Talk Is Cheap, but a Picture Is Worth a Thousand Words: Privacy Rights in the Era of Camera Phone Technology

Alan Kato Ku

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TALK IS CHEAP, BUT A PICTURE IS WORTH A THOUSAND WORDS: PRIVACY RIGHTS IN THE ERA OF CAMERA PHONE TECHNOLOGY

By Alan Kato Ku*

I. INTRODUCTION

What recent technological advance has raised the ire of such diverse parties as bookstore owners, members of health clubs, facility staff at General Motors, and pop icon Britney Spears? Camera phones. Since camera phones bear no marked difference from cell phones, distinguishing between them is not easy. Camera phone popularity has rapidly increased in the United States since they were introduced to the U.S. market. Although six million of the estimated 148 million cellular customers currently own camera phones, the number is expected to explode based on market research suggesting more than half of all U.S. cell phones will be capable

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* Research Editor, Santa Clara Law Review, Volume 45; J.D. Candidate, Santa Clara University School of Law; A.B., Economics and B.S. Statistics, University of California, Berkeley. The author wishes to thank all of the women in his life: his mother Betty, his wife Linda, and all the ladies of the Santa Clara Law Review who contributed to this comment.

2. Id. Camera phones merge the functionality of a digital camera with that of a regular cellular phone. See id. They have been regularly reported on in the press as one of the newest technological trends. See id.
3. Id.
5. Id.

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Camera phones have proven more than a novelty, as evidenced by their use in assisting law enforcement by capturing images of criminals or crimes in progress. Nevertheless, the new technology is quickly facing concerns in three areas: (1) its threat to privacy; (2) the theft of copyrighted materials; and, (3) corporate espionage. And, as a means of addressing the proposed danger, Saudi Arabia has taken the extraordinary step of banning camera phones altogether.

Among the legal issues raised, the threat to privacy has been the impetus behind municipal regulations that limit the use of camera phones in certain public settings, and the prohibition against use in certain commercial establishments like sports clubs. As the public comes to terms with this new technology, privacy rights face another device that erodes the expectation of privacy in public settings. This comment addresses the potential legal responses to address the privacy concerns raised by camera phones and how these legal responses may implicate and apply to succeeding technologies that will inevitably further erode society's expectation of privacy in a public setting.

First, this comment will present a brief discussion on the legal definition of privacy. Next, it will outline the history of privacy laws in the United States with particular emphasis on two major areas: the common law of torts and the jurisprudence that has arisen from the courts' interpretation of the Fourth Amendment provision on searches and seizures. The two doctrines of American privacy law will set the foundation for the final discussion on contemporary statutory laws that may apply to, or have been introduced because of, the

6. Id.
8. See id. The author cites to various incidents raising concerns: pictures of undressed gym members, customers taking pictures of cookbook recipe pages, and manufacturing sites worried about theft of product development plans. Id. In addition, pop idol Britney Spears prohibited camera phones at a party thrown in September 2003. Id.
9. Id.
10. See Jo Napolitano, Hold It Right There, And Drop That Camera, N.Y. TIMES, Dec. 11, 2003, at G1 (citing camera phone proposals and statutes in Illinois, Ohio, and Missouri).
12. See discussion infra Part II.A.
13. See discussion infra Part II.B.
disruptive technology of camera phones. After presenting the legal privacy concerns associated with camera phone technology, this comment will analyze possible remedies found in existing cases and statutes. Finally, this comment will propose the creation of "safe places" within a framework of common law privacy tort remedies.

II. BACKGROUND

A. The Legal Definition of Privacy

A proper treatment of the definition of privacy is an exhaustive effort which has been thoroughly examined by legal scholars. The following discussion presents only a brief survey of the topic.

