the final images left picture taking largely in the hands of commercial establishments.⁹⁶

A number of changes had to occur before photography could move out of the studio and into the hands of the general, middle class citizenry. First, a way had to be found to avoid the need to produce an image directly from exposure to light. If the picture surface or plate could be held aside and developed later, the camera and its related paraphernalia could more easily be moved from place to place. Decisions about which of multiple exposures should be preserved could be delayed. Second, the exposure time required to make an image had to be reduced—not simply to ease the labor of posing but also to make outdoor photography of changing scenery, unstable objects, or moving figures possible. Both of these improvements emerged during the early 1840s with the “calotype.” It was perfected by William Talbot, one of the original developers of photography, in the 1830s.⁹⁷

⁹² See GUSTAVSON, *supra* note 88, at 8–16 (explaining briefly twelve daguerreotype cameras, produced by camera makers in France and the United States from 1839 to 1851, that improved upon, or altered, the original design).

⁹³ *Id.* at 11.

⁹⁴ *Id.* at 11, 17; see also NEWHALL, *supra* note 91, at 32.

⁹⁵ See NEWHALL, *supra* note 91, at 32 (“It was hard work to be daguerreotyped; you had to cooperate with the operator, forcing yourself not only to sit still for about half a minute, but also to assume a normal expression.”).

⁹⁶ See *id.* at 30.

⁹⁷ *Id.* at 43–46; see also GUSTAVSON, *supra* note 88, at 21. The word “calotype” derives from a Greek word meaning “beautiful picture.” Talbot perfected the use of paper covered in silver iodide to make images, a significant advance over metal daguerreotypes.

But the invention of the calotype and similar processes was not enough to easily move photography out of the studio and onto the street. Taking pictures still required the use of bulky equipment and complicated development techniques. While expeditions carrying equipment around the globe on ships and beasts of burden occurred, they were neither easy nor cheap to mount. Shots of outdoor scenes began to appear early in the history of photography but it was not until after the middle of the nineteenth century that photography fully blossomed.⁹⁸ The final steps in making photography a creature of the masses required that picture taking be simple, that preservation of multiple shots for long periods of times prior to development be easy, and that carrying a camera virtually anywhere be a breeze. When small, easily portable cameras emerged after the Civil War—first in England and then in the United States—the stage was set for surreptitious picture taking.⁹⁹ And the subversive possibilities became quite obvious as cameras placed inside pistols, book covers, cravats, binocular cases, purses, watches and briefcases became available.¹⁰⁰ Kodak, founded in 1888, took full advantage of the trend by heavily marketing its pocket cameras, perfecting fairly cheap and easy to use film rolls, and creating a widely available system for developing pictures.^{101*} The stage—both personal and artistic—was set.

B. *Early Surveillance Photography*

This is not the place to attempt a comprehensive survey of surveillance photography over the last century. Much has been written and the field is quite large. One recent museum project, however, serves well as an entrée into the field. In 2010 and 2011 the San Francisco Museum of Modern Art and the Tate Modern in Lon-

⁹⁸ See GUSTAVSON, *supra* note 88, at 38, 44.

⁹⁹ *Id.* at 100–13.

¹⁰⁰ *Id.* at 99–113. The pictures of such cameras in Gustavson's book are quite remarkable.

^{101*} See Richard H. Chused, *Early Kodak Camera Advertisement*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments10.html> [<http://perma.cc/D2KC-MDZT>] (last visited Sept. 28, 2015), for an image of an early Kodak ad. I have also posted pictures of early Kodak cameras on my website. See Richard H. Chused, *Early Kodak Cameras*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments11.html> [<http://perma.cc/338T-QB9T>] (last visited Sept. 28, 2015).

don jointly mounted an exhibition called *Exposed*.¹⁰² It was an exploration of the ways in which photography and voyeurism are related. The show, displayed for a time at each museum, was divided into five segments—*The Unseen Photographer*, *Voyeurism and Desire*, *Celebrity and the Public Gaze*, *Witnessing Violence*, and *Surveillance*.¹⁰³ The wide-ranging show confirmed that once the camera became easily available for use in a broad cross section of human activities, pictures capturing private moments, artistic compositions, politically charged environments, violence, war, scandal, and disfavored activities proliferated. Some of the most famous photographs in American history were on display at the museums. Well-known images taken by Jacob Riis and published in 1890 in his classic muckraking book *How the Other Half Lives* were among the earliest surreptitiously-taken photographs.¹⁰⁴ Some of the pictures by Walker Evans displayed in *Let Us Now Praise Famous Men*—an equally famous volume that came to personify the hardships of the Great Depression—also were taken secretly.¹⁰⁵ Evans' later book, *Many Are Called*, contained covertly-taken images of people on the New York City subway system during the 1930s and 1940s.¹⁰⁶ In these and many other examples displayed in the Tate/San Francis-

¹⁰² *Exposed: Voyeurism, Surveillance and the Camera, Exhibition Guide*, TATE, <http://www.tate.org.uk/whats-on/tate-modern/exhibition/exposed/exposed-voyeurism-surveillance-and-camera-exhibition-guide> [<http://perma.cc/LEJ3-GPPF>] (last visited Nov. 16, 2015).

¹⁰³ *Id.* A companion book to the exhibition was published. EXPOSED: VOYEURISM, SURVEILLANCE AND THE CAMERA SINCE 1870 (Sandra S. Phillips ed., 2010) [hereinafter EXPOSED: VOYEURISM]. Each museum has a page on their website devoted to the exhibition. See *Exposed*, TATE, www.tate.org.uk/whats-on/tate-modern/exhibition/exposed [<http://perma.cc/M576-N4S4>] (last visited Sept. 28, 2015).

¹⁰⁴ JACOB RIIS, *HOW THE OTHER HALF LIVES* (1890).

¹⁰⁵ JAMES AGEE & WALKER EVANS, *LET US NOW PRAISE FAMOUS MEN* (Houghton Mifflin Co. ed. 1960) (1941). The book was also reissued in 2001 with enhanced versions of the photographs taken by Evans.

¹⁰⁶ WALKER EVANS, *MANY ARE CALLED* (First Metro. Museum of Art/Yale Univ. Press ed., 2004) (1966). The book was not published for many years after the pictures were taken. The subway project recently became a principle event in a well-received novel. See AMOR TOWLES, *RULES OF CIVILITY* (2011). Its connection to Evans is described in reviews. See, e.g., Liesl Shillinger, *Romantic Mischief in 1930s Manhattan*, N.Y. TIMES, Aug. 12, 2011, at BR20; Sarah Coleman, *Rules of Civility and Subway Photos*, LITERATE LENS (Jan. 12, 2012), <http://theliteratelens.com/2012/01/12/rules-of-civility-and-subway-photos> [<http://perma.cc/S8R3-RV4A>].

co exhibition, the photographs now are highly valued artistic, political, and cultural classics of America and other nations.

From early on some photographers felt the tension between their artistic and political goals and the sensibilities of those either in the images or viewing the pictures. Jacob Riis, however, was not one of them. Many of the photographs in *How the Other Half Lives* were the product of invasive behavior.¹⁰⁷ Carrying a newfangled flash camera, he ventured with colleagues into the tenement house districts of New York, often at night, taking pictures of people in a variety of settings. Sometimes he caught sleeping vagrants and children, both on the street and inside living quarters. Others captured people carousing in back alleys and hallways. Permission was not sought. Sandra Phillips, senior curator at the San Francisco Museum of Modern Art, explained Riis's activities.

Riis walked through the tough parts of lower Manhattan describing the deplorable conditions in which poor people lived. But what made his descriptive prose even more powerful were the photographs that accompanied it, made possible by the recent discovery of the magnesium flare and the flash gun Riis and some friends, mainly amateur photographers, went at night into the most destitute neighborhoods and photographed in dark alleys, small rooms, even basements, often while the subjects were sleeping. The press called these photographers "the intruders," and Riis's pictures seemed especially intrusive when they were seen, greatly enlarged, in his popular lantern slide shows, his principle means of showing them to the public

Although his intent was to promote an improved standard of living for the poor, protect society from endangerment, and preserve humane intimacy, many of Riis's photographs are almost shockingly invasive, a sense reinforced by the brutal, assaultive flash, especially potent in photographs made in-

¹⁰⁷ See RIIS, *supra* note 104.

doors of the sleeping poor. Even when awake, these people were sometimes so dead tired, inebriated, or desperate they seemed not to care, or even by aware that the man in front of them, focusing his camera and igniting the flare.¹⁰⁸

Phillips, with her modern sensibilities about privacy in sleeping quarters, expressed shock at the intrusive nature of pictures such as the one I have posted online.^{109*} While her reaction is understandable in contemporary terms, the issues were not at all the same for Riis. He was much more interested in adventure, the “art” of photography, and charitable reforms than he was in the feelings of his pictorial subjects. It is quite likely that his perceptions were influenced by sensibilities virtually opposite those of his contemporaries—Warren and Brandeis. Rather than wondering about protecting the lives of the elite, he used pictures of impoverished people to encourage voluntary social reform and to aggrandize his own career. Like some other Progressives around the turn of the twentieth century, he had little faith in government reform efforts, thought Christian charity more likely than public programs to solve problems, was more than willing to blame immigrants and the poor for their often dispiriting plight, and found much to admire in Spense-rian notions of natural selection.¹¹⁰ His public lectures were widely attended and helped stimulate sales of *How the Other Half Lives*. The book was a major best seller.¹¹¹ Privacy was hardly on his mind. He mentioned the idea only twice—once to observe how useless

¹⁰⁸ *Id.*

^{109*} The image, entitled “Lodgers in a Crowded Bayard Street Tenement,” taken by Jacob Riis, is available in RIIS, *supra* note 104, at 57, and EXPOSED: VOYEURISM, *supra* note 103, at 30. It is also available online. See *Jacob Riis: How the Other Half Lives*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments12.html> [<http://perma.cc/N3LQ-LWLV>] (last visited Sept. 28, 2015)

¹¹⁰ See BONNIE YOCHELSON & DANIEL CZITROM, REDISCOVERING JACOB RIIS: EXPOSURE JOURNALISM AND PHOTOGRAPHY IN TURN-OF-THE-CENTURY NEW YORK 106–15 (2007). Though many Progressives were deeply interested in government reforms, there also was a deep stream of opposition to government intervention among those claiming an interest in the plight of the impoverished. I found the same train of thought when studying landlord-tenant reforms at the turn of the twentieth century. See Richard Chused, *Impoverished Tenants in Twentieth Century America*, in LANDLORD AND TENANT LAW: PAST, PRESENT AND FUTURE 257–76 (Susan Bright ed., 2006).

¹¹¹ YOCHELSON & CZITROM, *supra* note 110, at 160.

the concept was in overcrowded tenements and the other to note in a similar vein that having doors in living quarters might be helpful in securing privacy.¹¹² Any notion that he inappropriately intruded into the lives of tenement dwellers was outside his frame of reference. He occupied a superior social place.

Riis's views were typical of many, though certainly not all, early twentieth-century Progressives. He described residents of Jewtown in prose laden with the old canard about nefarious moneymaking:

[I]n presenting the home life of these people, I have been at some pains to avoid the extreme of privation, taking the cases just as they came to hand on the safer middle ground of average earnings. Yet even the direst apparent poverty in Jewtown, unless dependent on the absolute lack of work, would, were the truth known, in nine cases out of ten have a silver lining in the shape of margin in bank.¹¹³

Similarly, with the black poor, Riis expressed marginal antipathy for the most atrocious forms of oppression while leaving no doubt about his lowly opinion of the race:

Natural selection will have more or less to do beyond a doubt in every age with dividing the races; only so, it may be, can they work out together their highest destiny. But with the despotism that deliberately assigns to the defenseless Black the lowest level for the purpose of robbing him there that has nothing to do. Of such slavery, different only in degree from the other kind that held him as chattel, to be sold or bartered at the will of his master, this century, if signs fail not, will see the end in New York.¹¹⁴

By the time James Agee and Walker Evans published the classic book *Let Us Now Praise Famous Men* half a century later, the authors expressed, though did not act upon, quite different notions about the significance of private spaces and intimate photogra-

¹¹² Riis, *supra* note 104, at 133, 159.

¹¹³ *Id.* at 148-49.

¹¹⁴ *Id.* at 133.

phy.¹¹⁵ In 1936, they agreed to do a project for *Fortune Magazine* on “cotton tenantry in the United States, in the form of a photographic and verbal record of the daily living and environment of an average white family of tenant farmers.”¹¹⁶ Though the magazine project never saw the light of day,¹¹⁷ it led to publication of the book five years later. The opening lines of the volume revealed a distinctly different mindset from that of Riis. Agee began his powerful exploration of impoverished farmers with an agonizing appraisal of his own role:

It seems to me curious, not to say obscene and thoroughly terrifying, that it could occur to an association of human beings drawn together through need and chance and for profit into a company, an organ of journalism, to pry intimately into the lives of an undefended and appallingly damaged group of human beings, an ignorant and helpless rural family, for the purpose of parading the nakedness, disadvantage and humiliation of these lives before another group of human beings, in the name of science, of “honest journalism” (whatever that paradox may mean), of humanity, of social fearlessness, for money, and for a reputation for crusading and for unbiased, which, when skillfully enough qualified, is exchangeable at any bank for money (and in politics, for votes, job patronage, abelincolnism, etc.); and that these people could be capable of meditating this prospect without the slightest doubt of their qualification to do an “honest” piece of work, and with a conscious better than clear, and in the virtual certitude of almost unanimous public approval.¹¹⁸

¹¹⁵ See BELINDA RATHBONE, *WALKER EVANS: A BIOGRAPHY* 118–38 (1995) for a full telling of the development of the project.

¹¹⁶ AGEE & EVANS, *supra* note 105, at ix.

¹¹⁷ Copies of the original manuscript that was never published have now been found and published. Christine Haughney, *A Paean to Forbearance (the Rough Draft)*, N.Y. TIMES, June 3, 2013, at C1.

¹¹⁸ AGEE & EVANS, *supra* note 105, at 7.

The deep respect Agee and Evans felt for members of the three families they befriended in Alabama is starkly evident in the regal qualities of the faces Evans captured and the artful way he composed shots of rooms and locations empty of people.^{119*} It also is palpable in the way Agee described their movements as Evans took pictures when the houses were empty:

No one is at home, in all this house, in all this land. It is a long while before their return. I shall move as they would trust me not to, and as I could not, were they here. I shall touch nothing but as I would touch the most delicate wounds, the most dedicated objects.

The silence of the brightness of this middle morning is increased upon me moment by moment and upon this house, and upon this house the whole of heaven is drawn into one lens; and this house itself, in each of its objects, it, too, is one lens.

I am being made witness to matters no human being may see.

There is a cold beating at my solar plexus. I move in exceeding slowness and silence that I shall not dishonor nor awaken this house: and in every instant of silence, it becomes more entirely perfected upon itself under the sun.¹²⁰

The very artistry of Agee's prose mirrors the deep tensions he and Evans felt as they completed their invasive project. Their concerns and internal conflicts were motivated both by an understand-

^{119*} Two examples are posted online at Richard H. Chused, *Agee and Walker*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments13.html> [<http://perma.cc/XD6V-LJQT>] (last visited Sept. 28, 2015). Both were taken by Evans when he was under contract with the Farm Security Administration as part of a number of New Deal programs to support the arts and develop support for reform programs. The photos are government documents now in the collection of the Library of Congress. The picture of Allie Mae Burroughs is available online. See *Allie Mae Burroughs, Wife of a Cotton Sharecropper. Hale County, Alabama*, LIB. OF CONG., <http://www.loc.gov/pictures/item/fsa1998020949/PP> [<http://perma.cc/5TS4-GV76>] (last visited Sept. 28, 2015); *Corner of Kitchen in Floyd Burroughs' Cabin. Hale County, Alabama*, LIB. OF CONG., <http://www.loc.gov/pictures/item/fsa1998020949/PP> [<http://perma.cc/YXH7-VEZK>] (last visited Sept. 28, 2015).

¹²⁰ AGEE & EVANS, *supra* note 105, at 135–36.

ing of the intrusive nature of their work and by deep respect for the strength of the poor families they befriended. But, of course, Evans went ahead and took the pictures. They also “explored bureau drawers, storage trunks, kitchen cupboards, and closets, making a thorough inventory of their contents.”¹²¹ Perhaps this was a concession to the importance of the political contours of their work. Or maybe Evans and Agee felt free to go ahead because they obtained some level of consent from the families they imposed upon. They did, however, carry guilt with them as they left Alabama and headed back to New York:

When they finally made their departure . . . Agee and Evans felt as much guilt as they had setting out. But now their guilt was real rather than simply anticipated. They knew that what they had done would not really change the families’ lives for the better, and they knew that the families were under the innocent impression that it would.¹²²

The notion that Agee and Evans could help the locals obtain government assistance was left intact, both while the project was documented and after it ended. In any case, the book received mixed reviews and did not sell well.¹²³ But, when the volume was condemned in reviews, it was not Evans’ images that evoked dyspepsia; rather, it was Agee’s sometimes unfathomable prose that left critical readers at sea.¹²⁴

Not long after Evans took the photographs used in *Let Us Now Praise Famous Men*, he began another project taking pictures with a hidden camera of riders on the New York City subways. He was far

¹²¹ RATHBONE, *supra* note 115, at 129.

¹²² *Id.* at 137.

¹²³ See Malcolm Jones, *Revisiting James Agee: Discovering the Original “Let Us Now Praise Famous Men,”* DAILY BEAST (June 7, 2013, 3:25 PM), <http://www.thedailybeast.com/articles/2013/06/07/revisiting-james-agee-discovering-the-original-let-us-now-praise-famous-men.html> [<http://perma.cc/A6RC-WW7A>].

¹²⁴ See ENCYCLOPEDIA OF THE ESSAY 16–18 (Tracy Chevalier ed., 1977). For a conflicted review, see the 1941 essay of Whittaker Chambers, *Books: Experiment in Communication*, TIME (Oct. 13, 1941), <http://content.time.com/time/magazine/article/0,9171,766271,00.html> [<http://perma.cc/HUD8-SSHD>].

from the only person doing it.¹²⁵ Evans' images, however, were not published until *Many Are Called* was released in 1966. Before the book appeared, Evans claimed that the twenty-five year interval between creating the images and their release was due to his concern about reactions from those portrayed in the pictures. In *Harper's Bazaar*, however, he admitted for the first time,

[T]he portraits on these pages were caught by a hidden camera, in the hands of a penitent spy and apologetic voyeur. But the rude and impudent invasion involved has been carefully softened and partially mitigated by a planned passage of time. These pictures were made twenty years ago, and deliberately preserved from publication.¹²⁶

But, as Jeff Rosenheim was careful to note, the delay may have been due as much to Evans' difficulty in finding a publisher, as it was to concern about the feelings of those pictured.¹²⁷ Furthermore, eight of the pictures were published in 1956.¹²⁸ Luc Sante, in his foreword to the 2004 edition of the book, doubted that the delay was due to any fear of litigation.¹²⁹

Twenty-five years passed between the completion of this book and its original publication. Although folklore has it that Walker Evans feared lawsuits from his unwitting subjects, the times were nowhere near as litigious as ours. Furthermore, Evans had been photographing people on the street, many of them unaware, for well over a decade by then, and he also knew that photographers from Paul Strand to Helen Levitt, who often sat beside him on the subway as his assistant and decoy, had taken surreptitious street pictures with a periscopic lens, and nobody had ever gone after

¹²⁵ See TRACY FITZPATRICK, ART AND THE SUBWAY: NEW YORK UNDERGROUND 117-31 (2009). These surreptitiously-taken pictures can be usefully compared to the use of portraits taken with consent. See, e.g., Corey Kilgallon, *The Faces on the Ferry*, N.Y. TIMES, Mar. 1, 2015, at MB9. This is an article about pictures taken by Marcus Trappaud Bjorn, a Danish photographer, on the Staten Island Ferry. Bjorn's images are quite good, though they lack the spontaneity, informality and compositional qualities of spur of the moment photography.

¹²⁶ Jeff L. Rosenheim, *Afterword*, in EVANS, *supra* note 106, at 203-04.

¹²⁷ *Id.*

¹²⁸ *Id.* at 202.

¹²⁹ Luc Sante, *Foreward*, in EVANS, *supra* note 106.

them when the results were exhibited or published. It is unlikely that Evans would have felt he needed to protect himself from possible retribution, but on the other hand he may well have been apprehensive about how his subject might react emotionally.¹³⁰

And that's the rub. Even if Evans empathized with the feelings of those whose pictures he secretly took, that did not translate into declining to snap the pictures or later publish them. Concern about privacy was "in the air" but not determinative of his or others' artistic actions.

While Riis, Agee, and Evans were among the most famous American surveillance photographers of the first half of the twentieth century, they had many other well-known contemporary and successor colleagues. Lewis Hine took pictures of child laborers in mines without the knowledge of the mine owners; Paul Strand, Alfred Stieglitz, Ben Shahn, Helen Levitt, Henri Cartier-Bresson, Arthur Fellig, and Diane Arbus all took pictures without consent.¹³¹ And, of course, there is the famous dispute over Frederick Wiseman's 1967 documentary film *Titicut Follies*—a devastating portrait of the Massachusetts Correctional Institution at Bridgewater.¹³² "Insane persons charged with crime and defective delinquents" were committed to the facility.¹³³ Wiseman obtained oral permission from the state's Commissioner of Correction and the Attorney General to film operations at the institution.¹³⁴ The terms of the understanding became the subject of much disagreement after then Massachusetts Attorney General Elliot Richardson concluded that they had been violated and that the privacy rights of the institution's inmates breached. Scenes in the film are quite stark and challenging to watch—preparation of a suicide victim's body for burial,

¹³⁰ *Id.* at 11.

¹³¹ Their careers are briefly sketched in Sandra Phillips, *The Unseen Photographer, in EXPOSED: VOYEURISM*, *supra* note 103, at 20–23.

¹³² FREDERICK WISEMAN, *TITICUT FOLLIES* (1967). Wiseman may be the most famous documentary filmmaker of twentieth-century America. He has made dozens of films. In each, he displays people moving, speaking and working in an institution or place, edits the film, and presents it without any narration. The subjects of each film he makes quite literally speak for themselves. Movies and videos were not part of the Tate/San Francisco Modern exhibition, but it would be a striking omission in an essay like this to ignore Wiseman's activities.

¹³³ *Commonwealth v. Wiseman*, 249 N.E.2d 610, 612 (Mass. 1969).

¹³⁴ *Id.* at 612–13.

forced feedings, masturbation, nude inmates confined in their cells, and strip searches, among others. After a trial court enjoined all showings of the film, the Massachusetts Supreme Court modified the injunction to permit educational performances “to legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity.”¹³⁵ The court expressed deep concern about the vagueness of the permission granted to Wiseman, the inability of many inmates to agree to their filming, and the failure to obtain consent from many of those filmed.¹³⁶

Though Wiseman and others have claimed that the First Amendment prevents Massachusetts from limiting use of the film, it is easy to understand why its display was constrained. Despite the fact that it led to significant changes in the way we treat those confined because of mental limitations, the extent of its intrusion into the lives of the inmates was stunning. But for purposes of this Article, the most interesting happening is not the partial banning of the film in the late 1960s, but its release for general use in 1991. Though he previously viewed the film as an egregious intrusion into the lives of Bridgewater’s inmates and was responsible for issuing the initial injunction against its display, Judge Andrew Gill Meyer concluded that a “quarter century has passed since the film was made” and that “no evidence of harm to any individual” resulted from its showings.¹³⁷ This denouement echoes the belated publication of Walker Evans’ subway pictures—acceding to the realities of the passage of time. The fate of Wiseman’s film was a symbol not only of the somewhat heightened cultural awareness of privacy issues during the 1960s, but also the fading impact of intrusion as time passes.

¹³⁵ *Id.* at 618. For a brief summary of the judicial history of the dispute, see Comment, *The “Titicut Follies” Case: Limiting the Public Interest Privilege*, 70 COLUM. L. REV. 359 (1970).

¹³⁶ *Wiseman*, 249 N.E.2d at 616–17.

¹³⁷ Paul Langner, *Last Curb on ‘Titicut Follies’ is Lifted, 24 Years After Ban*, BOS. GLOBE, Aug. 2, 1991. The judge did, however, require that the names and addresses of people shown in the film remain confidential. *Id.*

In an affidavit accompanying his motion to dismiss the Fosters' claims, Arne Svenson noted other more recent photographers have followed in the footsteps of Riis, Agee, and Evans.¹³⁸ For purposes of this Article, the most pertinent artists he noted were Michael Wolf and Michelle Iverson.¹³⁹ Wolf's 2008 book, *The Transparent City*, commissioned by the Museum of Contemporary Photography in Chicago, contained an array of color pictures taken with a telephoto lens in Chicago.¹⁴⁰ Wolf, whose work is in the Metropolitan Museum of Art among other important institutions,¹⁴¹ captured people at home and at work. He began by taking images of large buildings in downtown Chicago from high open-air vantage points. He then blew up pictures—sometimes hundreds of times—of entire structures and discovered images not visible when he snapped the shots. Though they became pixelated, images of people in various forms of apparent concern, distress, boredom, and partial nudity emerged. Examples, available on his website, include one of a man standing in his office and another of a pixelated woman's face in apparent distress.¹⁴² Wolf's pictures, like Svenson's, generated some controversy,¹⁴³ though no litigation was filed.

¹³⁸ Supplemental Affidavit of Arne Svenson ¶¶ 6–10, *Foster v. Svenson*, No. 651826/2013, 2013 WL 3989038 (N.Y. Sup. Ct. Aug. 5, 2013).

¹³⁹ Svenson also referred to the work of Mitchell Epstein. See Supplemental Affidavit of Arne Svenson, *supra* note 138, ¶ 8 (referring to Epstein's *City* series); see also *The City*, MITCHELL EPSTEIN, <http://mitchepestein.net/work/city/index.html> [<http://perma.cc/2B3K-CK64>] (last visited Sept. 28, 2015).

¹⁴⁰ MICHAEL WOLF, *THE TRANSPARENT CITY* (2008).

¹⁴¹ One of his pieces is in the Metropolitan collection online. See *The Online Collection*, METROPOLITAN MUSEUM OF ART, <http://www.metmuseum.org/collection/the-collection-online/search/287975?rpp=30&pg=1&ft=michael+wolf&pos=1> [<http://perma.cc/PET8-ZWEZ>] (last visited Sept. 28, 2015). For a list of other museum collections, see *Biography*, MICHAEL WOLF, <http://photomichaelwolf.com/#biography> [<http://perma.cc/9XDF-SFK6>] (last visited Dec. 21, 2015).

¹⁴² See *Transparent City Detail #7*, MICHAEL WOLF, <http://photomichaelwolf.com/#transparent-city-details/7> [<http://perma.cc/49NN-GBW4>] (last visited Sept. 28, 2015); *Transparent City #32*, MICHAEL WOLF, <http://photomichaelwolf.com/#transparent-city/10> [<http://perma.cc/BQC9-HAY2>] (last visited Dec. 21, 2015). I have elected not to show pictures by either Wolf or Iverson even though it really is not possible to sense the nature of their work without looking at the images.

¹⁴³ See, e.g., James Estrin, *Showcase: Life Behind Glass*, N.Y. TIMES: LENS (July 2, 2009), <http://lens.blogs.nytimes.com/2009/07/02/showcase-14/> [<http://perma.cc/9FKC-DUR3>].

Many of the black and white pictures in Michele Iversen's *Night Surveillance Series* display people's faces and lives in much more revealing and perhaps disturbing ways than in Svenson's.¹⁴⁴ She drove at night to various residential neighborhoods, parked in front of houses and waited with her camera for events to unfold. Her webpage has an artist's statement that would clearly upset the Foster family. It reads:

Night Surveillance Series

As a photographer, I choose to reveal aspects of human nature that were previously hidden from view. These unknown images are constructed from real life. I use the camera as a tool to objectively document and create intimate discoveries through both systematic and chance shooting.

In the *Night Surveillance Series*, I have cautiously and randomly photographed people inside of their homes through windows . . . witnessing curious behaviors. Surveillance is an important element for me. I fearfully wait for an image to record, and to steal the privacy of the subject separated only by a window of glass. These images are motivated by fear. I am afraid to be seen, afraid to watch at the very same moment I determine when to suspend a stranger's privacy. I feel stimulation from the violation imposed upon the unknowingly compliant subjects. An intense aesthetic/erotic friction occurs.

¹⁴⁴ See *Night Surveillance Series*, MICHELE IVERSON, <http://micheleiversen.com/nseries.html> [<http://perma.cc/8CCH-HK9H>] (last visited Sept. 29, 2015). See, for example, a scene of three women talking in a kitchen—Untitled No. 31 (Pasadena, CA 1995). According to Svenson's affidavit, Iversen has been working on this series since 1995. See Supplemental Affidavit of Arne Svenson, *supra* note 138, ¶ 9. She also has received a grant from the New York State Foundation for the Arts. An even more revealing mental image of Iversen is presented in a monologue she gave on a radio show. It is available on *Studio 360* in a story created by Jonathan Mitchell that was originally aired on December 17, 2010. The excerpt with Iversen speaking is part of an hour-long program. See Jonathan Mitchell, *She Sees Your Every Move*, STUDIO 360 (Oct. 7, 2011), <http://www.studio360.org/story/162548-she-sees-your-every-move> [<http://perma.cc/6B-BF-2UAG>]; see also Kurt Anderson, *Surveillance*, STUDIO 360 (Dec. 17, 2010), <http://www.studio360.org/story/108704-surveillance> [<http://perma.cc/NRZ2-639D>] (containing the full program on surveillance technology).

However, I am compelled to make these images and to expose the voyeuristic tendencies inherent in human culture.

The photographs measure 40" x 48". They are intimate and anonymous, familiar and uncomfortable, while at the same time the viewer is complicit with the voyeurism conveyed by each image.¹⁴⁵

There is therefore little doubt that Svenson's work is part of a significant genre of highly regarded photography and filmmaking. Many major galleries and museums in addition to the Tate London and the San Francisco Museum of Modern Art have devoted significant space and resources for exhibitions of this kind of work. Barring the display of Svenson's images risks delegitimizing an artistic movement of some importance. There is, therefore, a dramatic tension between the artistic preferences of photographers like Wolf, Iverson, and Svenson and the privacy concerns of the Fosters.