1. The Most Elegant of Definitions

In 1890, *The Right to Privacy* was published in the *Harvard Law Review*. Its authors, Samuel D. Warren and Louis D. Brandeis, defined privacy as the right "to be let alone." This definition was in response to "[r]ecent inventions and business methods" that threatened the individual citizen's "inviolate personality." Warren and Brandeis prophetically worried that the recent introduction of photography combined with the press would cause "what is whispered in the closet... [to] be proclaimed from the house-tops." The "right... to be let alone" has remained a workable definition of privacy though it appears in many forms. One author, for instance, describes the right as the control over all dissemina-
tion of personal information. 24

When the "right . . . to be let alone" is paired with the accompanying question, "with respect to what?," 25 the definition can come to mean "new and different things." 26 Professor Gormley notes that "[f]or Warren and Brandeis in 1890, it meant the right to be let alone with respect to prying newspapers and photographers." 27 Today, privacy has included the right to be let alone with respect to the acquisition and use of personal information. 28 Ultimately, privacy under any definition will mean something different to each successive generation of Americans, with all such meanings representing "a boundary of individualism safeguarded by the force of law." 29

2. Categories of Privacy

Privacy laws can be broadly categorized into two branches, autonomous and individual privacy, 30 that are reflective of the rights they protect. Justice Stevens described the former as "the interest in independence in making certain kinds of important decisions," 31 while the latter was "the individual interest in avoiding disclosure of personal matters." 32

The Supreme Court acknowledged the emergence of in-

24. ALAN F. WESTIN, PRIVACY AND FREEDOM 7 (1967) ("[P]rivacy is the claim of individuals . . . to determine for themselves when, how, and to what extent information about them is communicated to others"). See also Gormley, supra note 18, at 1336 (listing several cross disciplinary derivations of a definition). The "right to be let alone" definition can be viewed as encompassing both categories of privacy: autonomy and informational. See discussion supra Part II.A.2. By its simple description, the "right . . . to be let alone" implicates autonomy privacy. However, it also implicates informational privacy as is indicated by Warren and Brandeis in describing the right of privacy to be the right to determine "to what extent his thoughts, sentiments, and emotions shall be communicated to others." Warren & Brandeis, supra note 19, at 198.

25. See Gormley, supra note 18, at 1342.

26. Id.

27. Id.


29. Gormley, supra note 18, at 1342.


31. Whalen, 429 U.S. at 599-600.

32. Id. at 599.
formational privacy when it ruled in *Whalen v. Roe*\(^{33}\) upon the constitutionality of a New York State Health Department procedure to log patient drug use and store it in a retrievable database.\(^{34}\) The Department's actions and database were upheld as legal.\(^{35}\) However, the Court acknowledged the "threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files."\(^{36}\) Since the late 1960s, congressional efforts have been numerous in passing statutory protections to provide accountability in the collection and use of personal data.\(^{37}\)

**B. The Historic Development of Privacy Laws**

There is no explicit privacy protection in the Constitution, but courts have found implied privacy related rights found in certain amendments. For example, the Fourth Amendment's right against unreasonable searches and seizures protects the individual from unwarranted government intrusion into his personal and residential space.\(^{38}\) The authors of the Fourth Amendment, however, certainly could not have imagined that a search of a citizen's home could one day be accomplished without any physical entry whatsoever. Thus, the courts are challenged to apply the concept of privacy rights against the backdrop of technological and societal changes.\(^{39}\)

1. **The Courts' First Step: Privacy in the Common Law of Torts**

Though earlier judicial and academic precedents existed,\(^{40}\) the article by Warren and Brandeis received notice-