III. THE LEGAL JOURNEY

The *Foster/Svenson* case does not fit comfortably within the present structure of privacy law. Traditional rationales for creating privacy torts don't accurately speak to the dispute. The tensions between the artistic and cultural intentions of photographers and the preferences of imaged subjects fall outside the ways we normally think about this legal arena. An additional layer of dissonance has arisen with the arrival in the last two decades of digital photography, easy image manipulation, and vast online distribution systems. For this part of the inquiry, I first will investigate traditional privacy tort norms to see why they do not provide an appropriate way to resolve the *Foster* dispute. Second, with the help of others who have written in the field, I'll take a stab at constructing a new way of thinking about the case.

¹⁴⁵ *Night Surveillance Series*, *supra* note 144.

A. Traditional Privacy Tort Law

Commonly discussed rubrics for thinking about and describing privacy intrusions don't work well in the dispute between the Fosters and Svenson. They are either inapplicable to or unsuitable for use. Common law theories of privacy rights—largely derived from the Restatement (Second) of Torts, written in 1977—are very difficult to apply in this circumstance. The rules about intrusive privacy violations require quite offensive behavior, particularly at the place or moment of the intrusion¹⁴⁶—a major obstacle for the Fosters. Little attention is paid to the post-intrusion life of any images obtained¹⁴⁷—a crucial oversight in our digital world. Trespass, in the absence of a dramatic shift to a theory not based on physical incursions, is simply inapplicable.¹⁴⁸ The recent development of publicity rights, often described as an aspect of privacy, is widespread. But the general rule barring nonconsensual use of a person's name, likeness or voice for commercial purposes does not fit the *Foster* situation. The Restatement guidelines may provide protection against highly offensive physical or electronic intrusions, unreasonable public disclosure of private information or intentional revelation of facts placing a person in a false light, but they generally don't cover a situation like the surreptitious taking of pictures through open windows.¹⁴⁹ Privacy in the constitutional sense, and especially the now commonplace phrase “expectation of privacy,” is particularly difficult to fathom in settings where people are openly visible to the world and the invading party is private rather than governmental.

Traditional privacy tort law defines a narrow set of wrongs.¹⁵⁰ Since William Prosser penned his famous article, *Privacy*, in

¹⁴⁶ RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

¹⁴⁷ *Id.* In the language of the rule, the tort arises from the “intrusion,” not the later consequences flowing from distribution of images.

¹⁴⁸ In the *Foster* case, there was no physical intrusion. Relief was possible only if the standard definition of “trespass” was expanded to include the use of cameras to obtain images of areas normally accessible only to someone present in the space.

¹⁴⁹ New York, where the *Foster* dispute arose, generally does not provide relief for any privacy violations that fall outside of the “right of publicity” rubric. See N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2014); see also discussion *infra* note 154.

¹⁵⁰ The literature is enormous. A good starting point for the uninitiated is Richards & Solove, *supra* note 22. A longer version of Solove's ideas is available in SOLOVE, *supra* note 83.

1960,¹⁵¹ courts generally have given credence to the four categories of harms he described.

- (1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.
- (2) Public disclosure of embarrassing private facts about the plaintiff.
- (3) Publicity which places the plaintiff in a false light in the public eye.
- (4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.¹⁵²

This basic structure was copied by the authors of the Second Restatement.¹⁵³ The Fosters are unlikely to gain much solace from

¹⁵¹ See Prosser, *supra* note 22, at 383.

¹⁵² *Id.* at 389. Though intentional infliction of emotional distress often touches on privacy issues, it was never included in Prosser's structure. See Richards & Solove, *supra* note 22, at 1907-09.

¹⁵³ See RESTATEMENT (SECOND) OF TORTS § 652A (AM. LAW INST. 1977). Prosser served as the Reporter for the Restatement (Second) of Torts, so it is hardly surprising that his views of privacy resurfaced. Though he died in 1972 before the new version was published, it emerged virtually unchanged. The privacy provisions are as follows:

652A. General Principle

- (1) One who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.
- (2) The right of privacy is invaded by:
 - (a) unreasonable intrusion upon the seclusion of another, as stated in 652B; or
 - (b) appropriation of the other's name or likeness, as stated in 652C; or
 - (c) unreasonable publicity given to the other's private life, as stated in 652D; or
 - (d) publicity that unreasonably places the other in a false light before the public, as stated in 652E.

652B. Intrusion upon Seclusion

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.

652C. Appropriation of Name or Likeness

One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy.

652D. Publicity Given to Private Life

this taxonomy, not simply because New York is one of the states that does not recognize a common law privacy tort,¹⁵⁴ but because

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that

- (a) would be highly offensive to a reasonable person, and
- (b) is not of legitimate concern to the public.

652E. Publicity Placing Person in False Light

One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if

- (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
- (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Id. §§ 652A–E.

¹⁵⁴ See N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2009). While there are statutory provisions that were adopted in 1903, they deal mostly with right of publicity claims. The pertinent text of these provisions follows:

Section 50 – Right of privacy

A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.

Section 51 – Action for injunction and for damages

Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use and if the defendant shall have knowingly used such person's name, portrait, picture or voice in such manner as is forbidden or declared to be unlawful by section fifty of this article, the jury, in its discretion, may award exemplary damages. But nothing contained in this article shall be so construed as to prevent any person, firm or corporation from selling or otherwise transferring any material containing such name, portrait, picture or voice in whatever medium to any user of such name, portrait, picture or voice, or to any third party for sale or transfer directly or indirectly to such a user, for use in a manner lawful under this article; nothing contained in this article shall be so construed as to prevent any person, firm or corporation, practicing the profession of photography, from

the standards themselves are likely to be unavailing.¹⁵⁵ The Restatement (Second) of Torts section 652B's unlawful intrusion

exhibiting in or about his or its establishment specimens of the work of such establishment, unless the same is continued by such person, firm or corporation after written notice objecting thereto has been given by the person portrayed; and nothing contained in this article shall be so construed as to prevent any person, firm or corporation from using the name, portrait, picture or voice of any manufacturer or dealer in connection with the goods, wares and merchandise manufactured, produced or dealt in by him which he has sold or disposed of with such name, portrait, picture or voice used in connection therewithNothing contained in the foregoing sentence shall be deemed to abrogate or otherwise limit any rights or remedies otherwise conferred by federal law or state law.

Id. §§ 50-51

New York courts have consistently refused to allow expansion of these provisions to cover the taking and sale of pictures unattached to the marketing of a separate product. Plaintiffs must show that their picture was used for purposes of advertising or trade without consent. Under this standard, non-consensual use of an image to promote a product is one thing. Sale of the image itself is another. Therefore, a person whose name, address, date of birth, and social security number were published by a daily newspaper along with information concerning involvement in an illegal sports gambling operation, could not recover because the information was published by defendant in a newsworthy article and was not used for advertising or trade purposes. *See, e.g., Valeriano v. Rome Sentinel Co.*, 43 A.D.3d 1357 (N.Y. 2007).

Similarly, an artist may make a work of art that includes a recognizable likeness of person without consent and sell copies without violating privacy statutes, *see Simeonov v. Tieg*s, 159 Misc.2d 54 (N.Y. 1993), use the identity of a person in a work of fiction, *see Costanza v. Seinfeld*, 279 A.D.2d 255 (N.Y. 2001), or use a photo in a book on nude beaches with the recognizable image of a person who was present at the time, *see Creel v. Crown Publishing, Inc.*, 115 A.D.2d 414 (N.Y. 1985). These disputes should be contrasted with *Cohen v. Herbal Concepts, Inc.*, 63 N.Y.2d 379 (1984), where a surreptitiously taken picture of a mother and her child bathing nude in a stream was later used without permission in an ad for a product claiming to get rid of cellulite. The picture was from the side and did not show faces, but was remanded for trial on whether the plaintiffs were recognizable. Putting aside the privacy intrusion issues at stake in this Article, the limitation on publicity right claims makes some sense. Many photographs of people are taken both without consent and without serious concerns about privacy. The sales of such images should not raise publicity rights problems.

¹⁵⁵ A fairly recent, tragic case is a perfect example of both the unwillingness of the New York courts to allow common law privacy claims and the difficulties of meeting the traditionally defined privacy intrusion standard about to be described in the text. *N.Y. Med*, an ABC-TV series, broadcast a recording made in the New York-Presbyterian Hospital emergency room of the futile efforts to save the life of a man hit by a garbage truck. For more details, see Charles Ornstein, *Dying in the E. R., and on TV*, N.Y. TIMES, Jan. 4, 2014, at M1. Neither the dying man, Mark Chanko, nor any member of his family

standard—the most relevant to the Fosters—provides, “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”¹⁵⁶ The commentary indicates clearly that the interest protected is “solitude or seclusion,” that publicizing the results of the intrusion is not a prerequisite to suit,¹⁵⁷ and that the intrusion need not be physical.¹⁵⁸ While the standard seems applicable, the requirement that the intrusion be highly offensive to a reasonable person is a major stumbling block. The cases providing some form of relief typically involve obvious intrusions, such as divorce disputes where one soon-to-be ex-partner plants listening or video devices in the home of the other or disputes between neighbors involving long-term surveillance.¹⁵⁹ The examples in the Restatement commentary typically have either a dramatic quality about them—a hospital picture taken

consented to the recording of the hospital scenes or their later broadcast. No identifying information about the patient was revealed though he was visible with a pixelated face during the broadcast. The family sued the hospital, doctor, and TV network. Their privacy intrusion claims were dismissed. The trial court allowed an intentional infliction of emotional distress cause of action to go forward against the network, but that was reversed on appeal. The Appellate Division concluded that the imposition upon Mark Chanko’s family when they saw the episode without any knowledge of its impending broadcast “was not so extreme and outrageous as to support a claim” for emotional distress. *Chanko v. American Broadcasting Co., Inc.*, 122 A.D.3d 487 (N.Y. 2014). That limitation on emotional distress claims is quite similar to the traditional privacy intrusion rule requiring that the invasion must be highly objectionable to a reasonable person. It is very difficult to justify the *Chanko* result.

¹⁵⁶ RESTATEMENT (SECOND) OF TORTS § 652B.

¹⁵⁷ *Id.* § 652B cmt. a:

The form of invasion of privacy covered by this Section does not depend upon any publicity given to the person whose interest is invaded or to his affairs. It consists solely of an intentional interference with his interest in solitude or seclusion, either as to his person or as to his private affairs or concerns, of a kind that would be highly offensive to a reasonable man.

¹⁵⁸ *Id.* § 652B cmt. b:

The invasion may be by physical intrusion into a place in which the defendant has secluded himself It may also be by the use of the defendant’s senses, with or without mechanical aids, to oversee or overhear the plaintiff’s private affairs It may be by some other form of investigation or examination into his private concerns

¹⁵⁹ See, e.g., *Polay v. McMahon*, 10 N.E.2d 1122 (Mass. 2014); *In re Marriage of Tigges*, 758 N.W.2d 824 (Iowa 2008).

after being told to leave¹⁶⁰—or a quality of persistence and stubbornness by the intruder—intimate picturetaking over a period of time.¹⁶¹ In addition, public spaces, or perhaps spaces left visible to those in other places, are not environments conducive to privacy lawsuits.¹⁶²

While it is possible that these norms might be met in the Foster setting, it is a very steep hill to climb. There are a series of significant problems and potentially illogical limitations on the claim. First, there is no evidence that Svenson took pictures over a long period of time. Second, Svenson took pictures of a variety of apartments in addition to that of the Fosters. Only two of the images in *The Neighbors* exhibition involved their abode.¹⁶³ He was not particularly obsessed with them. Third, all the pictures in the exhibition involved views through windows totally or significantly un-

¹⁶⁰ One example reads,

A, a woman, is sick in a hospital with a rare disease that arouses public curiosity. B, a newspaper reporter, calls her on the telephone and asks for an interview, but she refuses to see him. B then goes to the hospital, enters A's room and over her objection takes her photograph. B has invaded A's privacy.

See RESTATEMENT (SECOND) OF TORTS § 652B cmt. b, illus. 1.

¹⁶¹ Another example tells this little story: "A, a private detective seeking evidence for use in a lawsuit, rents a room in a house adjoining B's residence, and for two weeks looks into the windows of B's upstairs bedroom through a telescope taking intimate pictures with a telescopic lens. A has invaded B's privacy." *Id.* § 652 cmt. b, illus. 2.

Life imitates Restatement examples. See Terrence McCoy, *Penn State Frat Boys Sure Enjoyed Posting Facebook Pics of Passed Out, Nude Women*, WASH. POST (Mar. 18, 2015), <http://www.washingtonpost.com/news/morning-mix/wp/2015/03/18/what-penn-state-frat-brothers-said-while-posting-pics-of-passed-out-nude-women> [<http://perma.cc/GZS3-HJEM>]. This article describes one of a spate of recent fraternity scandals. Or recall the incredible incident of a Modern Orthodox rabbi hiding a video device in a *mikva* (ritual purification bath) in a synagogue. See Michael Paulson, *Prominent Rabbi Arrested on a Charge of Voyeurism*, N.Y. TIMES, Oct. 14, 2014, at A26.

¹⁶² That doesn't mean controversy is lacking. Street photography, now a common artistic endeavor, does not pass unnoticed. Bruce Gilden is certainly one of the most talked about and sometimes disliked practitioners of the genre. For commentary on his work from a fellow traveler and blogger, see Erik Kim, *Bruce Gilden: Asshole or Genius*, ERIC KIM PHOTOGRAPHY BLOG (June 24, 2011), <http://erickimphotography.com/blog/2011/06/24/bruce-gilden-asshole-or-genius> [<http://perma.cc/9VXT-ZUBT>]. Or you can visit Gilden's website and make up your own mind. BRUCE GILDEN, <http://www.brucegilden.com> [<http://perma.cc/5UUF-UDDU>] (last visited Sept. 28, 2015).

¹⁶³ It is possible he has more pictures that have not been publicly displayed, but I have no way of obtaining information about that at the moment.

obstructed by curtains or blinds. The occupants, in a sense, allowed others to view them and perhaps therefore waived any intrusion claims. Fourth, as far as I can tell, all but one of the images in the exhibition was of living spaces, not bedrooms. These were not places where Svenson would have expected people to disrobe while leaving their shades up. And finally, Svenson's intention was not malicious, unkind, or prurient. His goals were artistic. In short, there is a strong basis for concluding that the traditional privacy intrusion rules do not cover this case—that they would not be deemed “highly offensive to a reasonable person.”¹⁶⁴ When merged with the focus on the moment of intrusion rather than the range of impacts—before, during and after the intrusion—the doctrine artificially limits the factors that may be taken into account.

For quite similar reasons, traditional ideas about physical intrusions into property aren't helpful. It is obvious that prying human eyes, whether looking through a camera lens or not, do not trespass on the place being viewed. And, of course, eyes and the cameras in front of them are now the least of our problems. Technology has made it possible to discern much about what goes on inside buildings without either physically entering them or using our eyes to discern activity. Heat detectors can peer through walls and sound receivers can amplify faint noises emanating from many types of places.¹⁶⁵ Roving cameras in cars, robots, drones, and satellites turn Google Maps and other systems into unreal ways of viewing the world's features—large and small alike. Indeed, the happenstance ways people and homes are imaged as Google's cameras scour the world raises issues related to those under discussion here.¹⁶⁶

But even if you wished to dramatically reconstruct the idea of trespass to include sensory intrusions into homes by the use of cameras, listening devices, heat detectors or other (perhaps not yet invented) contraptions, there is no obvious way to categorize which

¹⁶⁴ This is the standard norm found in the Restatement (Second) of Torts, section 652B.

¹⁶⁵ See, e.g., *Kyllo v. United States*, 533 U.S. 27 (2001) (involving the use of detection devices without a warrant, the Supreme Court disallowed use of the evidence obtained without a warrant); *Riley v. California*, 134 S.Ct. 2473 (2014) (barring the routine search of cell phone contents after a stop or an arrest without a warrant).

¹⁶⁶ For a review of some of the issues, see Roger C. Geissler, *Private Eyes Watching You: Google Street View and the Right to an Inviolable Personality*, 63 HASTINGS L.J. 897 (2012).

sensory intrusions should be deemed unlawful. Attempting to do so only recreates the dilemmas presented by the dispute between the Fosters and Svenson. Some intrusions may be perfectly acceptable; others may not. The presence or non-presence of a particular intrusive device does not resolve the problem. In addition, the requirement that the invasion be highly offensive is a significant and perhaps irrational standard in a world filled with barely obvious or subtle ways of gaining access to the intimate lives of others.

Nor do standard notions of commercial exploitation embedded in doctrines like publicity rights resolve the problems. The core of publicity rights attacks the use of a well-known person's name or likeness to endorse or sell a product—using a famous name as a product moniker or a well-known person's likeness in an advertisement without obtaining consent. So courts have barred Christian Dior from using Barbara Reynolds—a Jackie Onassis look-alike—in advertisements^{167*} and Ford Motor Company from hiring Ula Hedwig—a one-time backup singer for Bette Midler—to record a Midler staple with an amazingly good imitation of Midler's voice in a TV spot for Mercury Sable automobiles.¹⁶⁸ Though the baseline rule makes sense as a way of deterring those who attempt to reap where they have not sown, it has too often been used

^{167*} Philip Shenon, *Court Supports Mrs. Onassis on Ad*, N.Y. TIMES (Jan. 13, 1984), <http://www.nytimes.com/1984/01/13/nyregion/court-supports-mrs-onassis-on-ad.html> [<http://perma.cc/2ABX-NUSW>]. A picture of the Dior advertisement can be found at Richard H. Chused, *Onassis Publicity Rights*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments14.html> [<http://perma.cc/M4G6-FF5H>] (last visited Sept. 28, 2015).

¹⁶⁸ *Midler v. Ford Motor Company*, 849 F.2d 460 (9th Cir. 1988). One of the ads is available online. (Mostly) Fan Made Ford Ads, *2008 Mercury Sable Commercial*, YOUTUBE (Aug. 12, 2007), <http://www.youtube.com/watch?v=YUiMiox0WP0> [<http://perma.cc/ZJV6-S2CZ>]. The story is told in GENELLE BELMAS & WAYNE OVERBECK, *MAJOR PRINCIPLES OF MEDIA LAW* 214 (2012). It's worth comparing the Midler dispute with *Sinatra v. Goodyear Tire & Rubber Co.*, 435 F. 2d 711 (9th Cir. 1970). Here, too, the advertiser had purchased the right to use the song, "These Boots Are Made For Walking," made famous by Nancy Sinatra, without obtaining the singer's consent. But the voice imitation, if you dare to call it that, did not sound much like Sinatra. Though many people watching the ad certainly thought of Sinatra because of the music, it was difficult to contend that her persona was used in the ad itself. In both *Midler* and *Sinatra*, rights to use the music itself were purchased by the advertiser.

well beyond any legitimate boundary line to crimp creativity and public commentary.¹⁶⁹

There are at least two justifications for the right of publicity. First, use of a person's image, a likeness of a person, a spot-on imitation, or the name of a person in a sales pitch connotes an endorsement of the product by the personality appearing or seeming to appear in the pitch. That, of course, is the primary reason for using a well-known person's likeness in an ad—it helps sell products. But such non-consensual use can, at times, be pernicious. Bette Midler, for example, has never agreed to participate in a product advertisement.¹⁷⁰ To undermine such a course of conduct attacks one of the core values she adheres to in her business life. Second, even if a personality does, from time to time, appear in ads, those decisions presumably are made with consent and, typically, for compensation. Why should a company be able to obtain the services of a well-known personage for free? Those who reap where they have not sown typically are treated badly in business tort jurisprudence. It is this commercial use standard—often a stand-in for trademark—that is embodied most clearly in the New York privacy statutes relied upon by the Fosters. But the state's

¹⁶⁹ There now are many examples of publicity rights “overreaching.” Two are enough to make the point. One is the famous case of *Factors Etc., Inc. v. Pro Arts Inc.*, 579 F.2d 215 (2d Cir. 1978), involving a poster of Elvis Presley released shortly after his death. The successor in interest of Presley's estate claimed control over the use of his fame, a position supported by the court. There were two serious flaws with the result, putting aside the issue of whether publicity rights should survive the death of the famous person. First, copyright in the picture used in the poster was not held by Presley's estate and the photo was legitimately taken at a concert. Allowing publicity rights to control its use should have been preempted under the Copyright Act, 17 U.S.C. § 301 (2006). Second, and most important, the poster was simply a picture of Presley. It was not used as a come on to buy another item. That is not the sort of story normally governed by publicity rights. Another, and arguably more egregious result, was *White v. Samsung*, 971 F.2d 1395 (9th Cir. 1992). Vanna White, the letter turner on Wheel of Fortune, was made fun of in a Samsung ad that had a woman of similar stature dressed up as a robot turning letters. Though the parody of White was very funny, the court found its use in an ad a violation of her publicity rights. Why humor was not permitted is hard to discern. White, after all, really does play the part of a robot on Wheel of Fortune. The ad certainly cannot be taken as an endorsement by White of Samsung products.

¹⁷⁰ Terri Eileen Hilliard, *Advertisers Beware: Bette Midler Doesn't Want to Dance*, 9 LOY. L.A. ENT. L. REV. 43 (1989).

courts have steadfastly held to a rule that a likeness must be used to boost sales of a product other than the picture itself.¹⁷¹

That is a sensible result, for some secretly taken pictures create no significant privacy intrusion problems, and others do. Creative photographers and artists often should be allowed to shoot, draw, paint, and then sell scenes with people in them—even recognizable people—without seeking permission. The fact that one person makes money by using the likeness of another person found in a public place typically does not suffice by itself to support a suit claiming violation of privacy or publicity rights. The well-known photographer Jesse Kalisher, for example, is most proud of an image he took, reproduced online, of a woman he does not know standing in front of the Mona Lisa.^{172*} Surely he is not barred from selling this picture just because it features another person in a public space. Nor is marketing of the many pictures of people quietly sitting in a room of paintings by Rothko—an artist renowned for inducing contemplative, “private” viewing—barred. In fact, fascinating results appear if you do a Google image search using the

¹⁷¹ See N.Y. CIV. RIGHTS LAW §§ 50-51 (McKinney 2009). The statute was adopted in 1903 in response to the public furor created by the decision in *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902). A picture of Abigail Roberson, not a well-known personality, was used to advertise flour. Neither the picture nor its use was consensual. Twenty-five thousand copies were displayed all over the state. The new Court of Appeals refused to create a common law privacy or publicity rights theory to impose liability. A contrary, and now famous, result was reached three years later in *Georgia. Pavesich v. New England Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

^{172*} On his website he writes,

After a bit, I decided to step back from the crowd and just take in the room. My camera, at this point, was hanging around my neck and I was merely observing the ebb and flow of people. That’s when this woman walked past me. I’m asked often . . . so for the record: I don’t know who this woman is, I have never met her, never spoke to her, and I did not ask her to walk in front of me. It just happened. Luckily, I did notice her incredible resemblance to the famous painting, lifted my camera and got off one shot. I like to joke that this picture should put my kids through college . . . it is certainly one of the shots of which I’m most proud. Oh, and if anyone knows who this woman is, by all means, please tell me . . .

Jesse Kalisher, *Mona Lisa at the Mona Lisa* (Oct. 8, 2008), http://www.kalisher.com/photo_blog/?p=4 [<http://perma.cc/ABL3-GNFP>]. The image is also available at Richard H. Chused, *Kalisher Image*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments15.html> [<http://perma.cc/C7ER-EH6T>] (last visited Sept. 28, 2015).

phrase “contemplating Rothko.”^{173*} Some of the pictures are both beautiful and thought provoking.

While the pictures of the Fosters were for sale before they were removed during the litigation,¹⁷⁴ the images were not used to sell another product. Nor did Svenson’s compositions imply in any way that the Fosters or other residents of The Zinc were endorsing commercial activity; quite the contrary was the case. And since the Fosters were unknown figures, Svenson certainly was not reaping where others had sown. Their “fame” was not a basis for sale of any photographs. Only Svenson’s creative talents led people to buy an image. If those sales are to be constrained in any way, it must be for reasons other than the simple presence of an image of a human being.

Finally, the notion that something called “privacy” involves arenas where we have an expectation of non-intrusiveness doesn’t help much for at least two groups of reasons—one involving the settings in which the phrase typically is used, and the other arising from the limitations now imposed on its use in a private law context. First, the phrase “expectation of privacy” most commonly arises where a private party is attempting to use the Fourth Amendment to the Constitution to constrain government action.¹⁷⁵

^{173*} One site that pops up is a review of a 2012 Rothko exhibit at the Portland, Oregon Museum of Art. The page contains a number of images of people looking at Rothkos, including one displayed on my website, *see* Richard H. Chused, *Contemplating Rothko*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments16.html> [<http://perma.cc/5U7G-4NV9>] (last visited Sept. 28, 2015). *See also* *Rothko: Portland Art Museum*, TRAVELMARX (June 25, 2012), <http://blog.travelmarx.com/2012/06/rothko-portland-art-museum.html> [<http://perma.cc/J9XA-FCCC>]. There also is a famous Rothko Chapel in Houston. ROTHKO CHAPEL, <http://rothkochapel.org> [<http://perma.cc/9MG7-UZAQ>] (last visited Sept. 28, 2015). An almost equally well-known Rothko Room at the Phillips Museum in Washington, D.C. with signs explicitly requesting viewers to view the paintings in quiet contemplation. *The Rothko Room*, PHILLIPS COLLECTION, <http://www.phillipscollection.org/collection/rothko-room> [<http://perma.cc/9DD6-XB68>] (last visited Sept. 28, 2015).

¹⁷⁴ Martha Foster claimed in an affidavit filed in the case that the pictures were for sale for \$5,000 to \$7,500. Affidavit of Martha G. Foster in Support of Motion for Preliminary Injunction ¶ 5, *Foster v. Svenson*, No. 651826/2013, 2013 WL 3989038 (N.Y. Sup. Ct. Aug. 5, 2013).

¹⁷⁵ Its first major incarnation was in Justice Harlan’s concurring opinion in *Katz v. United States*, 389 U.S. 347 (1967). He concluded that protection flowed from two conditions—“that a person have exhibited an actual (subjective) expectation of privacy

It asks what parts of our environment should be free from unreasonable intrusion because we “expect” the government to stay out.¹⁷⁶ Police, for example, are allowed to *peer* into virtually any unobstructed place.¹⁷⁷ It would be almost impossible, therefore, for the Fosters to bar government use in a criminal case of a photograph taken through their window. Still, enforcement authorities may not typically *enter* a private residence without good reasons or a warrant.

A fairly recent example is *Kyllo v. United States*.¹⁷⁸ The Supreme Court concluded that the warrantless use of a thermal detector to scan the inside of a home for possible use of lamps to grow marijuana violated the Fourth Amendment.¹⁷⁹ Justice Scalia wrote:

We have held that visual observation is no “search” at all—perhaps in order to preserve somewhat more intact our doctrine that warrantless searches are presumptively unconstitutional. In assessing when a search is not a search, we have applied somewhat in reverse the principle first enunciated in *Katz v. United States*, 389 U. S. 347 (1967). *Katz* involved eavesdropping by means of an electronic listening device placed on the outside of a telephone booth—a location not within the catalog (“persons, houses, papers, and effects”) that the Fourth Amendment protects against unreasonable searches. We held that the Fourth Amendment nonetheless protected *Katz* from the warrantless eavesdropping because he “justifiably relied” upon the privacy of the telephone booth. As Justice Harlan’s oft-quoted concurrence described it, a Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as

and, second, that the expectation be one that society is prepared to recognize as [objectively] ‘reasonable.’” *Id.* at 361.

¹⁷⁶ *See id.*

¹⁷⁷ *See, e.g., Dow Chemical Co. v. United States*, 476 U.S. 227, 234–35, 239 (1986) (holding that an aerial viewing of Dow facilities by environmental regulations was not a search within the meaning of the Fourth Amendment).

¹⁷⁸ 533 U.S. 27 (2001).

¹⁷⁹ *Id.* at 41.

reasonable. We have subsequently applied this principle to hold that a Fourth Amendment search does not occur—even when the explicitly protected location of a house is concerned—unless “the individual manifested a subjective expectation of privacy in the object of the challenged search,” and “society [is] willing to recognize that expectation as reasonable.” We have applied this test in holding that it is not a search for the police to use a pen register at the phone company to determine what numbers were dialed in a private home, and we have applied the test on two different occasions in holding that aerial surveillance of private homes and surrounding areas does not constitute a search.¹⁸⁰

In reading passages like this, it is clear that the Court was concerned about overly constraining police enforcement actions. Expectations of privacy must be held not only by the party intruded upon but also by society at large.^{181*} Though the rule’s wisdom is subject to serious questions, it has long been understood that areas open to sightlines or items held by third parties are not protected by the Fourth Amendment.¹⁸² Once something is visible to anyone

¹⁸⁰ *Id.* at 32–33. The same basic outcome may be gleaned from *Bond v. United States*, 529 U.S. 334 (2000) and *Florida v. Riley*, 488 U.S. 445 (1989). In *Bond*, the Court suppressed methamphetamine found in a soft bag. A Border Patrol Agent had squeezed the bag after boarding a bus to check the immigration status of the riders, but lacked any reasons to believe that Bond was carrying illegal substances. *Bond*, 529 U.S. at 338–39. On the other hand, the use of a helicopter to perform exterior searches from a height of 400 feet was approved in *Riley*. The helicopter search allowed a county sheriff to see into the interior of a greenhouse. The information gained led to the issuance of a search warrant and the arrest of Riley for growing marijuana. *Riley*, 488 U.S. at 451–52. *Bond* was said to be a case about unlawful intrusion, and *Riley* about using information obtained from an unobstructed view through windows.

^{181*} To test your sensibilities, look at a thermal image of the White House at Richard H. Chused, *Thermal Imaging*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments17.html> [<http://perma.cc/A62R-Q3PK>] (last visited Sept. 28, 2015). The British Gas image was published in 2010. Suzanne Goldenberg, *Barack Obama’s \$5bn Green Home Plan to Boost Economy Gets Off to a Slow Start*, *GUARDIAN* (Feb. 19, 2010), <http://www.theguardian.com/environment/2010/feb/19/weatherisation-energy-efficiency-us-recovery-plan> [<http://perma.cc/8UKC-EW6X>].

¹⁸² For a recent, thought provoking, privacy driven assessment of the Fourth and Fifth Amendments to the United States Constitution, see Bryan Choi, *For Whom the Data*

other than the rights claimant, it loses its constitutional protections.