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33. 429 U.S. 589.
34. Id. at 591.
35. Id. at 600.
36. Id. at 605.
37. See TURKINGTON & ALLEN, supra note 18, at 71-72 (surveying the federal statues regulating the collection and use of personal information ranging from credit scores, student records and banking data).
38. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ").
39. See generally Gormley, supra note 18, at 1439-41.
40. See TURKINGTON & ALLEN, supra note 18, at 22-23. See also Gormley, supra note 18, at 1343 (noting that despite arguments to the contrary, privacy rights were "infused" into early American common law). One of the earliest ref-
able attention that cemented its role as being one of the first attempts to formally articulate the right of privacy.\textsuperscript{41} The right was based on a basic tort notion and not to any constitutional right.\textsuperscript{42} A plaintiff was entitled to recovery if he or she suffered some sort of injury to his or her own sense of individuality, which Warren and Brandeis referred to as one’s “inviolate personality.”\textsuperscript{43} The right was not absolute, however. The authors noted that one would forfeit the right if one exposed himself to the general domain,\textsuperscript{44} or one would forfeit the right if the individual’s matter was of “public or general interest.”\textsuperscript{45}

The privacy tort was not immediately accepted but over the course of the several decades slowly began to take hold.\textsuperscript{46} New York passed the nation’s first privacy related statute in 1903, which prohibited the unauthorized use of an individual’s name or likeness.\textsuperscript{47} In 1905, the Georgia Supreme Court ruled that a plaintiff had a valid cause of action under a privacy theory when his image was used without his consent in a newspaper advertisement.\textsuperscript{48} By the time William L. Prosser revived interest in the area of privacy with his article in 1960,\textsuperscript{49} he was able to document a rich history of cases that

\begin{itemize}
\item References to privacy was a Michigan Supreme Court case holding that a defendant who had witnessed a childbirth without the mother’s consent was liable in tort. DeMay v. Roberts, 9 N.W. 146, 149 (Mich. 1881) (“The plaintiff had a legal right to the privacy of her apartment at such a time, and the law secures to her this right by requiring others to observe it, and to abstain from its violation.”).
\item See Gormley, supra note 18, at 1353.
\item See id. at 1345. It is worth repeating that the Constitution does not explicitly mention any “right to privacy,” and the constitutional basis for what we understand today as the “right to privacy” has evolved primarily in the extensive jurisprudence defining the contours of the Fourth Amendment protections from government searches and seizures and the fundamental, decisional privacy rights commonly associated with marriage, child rearing, and most recently, sexual practices. See discussion infra Part II.B.3.
\item Warren & Brandeis, supra note 19, at 197-98, 205. A sense of what Warren and Brandeis intended by the term “inviolate personality” can be gathered from a contemporary case in which an actress sued to bar the publication of an unauthorized picture of her in tights. Id. at 195 n.7, 205.
\item Id. at 199-200.
\item Id. at 214-15.
\item See TURKINGTON & ALLEN, supra note 18, at 23 (citing Professor Bohlen). Professor Bohlen commented that the right of privacy advocated by Warren and Brandeis had “almost completely failed.” Francis H. Bohlen, Fifty Years of Torts, 50 HARv. L. REV. 725, 731 (1937).
\item Act of April 6, 1903, ch. 132, §§ 1-2, 1903 N.Y. Laws 308.
\item William L. Prosser, Privacy, 48 CAL. L. REV. 383 (1960). William L.
had referenced the right to privacy under various circumstances.\textsuperscript{50} He observed that courts overwhelmingly had come to recognize the right of privacy in some form and that only a few states completely rejected it.\textsuperscript{51} Dean Prosser's article further established the privacy tort by refining it into four distinct categories,\textsuperscript{52} all of which were subsequently adopted by the \textit{Restatement (Second) of Torts} (the "\textit{Restatement}").\textsuperscript{53}

Though courts have adopted the privacy torts as a valid claim, the courts have not always ruled favorably for those who claim a violation under any of the four categories.\textsuperscript{54} For instance, courts generally dismiss a cause of action under the privacy tort of intrusion upon the plaintiff's seclusion or solitude because of the accepted notion that there is no privacy in a public place.\textsuperscript{55} Nevertheless, the \textit{Daily Times Democrat v. Graham}\textsuperscript{56} case granted relief to plaintiff's claim of a privacy right in public.\textsuperscript{57} The case involved a mother and her sons who visited a local fair during which the woman's dress was

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\textsuperscript{50} See Gormley, supra note 18, at 1355-56 n.102 (citing a representative list of cases since 1893 in which the court either recognized or did not recognize a right to privacy).