These sorts of norms may not rationally be applied in the *Foster/Svenson* setting. The most obvious reason is that the privacy expectation rubric itself has lost connection with reality. The way the various branches of the government obtain personal information no longer allows for much, if any, expectation of privacy. The rule allowing the government to use information or objects visible to third parties, regardless of how they obtained it, places an enormous realm of “private” information and data outside constitutional boundaries. The vast wealth of online data, all routinely searchable by government authorities, makes a mockery of the idea that our expectations about the ways “private” information should be used by public authorities has any relationship to its actual use. The widespread knowledge that the government routinely searches a great deal of our supposedly private physical, electronic, and psychic spaces makes any notion of privacy based on intrusion into physical places or territories seem preposterous. But most importantly, the *Foster/Svenson* dispute does not involve any expectations about the use or abuse of government power. It asks quite different questions about human interactions outside the arenas of government security and enforcement authority. That is critically important, for sometimes, the government may justifiably intrude in ways individuals may not, while in other instances, individuals may venture where the government is barred.¹⁸³

Second, there are many parts of our lives that are routinely visible to the general public, but traditional civil privacy law does not bar the media from using information once it is publicly available—regardless of our expectations.¹⁸⁴ The impact of that rule on the

Tolls: A Reunified Theory of Fourth and Fifth Amendment Jurisprudence, 37 CARDOZO L. REV. 185 (2015).

¹⁸³ For example, a police officer may often stop a person on the street and seek information, make an arrest or perform a search. Those not involved in law enforcement may not take such steps. On the other hand, a spouse or parent typically may open any closet in her or his residence, even if another occupant is the primary user of the space. Police may not take such actions without quite specific permission or reasons. This Article is not about government-citizen contacts, but citizen-citizen contacts.

¹⁸⁴ The principle early case is *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). The Supreme Court concluded that the First Amendment barred providing an invasion of

Fosters is not clear. Leaving the blinds up or curtains open in our apartments doesn't necessarily invite prying eyes to look, but it doesn't bar them either. Indeed, walking around New York at night often is a visual delight for those who enjoy seeing how residents have decorated or remodeled apartment interiors in the sometimes nondescript buildings that line the city's streets and avenues. We have no pure privacy expectations from prying eyes in such settings, but we may still conclude—despite our open confession that we often make the interiors of our abodes visible to those outside our living spaces—that some distributions of photographs of our home-based happenings is inappropriate. It is not that we have any expectation that peering into a place is off limits to third parties, but rather that we might reasonably hope to limit the ways such peering may be used. It is not just, or even, the intrusion that is at issue. It is the entire context surrounding what people do with their ability to appropriate moments in other people's lives. Something other than or in addition to expectations of privacy must be at work.

There are, of course, similar problems in the electronic world. Indeed, the more we learn about the scope of intrusive actions by both public and private entities, the less relevant does the "expectation of privacy" rubric become. There no longer can be a cultural belief that our personal lives are invisible or unavailable to others. We hope that much of what we deposit in online data clouds, say on a telephone, or send in a text message or email stays private. But we know that even the best-intentioned cloud manager makes mistakes or fails to detect hacking. And we also know that much of what we post or send online easily may escape into the world or government data caches. Granting only "friends" access to pictures and videos on Facebook hardly guarantees that they will remain visible just to that group. One right-click of a mouse allows any "friend" to save such an image and then to send it to others. The lack of privacy expectations, however, does not mean that eve-

privacy cause of action against a broadcast outlet to the father of a rape victim when state law barred the release of the victim's name but reporters discovered it in public records. The same basic result emerged a some years later in another Florida case, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989). Further discussion of this issue may be found in later segments of this Article, *see infra* note 239.

rything about us that is visible to some machine or person—whether online or not—should be available for appropriation or use in all circumstances. That, of course, is the problem confronted here.

B. Reconstructing Intrusive Privacy Violations

The traditional rules don't ask the right questions. Just as in the age of Warren and Brandeis, technology has dramatically altered the ways in which moments may be appropriated, and perhaps even more importantly, distributed. In the case of Svenson's *Neighbors* exhibition, images were displayed not only on the walls of a gallery, but also online. So it is not just the traditional notion of intrusion that is at issue. The ways in which incursions manifest themselves in the world after a moment is appropriated also are relevant. In the view of the Restatement (Second) of Torts, to say nothing of the traditional construction of the Fourth Amendment, it is the intrusion that is the harm.¹⁸⁵ That is no longer the appropriate measure for the nature of the interests that need protection. Contemporary issues are much more complex than in the 1970s when the Restatement (Second) was written and *Katz* was decided. We should applaud, rather than bemoan, the possibility that similar sorts of intrusions might produce quite different legal results—dependent at times upon what happens after the intrusion itself occurs. Bright line rules no longer serve us very well. As Daniel Solove¹⁸⁶ and Helen Nissenbaum¹⁸⁷ have correctly noted, privacy law needs to be thickly contextualized—each case placed in a deeply fact-based setting. Though writing about technology-based privacy issues, Helen Nissenbaum aptly framed the problem.

The framework of contextual integrity maintains that the indignation, protest, discomfit, and resistance to technology-based information systems and practices . . . invariably can be traced to breaches of context-relative information norms. . . . Context-relative informational norms are characterized by four key parameters: context, actors, attributes and

¹⁸⁵ RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977).

¹⁸⁶ See SOLOVE, *supra* note 22, at 39–41.

¹⁸⁷ See NISSENBAUM, *supra* note 22, at 140–43, 186–230.

transmission principles. Generally, they prescribe, for a given context, the types of information, the parties who are the subjects of the information as well as those who are sending and receiving it, and the principles under which this information is transmitted.¹⁸⁸

That means that it is not merely the way images are obtained, but also the entire setting in which that event occurs and plays out over time. We need to consider the nature of the observation by the photographer, the methods used to obtain the information, the physical setting in which the observation occurs, the dissemination and distribution of the information, and the way the information is used.¹⁸⁹ Though such factor-based analytical structures reduce the ability of relevant actors to predict dispute outcomes, they may produce much more appropriate results. At least for now, that sort of compromise is much better than the alternative. It makes more sense to seek fair resolutions of modern privacy disputes than to rigidly apply old rules that are losing their ability to cope with modern technological developments.¹⁹⁰

C. *Resolving the Foster Dispute*

So, allow me a stab at resolving the *Foster* case. I suggest that when the entire context of the Foster situation is taken into account, a strong argument may be made that Svenson's behavior was inappropriate. First, the observation was obtained surreptitiously and without express consent. Second, the non-consensually taken images were shot from the shadows of Svenson's apartment using a camera with the capacity to zoom in on the subjects. Third, the images were taken of people during the routines of their daily lives and in the confines of their homes above street level. Fourth, Svenson did not just record the digital images and save them for his personal use; he also composed images, blew them up and arranged

¹⁸⁸ *Id.* at 140–41.

¹⁸⁹ A similar point is made by Jane Yakowitz Bambauer in *The New Intrusion*, 88 NOTRE DAME L. REV. 204, 211–13 (2012).

¹⁹⁰ One of the finest articles about the constantly changing tension between bright line and flexible rules is Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577 (1988).

for their display in both a gallery and on a web site. Finally, the two images the Fosters sued over displayed the faces of their children. Is it appropriate for this sort of photographic endeavor to use children as its subjects? Let's review each of these factors to discover if they construct an edifice.

1. The Consent Conundrum

Those in Svenson's view finder had no idea they were being photographed from the shadows of his loft and no way of finding out unless the images were publicly displayed or the serendipity gods intervened. That may well not be enough by itself to penalize him. Many images captured without the knowledge and consent of the subject are not—and should not—be considered privacy problems. Conversely, images obtained consensually but later distributed without permission might raise serious concerns. It is not that the presence or absence of consent determines the appropriate result in every context, but only that it alters the context. If Svenson, for example, had knocked on the doors of his neighbors' apartments, described his project, and obtained their permission to take pictures for a period of time without further bargaining, it is hard to imagine that any legal repercussions should follow. Taking a picture of someone with their consent, regardless of the setting in which the photograph is made, is typically legitimate. Consent, in short, is highly likely to prevent privacy litigation about the mere creation of an image.¹⁹¹ Its absence, however, leaves the door open for later disputation—if the context is right.

On the other hand, obtaining consent to do one thing doesn't automatically carry with it permission to do another. Even if Svenson obtained consent to aim his camera into an apartment and take a picture, it is not clear that such permission carries distributional rights with it. Lack of consent may by itself raise a red flag, but presence of consent to take a picture doesn't automatically carry with it control over all uses of the image.¹⁹² Later actions, there-

¹⁹¹ Note well that this discussion is only about the *taking* of a picture, not what is done with it. The question of consent, of course, may extend beyond the creation stage, but that simply moves the context further down the decisional matrix.

¹⁹² I am putting aside copyright issues here. Typically, the owner of the copyright in an image has the right to sell and exploit it. But if a photograph is taken in violation of

fore, may create quite complex problems. Taking pictures or videos of intimate behavior with the agreement of all adult participants in the episode may be unwise, but is usually legal. Distribution of the images to others, however, may create a wholly different context. Revenge porn is the obvious example.¹⁹³ More mundane consent issues surface in an array of contexts. Consider, for example, the Google Street View controversies brewing in Europe.¹⁹⁴ While there are some European rulings suggesting that the non-consensual taking of pictures of people by roving equipment and the placement of the images online are privacy invasions, the problem disappears if appropriate consent is obtained. Walking down the street while your picture is taken in the United States has not yet been deemed a problem, but clearly the lack of consent may lead to disputes in settings where obtaining permission obviates them. Given changes in context, the lack of consent may be telling.

The meaning of consent itself also is a major problem. While express grants of permission typically remove privacy concerns if the terms of the consent are clear,¹⁹⁵ the dispute with Svenson and

privacy rights, those rights may trump the right to exploit the intellectual property interests. Think about up-skirt or Peeping Tom photographs: surely the ownership of a copyright in the picture taker doesn't justify bestowing distribution rights in the images. Such disputes may raise interesting preemption issues not taken up here.

¹⁹³ There have been a number of major controversies in recent years about the distribution of consensually taken intimate videos after the sexual partners separate. One of the most serious involved the conviction of Kevin Bollaert for identity theft and extortion arising out of the operation of two revenge porn websites. Nicky Woolf, *San Diego Jury Convicts Revenge-Porn Website Operator Kevin Bollaert*, *GUARDIAN* (Feb. 3, 2015, 7:58 PM), <http://www.theguardian.com/culture/2015/feb/03/revenge-porn-web-site-operator-convicted-san-diego-kevin-bollaert> [<http://perma.cc/65T9-KBVX>].

¹⁹⁴ For a survey of the different rules in the United States and Europe in this area, see Geissler, *supra* note 166, at 897. There are very few cases in the United States. In the absence of trespass claims or allegations that Google equipment picked up and stored signals from open wireless systems, the courts have not found any privacy problems. See *Joffe v. Google, Inc.*, 746 F.3d 920 (9th Cir. 2013); *Boring v. Google, Inc.*, 598 F. Supp. 2d 695, *rev'd on other grounds*, 362 F. App'x 273 (3d Cir. 2010).

¹⁹⁵ Problems, of course, can occur here as well, for "express" consent to use an image may be obtained under tenuous circumstances. On February 25, 2015, my wife and I attended a concert in a small space at Lincoln Center to listen to music from Bach's magnificent *Cello Suites*. We ordered and paid for the tickets online and picked them up on arrival at the venue. The back of each ticket contained typical provisions designating them as licenses, but they also contained the following provision:

This event may be recorded (by audiovisual or photographic means),
and such recordings may include pictures of the audience or

the issues that might surface from the actions of Wolf or Iverson involve puzzling notions of constructive consent. Svenson's images were obtained through open windows across a fairly narrow street. Using his words, Svenson took that as a sign that "there is no question of privacy."¹⁹⁶ When New Yorkers living in buildings with large windows leave their curtains open or shades up, does that connote consent for others to look inside? Surely the answer sometimes must be "yes!" Walking down any street, especially at night, often opens to public view the interiors of first floor apartments or bottom levels of town houses. It would be absurd to contend that residents who leave their windows uncovered assume that no one ever looks inside. Indeed, we are told we must assume that government authorities always have the right to look!



My photograph while walking the High Line on May 15, 2015.
The apartment building is The Caledonia at 450 West 17th Street.

individuals in the audience. Your attendance at the event shall be deemed your consent to appear in such recordings and to the unlimited exploitation of such recordings in any and all media now known or hereafter devised.

If someone's image is used in a video recording, is its use any more consensual than the use of an image of the Fosters by Svenson?

¹⁹⁶ These words are taken from his description of *The Neighbors* exhibition.

Or what of those who purchase glass walled apartments directly abutting or easily visible from the pedestrian level of the High Line¹⁹⁷ a magnificent walking park that meanders mostly mid-block above street level between 13th and 34th Streets on the west side of Manhattan on the bed of an old freight train trestle.^{198*} Owners of apartments by the High Line are regularly both gazers of the passing people parade and objects of attention by those sauntering by. Some, as they admitted when interviewed, recognized that purchasing units at park level involved loss of privacy. They expected to have eye contact—if not discourse—with those walking by. Some even greet park visitors like kids wave at fire trucks. Others in buildings by the High Line claimed they intentionally avoided buying lower level units.¹⁹⁹

Do those of us living well above street (or park) level confront similar issues? Must we assume that some residents living across the street in equally tall buildings peer out of their windows, sometimes with binoculars or telescopes? Telescopes are not sold in a city like New York, where the stars rarely shine, unless there is a market for them. Consent in this and other urban contexts becomes ambiguous, if not meaningless. The traditional rubric about “expectation of privacy”—in many ways a proxy for consent—loses contact with the reality of daily life in cities. The issue is not only whether we grant our neighbors consent to peer inside when our shades are up but what we give consent for under such circumstances. Looking is one thing; staring is another. Taking a picture is one thing; taking a picture with a telephoto lens is another. Looking inside for a period of time is one thing; making a video is another. Here too, the context is critical. Even if taking a picture with a telephoto lens equipped camera through an unobstructed window is

¹⁹⁷ Visit the park website at FRIENDS OF THE HIGHLINE, <http://www.thehighline.org/> [<http://perma.cc/FJR6-NVZ8>] (last visited Sept. 28, 2015). The High Line runs from Gansevoort Street on the south next to the new Whitney Museum of American Art in the Meatpacking District northwest of Greenwich Village, and ends at 34th Street after circling around the enormous Hudson Yards development now being constructed over the train yards west of Pennsylvania Station.

^{198*} I walked part of the High Line on May 15, 2015 and took a few pictures of apartment buildings, including that of The Caledonia displayed at Richard H. Chused, *The High Line*, APPROPRIATE(D) MOMENTS, www.rhchused.com/Moments18.html [<http://perma.cc/LE9E-MJX6>] (last visited Sept. 28, 2015).

¹⁹⁹ See Steven Kurutz, *Close Quarters*, N.Y. TIMES, Aug. 1, 2012, at D1.

constructively consensual, what is done with that photo after it's taken may be unacceptable. The more extensive the duration, magnification, and distribution of the imaging, the less likely it is that constructing consent from the presence of an unobstructed view is appropriate. Would it really be acceptable for a videographer to hide a camera in a bush on the High Line and take hours of movies of those in an apartment? Who should have the burden of obstructing the view—the videographer by stopping the camera or the resident by pulling down the shades? Surely it cannot be that we must live behind stone walls in order to avoid inappropriate appropriation of moments in our lives.^{200*}

The point is well made by an old example of the problem—Peeping Tom statutes.²⁰¹ New York, for example, criminalizes unlawful surveillance under a fairly modern statute adopted in 2003 and recently amended. Here is one of its provisions:

A person is guilty of unlawful surveillance in the second degree when . . . [f]or his or her own, or another person's amusement, entertainment, or profit, or for the purpose of degrading or abusing a person, he or she intentionally uses or installs, or permits the utilization or installation of an imaging device to surreptitiously view, broadcast or record a person dressing or undressing or the sexual or other intimate parts of such person at a place and time

^{200*} Another photograph I took of an unremodeled structure from the High Line in 2012 before the recent deluge of new buildings went up displays what use of cement blocks to avoid gazing might look like. See Richard H. Chused, *Cement Blocks*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments19.html> [<http://perma.cc/M9H5-37FV>] (last visited Sept. 28, 2015).

²⁰¹ About half the states have voyeurism or “Peeping Tom” statutes. See 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 (2007). The phrase “Peeping Tom” comes from a legend of 11th century Coventry in England. Lady Godiva, the wife of Leforic III, Earl of Mercia, urged her husband to reduce the burdensome taxes on the town. He agreed if she would ride naked from one end of Mercia to the other. She agreed, so the story goes, and successfully persuaded all the residents to avert their eyes as she did so. The first mention that a man named Tom peeked doesn't appear until the 18th century, but that addition to the legend became the basis for our modern phraseology. See Charles Coe, *Lady Godiva: The Naked Truth*, HARV. MAG. (July–Aug. 2003), <http://harvardmagazine.com/2003/07/lady-godiva-the-naked-tr.html> [<http://perma.cc/R27D-2CXL>].

when such person has a reasonable expectation of privacy, without such person's knowledge or consent.²⁰²

The statute is highly contextualized and presumes consent is absent. The picture taker must have the intent to amuse him or herself, to profit from the activity, or to degrade or abuse another person. And the image taking that is barred relates only to sexually oriented materials obtained when a person is in an area where disrobing typically proceeds privately. I mention this sort of statute not because it applies to Svenson's setting: it doesn't—at least as far as I can tell.²⁰³ But it clearly demonstrates the perils of ending discussion of privacy issues once we know whether actions were taken with or without consent or whether pictures were taken through unshaded windows. Concluding that Svenson would have invaded the Fosters' privacy if he surreptitiously peered into their bedroom while they were undressing does not compel us to reach similar conclusions if he photographed them chatting in their living room. Clearly the nature of the picture taking also is important.

2. The Nature of the Picture Taking

The sometimes ambiguous quality of consent is particularly relevant in the Svenson setting—large windows, blinds or shades up, curtains open, people making themselves visible. While express consent was never obtained, there almost surely was some unquantifiable level of permission granted to look inside, so the details of the picture taking become critically important. The more secretive and intrusive the viewing, the more willing we should be to condemn the activity. In this case, Svenson commented—perhaps gloated—about taking pictures from the shadows of his loft. It is worth repeating his description of the project.

For my subjects there is no question of privacy; they are performing behind a transparent scrim on a

²⁰² N.Y. PENAL LAW § 250.45 (McKinney 2009). Elsewhere in the statute is this definition: “‘Place and time when a person has a reasonable expectation of privacy’ . . . mean[s] a place and time when a reasonable person would believe that he or she could fully disrobe in privacy.” PENAL § 250.40.

²⁰³ One image does appear to have been taken into a bedroom, but other requirements of the statute probably are not met. *See* discussion *infra* Part III.C.3.

stage of their own creation with the curtain raised high. *The Neighbors* don't know they are being photographed; I carefully shoot from the shadows of my home into theirs. I am not unlike the birder, quietly waiting for hours, watching for the flutter of a hand or the movement of a curtain as an indication that there is life within.²⁰⁴

There are several qualities of this text that are disturbing—that connote a much more intrusive frame of reference than a momentary glimpse or even spontaneous picture taking through an unobstructed window. Though his intent probably was unlike that required by New York's anti-surveillance statute, Svenson took precautions to avoid being seen by those he was photographing. He waited for significant periods of time hoping that an interesting scene would develop. Deploying the word “stalking” probably pushes too far, for there is no evidence he harbored any malicious feelings towards those he was watching. But “stakeout” catches the mood—a long-term period of watching and hoping.²⁰⁵ At some ineffable point, peering into the apartment of another morphs from acceptable—sometimes even welcomed—urban behavior to unnecessary and unacceptable intrusion. Reactions of this sort also are appropriate after looking at both Michelle Iverson's work and her artist statement. Combine a lengthy stare at night with equipment that enlarges the image and makes events and people more visible and the context becomes more difficult to justify. The lack of consent takes on added significance in such a setting. Taking a quick shot through an open window may be one thing. “Hanging out” waiting for something to happen may be quite another.²⁰⁶

²⁰⁴ Gorence, *supra* note 4.

²⁰⁵ As already noted, police may make use of information obtained by gazing into unobstructed spaces. Why shouldn't that automatically connote that Svenson's actions were perfectly legitimate? On the surface, at least, it seems that the potential harm to the parties being staked out (criminal prosecution) is greater than any result someone like Svenson may produce. The difference, I suggest, lies in the public purposes served by the two intruders. Criminal prosecutions are brought to protect the public from harm. Svenson, however, cannot serve as a proxy for that sort of public goal. He may, of course, further First Amendment goals. *See* discussion *infra* Part III.D.2.

²⁰⁶ At some level, Iverson realized the controversial nature of her work. In an interview of her, *see* Weingart, *supra* note 14, she noted that a stroller saw her sitting her in her car

3. The Scenes Taken

Though many of the views Svenson snapped through the apartment windows of The Zinc and used in his exhibition were partially or totally unobstructed by shades or blinds, the scenes captured were sometimes quite startling. Two images from the exhibition not involving the Fosters best raise the issues. One—*Neighbors #5*—shows a woman on her hands and knees. There are objects in the background suggesting she is assembling some furniture or cabinets. Her rear end faces the viewer.²⁰⁷ It was hung greatly enlarged at the Julie Saul Gallery. An image of it with a man staring at it was published in news reports.²⁰⁸ Several thoughts come to mind. First, Svenson's image is particularly suggestive. Though the person in the photograph is identifiable only by people who know her, the position of her body is not one most women would typically want others to stare at, regardless of whether the viewing occurs only with the naked eye, with the aid of an enlargement device or telephoto lens equipped camera, in a gallery, or online.²⁰⁹ The thought of someone hiding in the shadows of their apartment waiting for someone across the street to assume such a position is disturbing. Another image is troubling for related but somewhat different reasons. It depicts a woman wearing a robe sitting on her bed with her back to the camera. There is a towel wrapped around her head—presumably drying wet hair—and she is looking down at and using an object (perhaps a cell phone) in her

with a camera and approached her. Rather than deal with him, she quickly drove away. Why?

²⁰⁷ This image is available at *The Neighbors*, ARNE SVENSON, <http://arnesvenson.com/theneighbors.html> [<http://perma.cc/5HP8-YAB3>] (last visited Sept. 28, 2015). I have elected not to show it here.

²⁰⁸ A Fox News article about the case contained the scene. *NYC Artist's Secret Photos of Neighbors Raise Privacy Issues; For Some, 'A Line Crossed,'* FOX NEWS (May 17, 2013), <http://www.foxnews.com/leisure/2013/05/17/nyc-artist-secret-photos-neighbors-raise-privacy-issues-for-some-line-crossed> [<http://perma.cc/U9TR-CZGK>].

²⁰⁹ In discussions I've had with Muslim women students about gender separation in mosques, one issue that has surfaced is their concern about being watched by men when they pray with their foreheads on the floor in a crouching position. Putting aside the philosophical and religious issues raised by gender segregation in places of worship, I can understand the cultural and social problems associated with taking such positions in front of men.

hand.²¹⁰ It comes perilously close to violating the Peeping Tom surveillance statute, though Svenson probably lacked the requisite intent to trigger a criminal prosecution. Nonetheless, it is difficult to believe this is an image most women would care to have publicly distributed.²¹¹

Other photographs raise similar problems in less intensive ways. One displays the lower parts of the torsos and legs of a man and an obviously pregnant woman sitting across from each other with their legs on an ottoman while they are dressed in their robes.²¹² Another pictures a napping man lying on his side with his back to the window and part of his lower back exposed to view.²¹³ In each case, Svenson appropriated particularly personal moments—ones where we all may have serious qualms about the propriety of someone staring through a window for a significant period of time and capturing such poses. The content may not by itself be enough to justify calling them invasions of privacy, but when combined with the lack of clear consent and the nature of the photography process, the potential for impropriety rises.

4. Display and Distribution

Ironically, or perhaps perversely, the Fosters did not feel or sense intrusion in the absence of knowledge generated by the public display and distribution of Svenson's images. Though his artistic

²¹⁰ See SVENSON, *supra* note 2, at Neighbors #14; *Neighbors #14*, JULIE SAUL GALLERY, <http://www.saulgallery.com/artists/arne-svenson/neighbors#17> [<http://perma.cc/R875-GCNY>] (last visited Sept. 28, 2015).

²¹¹ It may be worth noting that most of the Svenson pictures posted on the Gallery website were of women. Of the twenty-five on the site, fourteen featured female subjects, four male, two of both men and women, one was unclear, and five had neither. Though these numbers may suggest Svenson has a particular interest in taking pictures of women, it also is possible that they simply demonstrate that women are more likely to be at home during the day when most of the photographs were taken. It also is interesting that Svenson did not display any nudity in his pictures. It is certainly not outlandish to assume that unclothed or partially unclothed people appeared in his view finder from time to time. Perhaps he declined to take such images.

²¹² See SVENSON, *supra* note 2, at Neighbors #1; *Neighbors #1*, JULIE SAUL GALLERY, <http://www.saulgallery.com/artists/arne-svenson/neighbors#21> [<http://perma.cc/3AVL-BM44>] (last visited Sept. 28, 2015).

²¹³ See SVENSON, *supra* note 2, at Neighbors #11; *Neighbors #11*, JULIE SAUL GALLERY, <http://www.saulgallery.com/artists/arne-svenson/neighbors#5> [<http://perma.cc/8UFZ-AWZM>] (last visited Sept. 28, 2015).

instincts certainly make his actions understandable and at least partially justifiable, the decision to move surreptitiously taken photographs into the public realm amplifies the impact of the intrusion in quite dramatic ways. That is particularly true today given the pervasiveness and speed of the digital world. Rather than leading to the loss of privacy rights in accordance with some traditional privacy rules, the public display should be deemed to enhance the possibility of obtaining relief from the party responsible for creating public knowledge of the intrusion. In this case, the images were both displayed in a gallery and posted online. Each step has different and potentially troublesome consequences.

First, consider the gallery exhibition. As the discussion of the image of a crouching woman working on her hands and knees makes clear, Svenson's photographs were dramatically enlarged and hung in a spacious room. If, as suggested, there is something untoward about the nature of the images themselves, that effect is markedly amplified by the dramatic size and spacious setting used to display the pictures. When I displayed the exhibition picture of a man staring at the image of the rear of a crouching woman in front of my colleagues for a significant period of time while answering questions about an earlier draft of this paper, some in attendance got uneasy. One colleague noted that it was a bit unnerving to sit for twenty minutes watching a man with his back to the camera looking at the hindquarters of a woman working on her hands and knees. That's a fair observation and it made me think deeply about whether I should show such images to anyone—whether in an educational setting or not. The gallery display not only made Svenson's images available for public viewing, it also made it possible to stare at the images for as long as—or even longer—than Svenson stared through the windows of The Zinc building. He made it possible for others to experience the same feelings and emotions he may have felt as he waited in the shadows and took the pictures. As we look at the images, we become intruders just as he was. That, of course, was surely one of his artistic motivations: he wanted us to sense our own voyeuristic impulses. But that also accentuates the problems with his work. The very artistic sensibilities he played with are what raise privacy concerns. With each step along the path to the gallery show—looking across the street, waiting in shadows

for long periods of time, taking pictures, using a telephoto lens, capturing particularly touchy or intimate moments, enlarging the images, displaying the photographs publicly—the context becomes more seriously intrusive.

It also is worth noting that a significant period of time did not elapse between the time the pictures were taken and displayed. If Walker Evans was justified in showing his surreptitious subway pictures twenty-five years after they were taken,²¹⁴ or Judge Meyer was correct in allowing Frederick Wiseman to display *Titicut Follies* without restraint decades after it was originally filmed,²¹⁵ those decisions reinforce the likelihood that harm is more likely when secretly obtained images of recognizable people are displayed within a short time of their taking. Unsurprisingly, both the Fosters and Kravetz were concerned not only about the way their images were captured on film, but also about the speedy public display of the appropriated moments.

Both the gallery and Svenson took one more step: each made the photographs available online.²¹⁶ Though the significant enlargements made for the gallery were not duplicated online by a viewer's use of a standard computer monitor,²¹⁷ much of the rest of the impact of the gallery show is replicated. Viewers gain access to the pictures and the ability to look at them for as long as they wish. And, perhaps most importantly, once pictures find their way online, it often is very difficult either to control their further distribution or to remove them. Though both the Julie Saul Gallery and Svenson took down the images of the Foster children while the litigation was pending and the published exhibition book omitted both pictures, one of the photographs is now available on the gallery's website.²¹⁸ While the images were unavailable, I still managed to find them. The fairly widespread media discussions of the *Foster/Svenson* dispute also led to the distribution of exhibition images

²¹⁴ See Sante, *supra* note 130.

²¹⁵ See Langner, *supra* note 137.

²¹⁶ See SVENSON, *supra* note 2; *The Neighbors*, *supra* note 2.

²¹⁷ That, of course, need not always be the case with computer based digital images. Many households now have the capacity to display pictures stored on a computer using very large monitors or huge television screens.

²¹⁸ See *Neighbors #12*, JULIE SAUL GALLERY, <http://www.saulgallery.com/artists/arnesvenson/neighbors#1> [<http://perma.cc/VZ4H-9UJA>] (last visited Dec. 21, 2015).

around the world.²¹⁹ That speaks mountains about the nature of the contemporary digital realm and the ways in which privacy rules focusing only on an intrusion itself are short-sighted. Moving images to a website may mean they ride off on an unchartered, unpredictable, and uncontrollable journey. If they do, concerns about the methods used to take the images in the first place are heightened.

5. Children

Both the Fosters and Kravetz were particularly upset by the presence of their children in the pictures taken by Svenson. It is clear that consent was not obtained and could not be constructed to allow taking pictures of the children under the circumstances of this case. They had nothing to do with leaving the shades up. Since their parents were totally unaware of what Svenson was doing, they were in no position to grant permission on behalf of their offspring, either actually or constructively. We often opine that parents have the right—even at a constitutional level—to make decisions on behalf of their minor children.²²⁰ But it is difficult to see how that idea is triggered in a case like this. And even if parents sometimes may waive the privacy rights of their children, there is an open question about how extensive that right may be.²²¹ It would, I think, be stretching even an artificial notion of consent to allow Svenson to assume he has the freedom to gain access to the lives of the youngsters just because he could see them through an open window. In short, even if he was justified in taking all the other photographs of adults, the two of the Foster children fell into a different category. When all the characteristics of the Svenson project are taken into account, therefore, there are strong arguments that privacy law should limit such activities.