\textsuperscript{51} Prosser, supra note 49, at 386-88.

\textsuperscript{52} Id. at 389. Dean Prosser described the four torts as follows: "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 plaintiff in a false light in the public eye. 4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness." Id.

\textsuperscript{53} See \textit{RESTATEMENT (SECOND) OF TORTS} §§ 652B, 652C, 652D, 652E (1977) (categorizing the torts as Intrusion on Seclusion (Section 652B), Appropriation of Name or Likeness (Section 652C), Publicity Given to Private Life (Section 652D), and Publicity Placing Person in False Light (Section E)). See \textit{generally} Shulman v. Group W. Prods., Inc., 955 P.2d 469 (Cal. 1998) (providing a thorough discussion on the privacy invasion torts and their application to California law).


\textsuperscript{55} See \textit{RESTATEMENT (SECOND) OF TORTS}, supra note 53, § 652B; McClurg, supra note 54, at 1003-04. The lack of privacy in a public place is echoed in both the Warren and Brandeis, and Prosser law review articles. See \textit{generally} Warren & Brandeis, supra note 19; Prosser, supra note 49. Dean Prosser writes that "[o]n the public street, or in any other public place, the plaintiff has no right to be alone . . . ." Prosser, supra note 49, at 391.

\textsuperscript{56} 162 So. 2d 474 (Ala. 1964).

\textsuperscript{57} Id. at 478.
“blown up by the air jets and her body was exposed from the waist down” except for the portion covered by her undergarments. A photographer simultaneously took a picture of the scene and published it in a local paper with limited circulation. Notably, the Restatement authors included an illustration that borrowed heavily from the facts in Daily Times Democrat that acknowledges a potential tort cause of action even in a public setting.

2. Privacy Rights under the Fourth Amendment

The Fourth Amendment afforded courts the earliest opportunity to articulate privacy rights in the context of government and citizen interactions. The idea that such a right existed was first articulated by Thomas Cooley, writing that the “maxim that 'every man's house is his castle' is made a part of our constitutional law in the clause prohibiting unreasonable searches and seizures” from governmental intrusion. In 1886, the Supreme Court “first specifically wed the notion of privacy to the guarantee against unreasonable searches and seizures in the Fourth Amendment” when it articulated the “privacies of life” which guarded against the government’s seizure of imported items from the defendants.

In 1928, Louis Brandeis re-emerged in the privacy context with his dissent in Olmstead v. United States. Justice Brandeis drew upon his earlier article with Warren when he linked the Fourth Amendment’s protection with the “right to be let alone.” Brandeis wrote in his dissent that the authors of the Constitution:

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58. Id. at 476.
59. Id.
60. The illustration is as follows:
A, a young woman, attends a “Fun House,” a public place of amusement where various tricks are played upon visitors. While she is there a concealed jet of compressed air blows her skirt over her head, and reveals her underwear. B takes a photograph of her in that position. B has invaded A’s privacy.

RESTATEMENT (SECOND) OF TORTS, supra note 53, § 652B cmt. c, illus. 7.

62. See Gormley, supra note 18, at 1359 (citing Boyd v. United States, 116 U.S. 616 (1886)).
64. See Gormley, supra note 18, at 1360 (noting that Brandeis’s dissent showed his strong convictions on this matter).
conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual ... must be deemed a violation of the Fourth Amendment.  

Regarding nascent wiretapping technology, which was used by the Government against the defendant, Brandeis warned that it afforded the government power by allowing “disclosure in court of what is whispered in the closet.”