²¹⁹ I found them on English and German sites. There is, of course, deep irony in this result as well, for it was only because the Fosters publicly condemned Svenson's work and then filed a lawsuit that the story gained widespread attention in the media. Should Svenson be held responsible for this?

²²⁰ See, e.g., *Troel v. Granville*, 530 U.S. 57 (2000) (discussing the parental right to control access to their children); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (discussing the right of parents to refuse using public schools for religious reasons); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (discussing the right of parents to send their children to private schools).

²²¹ See, e.g., Benjamin Shmueli & Ayelet Blecher-Prigat, *Privacy for Children*, 42 COLUM. HUM. RTS. L. REV. 759 (2011).

D. An Elephant in the Room

There is an elephant in the room that needs to be addressed. Bemoaning the intrusive methods of surveillance photographers like Svenson does not totally negate either the long artistic heritage of the genre or the importance of the artistic messages the genre presents to us. It goes without saying that an artist's desire to publicly comment upon the voyeuristic tendencies of the human psyche may fall within the ambit of the First Amendment. It therefore is not surprising that significant parts of privacy law and related doctrines are limited by free speech considerations. Media coverage placing a public person in a false light creates a viable tort action only when accompanied by malicious intent.²²² The same is true in defamation cases—closely related to false light disputes.²²³ That is understandable in both settings. The tort is based upon the qualities of speech itself, disconnected from any actions that may have been taken to create it. In such settings, requiring those seeking relief to demonstrate significant intentional misbehavior is sensible, but this sort of rule does not obviously apply to privacy torts involving intrusions. Though the images made and distributed by Svenson certainly carry some level of First Amendment protection with them, the methods by which the images were obtained do not evoke speech metaphors in the same way.²²⁴ It is difficult to claim that the First Amendment privileges taking a picture of an intimate space if the total context of the photographic adventure is inappropriate. Surely, for example, a picture taken and released for publi-

²²² See, e.g., *Cantrell v. Forest City Publ'g Co.*, 419 U.S. 245 (1974); *Time, Inc. v. Hill*, 385 U.S. 374 (1967). Liability requires that the report be published with knowledge of its falsity or reckless disregard of its truth.

²²³ Some contend that the false light tort serves no purpose different than defamation and should be abolished. See, e.g., Sandra F. Chance & Christina M. Locke, *When Even the Truth Isn't Good Enough: Judicial Inconsistency in False Light Cases Threatens Free Speech*, 9 FIRST AMEND. L. REV. 546 (2011).

²²⁴ The speech versus action dichotomy, with the latter more easily regulated, is treacherous at best. Art "scenes" may stretch the distinction to the breaking point, whether we think of dance or Marina Abramovic sitting at a table in the lobby of the Museum of Modern Art staring at strangers for a period of time. See Jim Dwyer, *Confronting a Stranger, For Art*, N.Y. TIMES, Apr. 2, 2010, at MB1. Nonetheless, there are times when the Supreme Court has made use of the dichotomy, as when criminalizing draft card burning during the Vietnam War was approved. See *United States v. O'Brien*, 391 U.S. 367 (1968).

cation by an archetypical Peeping Tom could be suppressed even if it was aesthetically amazing.

Dealing comprehensively with this issue would require a long exegesis. This Article already is lengthy. So my plan is to use just a few examples and cases to outline the basic contours of my contention that the First Amendment does not and should not bar or severely constrain a claim by the Fosters that Svenson invaded their privacy. Compare three sets of well-known disputes. The first involves the revelation by newspapers or television media of the names of rape victims or juvenile offenders despite state statutes barring the release of such information. In general, the Supreme Court has concluded that the First Amendment protects such actions by news media.²²⁵ Second, consider the very narrow degree to which the First Amendment restricts publicity rights claims. While using the likeness or name of a well-known person in a way unrelated to efforts to sell a product is protected by free speech considerations, other publicity rights claims may go forward unimpeded by constitutional constraints.²²⁶ Finally, there is another set of disputes involving efforts to constrain demonstrations—sometimes by people uttering or displaying horribly-phrased insults—near abortion clinics, churches, funerals and other events or spaces. The Court's reluctance to limit such demonstrations creates further tension with privacy doctrine. It is not at all clear that these lines of cases either can or should be reconciled, but I'll do the best I can to trace my way through the disorder.

1. Name Revelation Cases

The classic name revelation case is *Cox Broadcasting Corp. v. Cohn*,²²⁷ decided in 1975. Six students from Sandy Springs High School, in a suburb north of Atlanta, were charged with the rape and murder of Cynthia Cohn, the seventeen-year-old daughter of Martin Cohn. A Georgia statute established a privacy norm by making the publication or broadcast of the name of a rape victim a

²²⁵ See *infra* Part III.D.1.

²²⁶ For a general overview of cases and literature in the area, see Dora Georgescu, *Two Tests Unite to Resolve the Tension Between the First Amendment and the Right of Publicity*, 83 FORDHAM L. REV. 907 (2014).

²²⁷ 420 U.S. 469 (1975).

misdeemeanor.²²⁸ The state also had a common law privacy tort, including claims for unlawful disclosure of private information.²²⁹ The student defendants appeared in court on April 10, 1972. Tom Wassell was assigned by WSB-TV in Atlanta to cover the event. He sat through most of the proceedings in which five of the six defendants pled guilty to rape in return for dismissal of the murder charges they faced. The other defendant's trial was put over to a later date. During the hearing, various statements were made by the parties and prosecutors revealing the name of the victim. In addition, Wassell approached the clerk sitting in front of the bench during a recess and asked to see the indictments. The clerk complied with the request, making no effort to conceal information about the identity of Ms. Cohn. As a result, her name was learned by Wassell and then mentioned during a television broadcast a bit later.²³⁰ Her father filed suit against Wassell and Cox Broadcasting Corp., the television station owner.²³¹

Justice White, writing for the Court, was careful in the way he described the case.

[W]e should recognize that we do not have at issue here an action for the invasion of privacy involving the appropriation of one's name or photograph, a physical or other tangible intrusion into a private area, or a publication of otherwise private informa-

²²⁸ GA. CODE ANN. § 26-9901 (1972) then provided:

It shall be unlawful for any news media or any other person to print and publish, broadcast, televise, or disseminate through any other medium of public dissemination or cause to be printed and published, broadcast, televised, or disseminated in any newspaper, magazine, periodical or other publication published in this State or through any radio or television broadcast originating in the State the name or identity or any female who may have been raped or upon whom an assault with intent to commit rape may have been made. Any person or corporation violating the provisions of this section shall, upon conviction, be punished as for a misdemeanor.

The section was later codified at GA. CODE ANN. § 16-6-23, but was invalidated by the Georgia court in *Dye v. Wallace*, 553 S.E.2d 561 (Ga. 2001).

²²⁹ Georgia may have been the first state to declare the existence of a range of common law privacy torts. The most famous case is *Pavesich v. New England Life Insurance Co.*, 50 S.E. 68 (Ga. 1905), decided in the same era New York declined to move in that direction.

²³⁰ See *Cox*, 420 U.S. at 472-74.

²³¹ See *id.* at 474.

tion that is also false although perhaps not defamatory. The version of the privacy tort now before us—termed in Georgia the tort of public disclosure—is that in which the plaintiff claims the right to be free from unwanted publicity about his private affairs, which, although wholly true, would be offensive to a person of ordinary sensibilities. Because the gravamen of the claimed injury is the publication of information, whether true or not, the dissemination of which is embarrassing or otherwise painful to an individual, it is here that claims of privacy most directly confront the constitutional freedoms of speech and press.²³²

Confronting potentially conflicting privacy and free speech claims with long-standing doctrinal support, the Court balanced the relevant interests. It rejected efforts by the defendants to privilege truthful commentary or to impose on the plaintiff high-level intention requirements like those operating in defamation and false light cases. Instead, while recognizing the importance of the values protected by Georgia's victim-anonymity statute, Justice White noted three factors that required barring Cohn's tort claim in this particular case. First, in spite of the rape victim protection statute, public officials revealed Cynthia Cohn's identity to the press and handed over the indictments for perusal by a reporter.²³³ In the absence of bureaucratic efforts to protect privacy, it was hard to take Georgia's victim protection policy very seriously.²³⁴ Second, the parties revealing the information to the general public were the most "saintly" for First Amendment purposes—traditional media outlets long cloaked in a constitutional mantle.²³⁵ Finally, the information Wassell revealed was about a regionally notorious case and therefore was a matter of public interest and importance.²³⁶ Once public officials revealed the victim's identity, television sta-

²³² *Id.* at 489.

²³³ *Id.* at 492–93.

²³⁴ The Court referred to the Restatement (Second) privacy provisions, *see supra* note 153, and noted that they probably did not protect claims after information was revealed to the public. *See* 420 U.S. at 493–94.

²³⁵ *Id.*

²³⁶ *See id.*

tions and newspapers could pass that information on to the world at large.

In many ways, the result is unattractive. In an era when rape victims often were shamed as much or more than the perpetrators of the crime, the Georgia privacy scheme made enormous sense. Today, the cultural proclivity to victimize the victim may have eased, though many surely would claim to the contrary. But for purposes of this Article, two aspects of the result in *Cox* strongly suggest that Svenson may not claim the same privilege as Wassell or Cox: Svenson neither replicated the role of the press in *Cox*, nor revealed information about a matter of public importance.

First, reconsider the impact of Justice White's opinion by changing the facts a bit. Suppose Martin Cohn had sued the prosecutor and court clerk—the parties who first revealed the identity of his daughter to Wassell. That significantly changes the nature and context of the privacy inquiry. Rather than worrying about the First Amendment protections surrounding the revelation of information by traditional media to the general public, this new case considers only the relationship between parties holding privacy rights and those who directly intrude upon them. There is an information chain from victim identification by the coroner, to police, to prosecuting authorities, to court officials, and finally to media. At some point the link to unlawful privacy intrusion may break. Perhaps, as the *Cox* court suggested, members of the press and TV media are the proper break-point.²³⁷ But freeing them from liability, as the Court did, does not relieve actors further back in the communication chain from liability for invasion of privacy. Indeed, strong arguments may be made that the actors originally breaching Cohn's privacy should be responsible for the harm caused by the media even if media outlets themselves are not financially responsible.

There is an analogous information chain in the *Foster/Svenson* dispute. It runs from the Foster family and their appropriated moments, to Svenson, to the Julie Saul Gallery, and finally to the media covering the show. While a media outlet or academic author publishing images from the exhibition in magazines or newspapers, displaying them on TV broadcasts, or placing them online may be

²³⁷ See *id.* at 496.

protected by a First Amendment privilege similar to that operating in *Cox*, those earlier in the information chain do not operate in the same context. The photographer and gallery are the parties enabling the publication of otherwise private images. In fact, the publication of the information in the general media and online, as already noted, exacerbated the impact of the original intrusion. Svenson and the Saul Gallery are analogous to the prosecutors and court clerk in *Cox*, not to Wassell and his TV station. In short, nothing in Justice White's opinion commands releasing Svenson and the Julie Saul Gallery from liability for appropriating private moments. They do not sit in the shoes of the press.

In addition, information revealed by displaying photographs of the Fosters in a gallery was not of any public interest. While it may have taken on qualities of importance after the media got wind of the story and spread knowledge of it widely around the world, that was not so when Svenson took his pictures and first hung them in a gallery. The pictures were artistic to be sure, but they were not cloaked with the typical aura surrounding general media discourse about important public events. Consider some analogous cases, none of which are typically thought to raise serious First Amendment problems. If a gallery displays a picture that infringes the copyright of another work, it may be compelled to remove it and pay damages for its public presentation. If a gallery displays a picture invading a famous person's publicity rights, it may be compelled to take it down. If a gallery hangs a picture that is stolen property it may be compelled to turn it over to the proper owner. The First Amendment extends to an artist the general privilege of creating a work, but only if some other interest of importance is not violated.²³⁸ Similarly, Svenson has a right to take and display photographs, but only if in doing so he does not violate the substantive rights of others.²³⁹

²³⁸ A book, for example, may be suppressed or the author forced to pay damages in a defamation case.

²³⁹ There are three other well known cases that follow the basic structure of *Cox*. First, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), involved another rape victim identification. Here, too, in the teeth of a Florida statute barring use of a rape victim's identity in the media, public officials revealed an identity. The Supreme Court barred suit against a newspaper that published the name.

2. Publicity Rights and the First Amendment

When the Fosters first sought preliminary injunction relief from the New York courts, their right of publicity claim was dismissed on First Amendment grounds. The Supreme Court of New York opined:

Plaintiffs cannot establish a likelihood of success on the merits. Defendant's photos are protected by the First Amendment in the form of art and therefore shielded from New York's Civil Rights Law Through the photos, Defendant is communicating his thoughts and ideas to the public. Additionally, they serve more than just an advertising or trade purpose because they promote the enjoyment of art in the form of a displayed exhibition. The value of artistic expression outweighs any sale that stems from the published photos.

Further, since the art is protected by the First Amendment, any advertising that is undertaken in connection with promoting that art is permitted. Defendant and the art gallery used Plaintiff's photos to advertise *The Neighbors*; and the advertising is beyond the limits of the statute because it related to the protected exhibition itself. Further, *The Neighbors* exhibition is a legitimate news item because cultural attractions are matters of public and consumer interest. Therefore, news agencies and television networks are entitled to use Defendant's photographs of Plaintiffs, which have a direct relationship to the news items—the photos are the focus of the newsworthy content.²⁴⁰

The two other cases, *Oklahoma Publ'g Co. v. District Court*, 430 U.S. 308 (1977) and *See; Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979), involved the revelation of names of juvenile court defendants. In both cases, identities were discovered via official channels. In one case, reporters were allowed to attend a court proceeding. *Oklahoma Publ'g*, 430 U.S. at 309. In the other, names were obtained by monitoring police radio channels. *Smith*, 443 U.S. at 99. Seeking relief from the media was barred in both cases.

²⁴⁰ *Foster v. Svenson*, No. 651826/2013, 2013 WL 3989038, at *1 (N.Y. Sup. Ct. Aug. 5, 2013) (internal citations omitted).

The Appellate Division affirmed this result using very similar language.²⁴¹ New York courts have consistently construed the state Civil Rights law to allow use of the likeness or identity of a person to report on newsworthy or publicly important events related to the likeness or identity, including art exhibitions.²⁴² They also have studiously declined to create any types of privacy claims other than now traditional publicity rights actions brought to bar use of a person's identity to sell a product.²⁴³ So the court's approach is severely limited by its unwillingness to think about intrusions, and the consequences of intrusions, as part of its analysis. The overall conclusion that the Fosters' claims are weak as a matter of New York state law, therefore, is theoretically challengeable but legally understandable. Nonetheless, the First Amendment analysis is dubious. By conflating the limitations of state law and constitutional analysis, the opinion ends up being deeply flawed. Even if intrusive privacy torts are not recognized in New York, that does not mean that the impact of intrusive behavior may also be ignored for First Amendment purposes. If an intrusion privacy tort was available to the Fosters in New York, there is no obvious reason why it would not frustrate Svenson's desire to appropriate their private moments. That is made quite clear by a number of publicity rights claims decided over the years. Two are seminal enough to make them appropriate candidates for discussion here—*Zacchini v. Scripps-Howard Broadcasting Co.*²⁴⁴ and *ETW Corp. v. Jireh Publishing Inc.*²⁴⁵

For decades, the Zacchini family participated in “thrill” shows where various kin were shot out of a cannon into a net some distance away.²⁴⁶ During August and September of 1972, family members took flight daily at the Geauga County Fair in Burton, Ohio. In late August, Hugo Zacchini noticed that a reporter was shooting movies of the act. He asked that filming cease, but under orders

²⁴¹ *Foster v. Svenson*, 128 A.D.3d 150, 160–63 (N.Y. App. Div. 2015).

²⁴² *See supra* note 154.

²⁴³ *See supra* note 154.

²⁴⁴ 433 U.S. 562 (1977).

²⁴⁵ 332 F.3d 915 (6th Cir. 2003).

²⁴⁶ For an old newsreel of one of their shows, see *Weird Reels, Human Cannonball—Zacchini the Modern Münchhausen*, YOUTUBE (Apr. 14, 2014), <https://www.youtube.com/watch?v=EuTzWPJ73vY> [<https://perma.cc/JH7E-UQ4V>].

from those running WKYC in Cleveland, filming continued. On September 1, the entire fifteen-second act was broadcast on the 11:00 PM news show.²⁴⁷ Zacchini then sued, claiming unlawful appropriation of the cannon shot act and seeking damages for its use. The Ohio Supreme Court concluded that the First Amendment protected the actions of the TV news station and that Zacchini's claim therefore must be dismissed.²⁴⁸ The United States Supreme Court took the case to decide whether the First Amendment privileged the actions of WKYC.²⁴⁹

The Court declined to exempt the cannon shot broadcast from tort liability. Justice White, writing for a slim 5–4 majority, opined that WKYC was free to verbally report on the cannon shot, as well as review and comment on it,²⁵⁰ but broadcasting the entire shot was another matter. While false light or defamation tort rules protected the reputation of the victim and therefore were likely to involve media presentation of information about an important event, publicity rights protected “the proprietary interest of the individual in his act in part to encourage such entertainment.”²⁵¹ Intrusion into such a propriety interest, just like infringement of a copyright, might give rise to a cause of action without limitation because of any policy embedded in the First Amendment.²⁵²

In *ETW Corp. v. Jireh Publishing Inc.*,²⁵³ Rick Rush²⁵⁴ made a painting called *The Masters of Augusta* containing three different images of Tiger Woods standing in front of the clubhouse at Augusta National, the site the Masters Golf Tournament.^{255*} The

²⁴⁷ *Zacchini*, 433 U.S. at 563–64.

²⁴⁸ *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454 (Ohio 1976).

²⁴⁹ *Zacchini*, 433 U.S. at 565.

²⁵⁰ *Id.* at 569–70, 575.

²⁵¹ *Id.* at 573.

²⁵² *See id.* 569–70.

²⁵³ 332 F.3d 915 (2003).

²⁵⁴ *See About Rick*, RICK RUSH ART, <http://www.rickrushart.com/about-rick-rush/> [<http://perma.cc/NQE9-3BBM>] (last visited Dec. 20, 2015). The *Masters of Augusta* is still available for purchase on this site. *See The Masters of Augusta*, RICK RUSH ART, <http://www.rickrushart.com/new-products-2/the-masters-of-augusta> [<http://perma.cc/R24C-LMSA>] (last visited Sept. 28, 2015).

^{255*} The image is available at Richard H. Chused, *Tiger Woods Painting*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments20.html> [<http://perma.cc/NA4V-QN JH>] (last visited Sept. 28, 2015).

work celebrated Woods's victory at the Masters in 1997, when he set a tournament scoring record en route to becoming the youngest person ever to win the championship. After completing the work, Rush made editions of a print version for sale to the general public with Jireh's assistance. Woods' licensing agent, ETW Corp., then sued claiming violation of his publicity rights.²⁵⁶ Rush's publisher, Jireh, claimed that the First Amendment protected the artist's right to distribute the work in a variety of formats. The Sixth Circuit Court of Appeals decided the dispute in Jireh's favor and thereby allowed Rush to continue licensing items to Jireh for sale.²⁵⁷

In combination, *Zacchini* and *Jireh* create an understandable and reasonable logical structure about the relationships between the First Amendment and the right of publicity. If, as in *Zacchini*, a personality-based product is used by another without consent for commercial purposes or the use of the name or likeness of a public person is used without consent in a way that leads reasonable viewers to think that the person endorses a product, then state law may step in without inhibition from the First Amendment. If, however, a public personality attempts to limit discussion of or writing about their lives, to inhibit the use of their likeness or personality for artistic purposes, or to control the way media or authors describe them to the public, the First Amendment will preclude such efforts. In the most obvious cases, the transformative use of a personality by those using arenas classically protected by the First Amendment will be approved. As framed by the *Jireh* court,

[W]e conclude that Ohio would construe its right of publicity as suggested in the Restatement (Third) of Unfair Competition, . . . which articulates a rule analogous to the rule of fair use in copyright law. Under this rule, the substantiality and market effect of the use of the celebrity's image is analyzed in

²⁵⁶ The publicity right claim was joined with a number of others—trademark infringement under the Lanham Act, dilution of the mark under the Lanham Act, unfair competition and false advertising under the Lanham Act, and unfair competition and deceptive trade practices under Ohio law. Only the publicity rights claim is of interest here. As in *Zacchini*, Ohio law became the focus of attention. ETW was incorporated in Ohio and claimed that state's publicity rights rules were violated by Jireh. *ETW Corp.*, 332 F.3d at 919.

²⁵⁷ *Id.* at 938.

light of the informational and creative content of the defendant's use. Applying this rule, we conclude that Rush's work has substantial and creative content which outweighs any adverse effect on ETW's market and that Rush's work does not violate Woods's right of publicity.²⁵⁸

In short, just as First Amendment considerations are deeply embedded in the meaning and use of the fair use rule in Copyright law, so too does publicity rights doctrine operating at its best have the equivalent of a fair use notion built into its structure. The fair use literature and case law is vast and complex, but for purposes of this Article, a simplified statement of the doctrine will suffice. Fair use allows any of us to employ materials protected by copyright if our new use is transformative and doesn't negatively affect the market for the original work.²⁵⁹ Application of the rule is intensely fact-based and contextual. Similarly as publicity rights, the transformative use of a person's likeness will be permissible if it doesn't have a negative impact on the ability of the public person to market themselves for endorsements or other remunerative purposes. Or, put another way, publicity rights operate to limit our ability to unfairly use the personality of another for our own commercial purposes.

That makes the results in *Zacchini* and *Jireh* both understandable and subject to disputation. That is not unusual in areas like fair use where the rule is vaguely stated and open to multiple interpretations.²⁶⁰ The *Zacchini* shot certainly was worthy of some minimal

²⁵⁸ *Id.* at 937.

²⁵⁹ The fair use case law is enormous. It is impossible to accurately summarize it in one sentence. Courts, when balancing the fair use factors listed in 17 U.S.C. § 107 (2014), tend to focus on the interactions between the creative ways authors use prior material and the impact such use will have on the market for the protected work. A good example is *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The Court concluded that a 2 Live Crew rap song entitled "Pretty Woman" was a permissible parody of the Roy Orbison song "Oh, Pretty Woman." For a parody to work, it must refer to the prior work. In addition, authors are unlikely to make fun of their own creative efforts and parodies are unlikely to have any impact on the market for the original. As a result, the transformations wrought by a parody often are treated as fair use.

²⁶⁰ That the world of intellectual property law survived reasonably intact despite the vagaries of fair use law suggests that nothing terrible will result from use of a highly fact-based, contextual law of privacy intrusion.

attention on a local news program. The Supreme Court said as much.²⁶¹ But that does not mean it was appropriate to display the entire act if that action might both increase the audience for the news program and reduce the size of the audience trooping to the county fair to see the cannon shot. While such an economic effect, and therefore the Court's decision, is subject to question, the underlying approach is not. Similarly, it might well be that the impact of Rush's paintings was quite different from the television display of the cannon shot. In contrast to the potential negative impact on the size of the thrill's market, Rush's work may have had no impact on Wood's ability to market his likeness by licensing and selling photographs of his choice. And though Rush might have used Woods' fame to attract buyers, his artistic talents, even if deemed minimal, provided added context to justify the court's result. I am not suggesting that disagreement with both outcomes is untenable. Quite the contrary is true. The broadcast of the cannon shot may actually have increased the value of Zacchini's act and the sale of Rush's work may have decreased the ability of Woods to market works displaying him in action. But the methodology used in these and many other publicity rights cases makes a great deal of sense.²⁶²

So what does this all mean for the Foster case? Most importantly, the cases suggest that in arenas like publicity rights and privacy, context is critically important in analyzing First Amendment cases. When either commercial viability or intrusive behavior is under discussion, concern about the ability of media to freely discuss matters of public importance declines in importance. Rather than impose high-level intention requirements as in defamation and false light cases, it is appropriate to balance an array of contextual factors before resolving disputes. In short, if New York wished to create a common law rule protecting the privacy interests of the Fosters, it could do so as long as the context suggested that Svenson's artistic impulses violated some strong social policy. That, of course, is exactly what may have occurred here.

²⁶¹ See *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575-76 (1977).

²⁶² It's also worth noting that both *Zacchini* and *Jireh*, went up on appeal after trial court decisions on summary judgment (*Zacchini* lost on summary judgment, while *Rush* won). The actual market impact, therefore, was never litigated in either case.

3. Demonstration Cases

The Westboro Baptist Church of Topeka, Kansas may be the most despised religious organization in the nation. Among other things, the church's members believe the United States is being punished for its tolerance of homosexuality.²⁶³ Those who died on 9/11, in Iraq, and in other national endeavors were simply being punished for the wayward politics of their nation.²⁶⁴ The funeral of Lance Corporal Matthew Snyder, killed on March 3, 2006 in a vehicle accident while serving in Iraq, therefore became a target for the church's odium. A week after his death, Westboro's pastor Fred Phelps, now deceased,²⁶⁵ members of his family, and other congregants picketed the funeral proceedings—one of tens of thousands of demonstrations they have held at funerals, churches, and other events and locations since 1991. As is evident in a photograph of the event,^{266*} the St. John Catholic Church in Westminster, Maryland where the funeral mass was held was surrounded by supporters of the family, many carrying American flags, while the Westboro congregants carrying their obnoxious signs were confined to a small area about one-thousand feet away.

Albert Snyder, Matthew's father, sued seeking damages for intentional infliction of emotional distress and intrusion on seclusion, among other claims. After he obtained a five-million dollar award in a federal diversity action, the Supreme Court reversed and dismissed the claim.²⁶⁷ Two factors were critical in the decision on the emotional distress claim—the public nature of the Westboro Church claims about American society, and the location of the demonstration on public land some distance away from the funer-

²⁶³ The church's website makes their belief structure painfully clear. *See God Hates Fags*, WESTBORO BAPTIST CHURCH, <http://www.godhatesfags.com/wbcinfo/aboutwbc.html> [<http://perma.cc/VR2Z-6W3A>] (last visited Nov. 13, 2015).

²⁶⁴ *See FAQ*, WESTBORO BAPTIST CHURCH, <http://www.godhatesfags.com/faq.html> [<http://perma.cc/J7UT-NQ6G>] (last visited Nov. 13, 2015).

²⁶⁵ Phelps died in 2014, but surviving members of his family carry on. *See Michael Paulson, Fred Phelps, Anti-Gay Preacher Who Targeted Military Funerals, Dies at 84*, N.Y. TIMES, Mar. 20, 2014, at A26.

^{266*} One picture is at Richard H. Chused, *Snyder Funeral*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments21.html> [<http://perma.cc/UD2H-RLW6>] (last visited Sept. 28, 2015).

²⁶⁷ *Snyder v. Phelps*, 562 U.S. 443, 459 (2011).

al.²⁶⁸ In combination, those factors bestowed a First Amendment privilege on the demonstration.²⁶⁹ Though the Court has construed the meaning of a matter of public concern broadly to include “any matter of political, social, or other concern to the community,”²⁷⁰ there was little doubt that the Westboro demonstration fell within the category. The funeral ritual itself certainly was private, but Phelps’s church was a well-known and widely discussed entity. The mere fact that supporters of the Snyder family gathered at St. John Catholic Church to counteract the hate speech of Westboro confirmed the public nature of the event. In addition, the use of public land, the lack of any shouting or insulting language by the Phelps supporters, and the distance of the picketing from the funeral all suggested that additional time, place, or manner limitations on the event probably were unnecessary. In short, the context of the event made it very difficult to avoid the application of traditional First Amendment doctrine to bar the imposition of penalties on the Westboro members.²⁷¹

The intrusion on seclusion tort fell by the wayside for similar reasons. Justice Roberts, writing for the Court, noted those disliking obnoxious speech on matters of public concern are asked to avoid listening to it.²⁷² Only in rare instances have the Justices approved ordinances limiting speech because the audience is “captive.” Examples include, “a statute allowing a homeowner to restrict delivery of offensive mail to his home, and an ordinance prohibiting picketing ‘before or about’ any individual’s residence.”²⁷³

As with the name disclosure and publicity rights cases, *Snyder* does not limit the ability to create a tort for the benefit of the Fosters. Certainly the surreptitious taking of photographs of those in

²⁶⁸ *Id.* at 455, 457.

²⁶⁹ *Id.* at 458.

²⁷⁰ *Id.* at 453 (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

²⁷¹ *See Snyder*, 562 U.S. at 458 (“Given that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to ‘special protection’ under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt.”).

²⁷² *Id.* at 459 (“Rather . . . the burden normally falls upon the viewer to avoid further bombardment of [his] sensibilities simply by averting [his] eyes.”) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–211 (1975)).

²⁷³ *Snyder*, 562 U.S. at 459 (internal citations omitted).

their homes is not a matter of general public concern. Quite the contrary is true. Indeed, Justice Roberts suggested that when at home, occupants are in a sense “captive”—lacking the ability to evade offensive behavior by those operating in close proximity to the shelter.²⁷⁴ Nor did the picture taking occur in an area traditionally viewed as a public forum. Again, quite the contrary is true. An open window does not a First Amendment public forum make. While commenting on voyeurism carries free speech attributes, acting as a voyeur may justifiably be thought of in a different breath.

CONCLUSION

It should not surprise anyone that the secret taking and public display of photographs of people quietly going about their lives at home would offend many. While I would expect that any debate over expansion of privacy doctrine to cover such matters would be contentious, it is no longer possible for us to ignore the intrusive qualities of digital technology. Perhaps this article will stimulate discussion on the issues. That alone would make my authorship of it worth the effort. The best way to conclude is simply to ask you to look at a view from my apartment balcony on a beautiful moonlit evening in New York City and to wonder what people across the street might be doing.^{275*}

²⁷⁴ *Id.*

^{275*} Go to Richard H. Chused, *Apartment View*, APPROPRIATE(D) MOMENTS, <http://www.rhchused.com/Moments22.html> [<http://perma.cc/YCX9-R6V4>] (last visited Sept. 29, 2015).