In 1967, the Court revisited the use of eavesdropping devices in *Katz v. United States*. In the intervening forty years, surveillance technology became intricately more sophisticated than the simple wire-tap implicated in *Olmstead*. The Court held in *Katz* that the “Fourth Amendment protects people, not places,” reflecting the Court’s acknowledgement that contrary to its ruling in *Olmstead*, an invasion could occur absent a physical intrusion. Justice Harlan’s concurring opinion went on to state that a citizen has a “reasonable expectation of privacy” against searches and seizures based upon a two-prong test. First, one must have a subjective expectation of privacy. Second, the expectation must be one that society accepts as reasonable.

In the intervening years, courts addressed the concept of reasonable expectations of privacy with respect to an individual’s garbage, dog-snooing checkpoints, and overhead flights by the police. The last example demonstrates how advances in technology have diminished the expected privacy

66. *Id.* at 473. Brandeis used the same reference to a “closet” image in this comment as he did in his earlier law review article. *See* Warren & Brandeis, supra note 19, at 195.
68. *See* Gormley, supra note 18, at 1363-64 (chronicling the exponential growth and concern over new technologies for surveillance).
70. *Id.* at 352-53.
71. *Id.* at 360 (Harlan, J., concurring).
72. *Id.* at 361.
73. *Id.*
of individuals. The Court ruled no expectation of privacy existed in a citizen's backyard "[i]n an age where private and commercial flight in the public airways is routine."77

The Court's reasoning, thus, could permit "new technological innovations . . . [to] render unreasonable those privacy expectations that were once reasonable."78 However, in Smith v. Maryland,79 the Court addressed this possibility in dicta. The Court noted that the government could not eliminate an individual's expectation of privacy by "announc[ing] on nationwide television that all homes henceforth would be subject to warrantless entry, individuals thereafter might not in fact entertain any actual expectation of privacy regarding their homes, papers, and effects."80

In 2001, the Court further refined the expectation of privacy standard in Kyllo v. United States.81 By this time, surveillance tools had reached a level of sophistication whereby police could use thermal imaging devices to detect heat emanating from homes.82 The Court ruled five to four in Kyllo that the use of such a device did constitute a search.83 The ruling was narrowly applied only to situations involving a homeowner's expectation of privacy and limited to technological devices that were not in use by the general public.84 The Court clearly acknowledged that new technologies had shrunk the realm of what was considered private and out of the reach of Government's view.85 Justice Scalia, writing for the majority, summarized that the Court decision in the case would determine "what limits there are upon this power of technology to shrink the realm of guaranteed privacy."86 The ruling has been characterized as the Court's "first step in successfully translating the original understanding of the Consti-

77. Id. at 215.
80. Id. at 740 n.5. See also Dorothy Glancy, At the Intersection of the Visible and Invisible Worlds: United States Privacy and the Internet, 16 SANTA CLARA COMPUTER & HIGH TECH. L.J. 357, 364 n.24 (2000).
82. See id.
83. Id. at 40.
84. Id.
85. Id. at 33-34.
86. Id. at 34.
tion into the electronic age. For now, the Court appears to have held back the intrusive advances of technology in a citizen's privacy at his or her doorstep.

The continued refinement of the reasonable expectation of privacy in adjudicating Fourth Amendment cases jurisprudence has important ramifications outside the criminal law context, as violations of state and local statutes against privacy invasions are based upon the same test.

3. Fundamental Decisional Privacy

Despite the privacy protections under Fourth Amendment jurisprudence, Justice Stewart in the Katz opinion noted that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion." Such a general right outside the scope of the Fourth Amendment was recognized in Griswold v. Connecticut, which involved a Connecticut law prohibiting the use or provision of contraceptives. Justice Douglas declared that "specific guarantees in the Bill of Rights have penumbras [in the First, Third, Fourth, Fifth and Ninth Amendments], formed by emanations from those guarantees that help give them life and substance." The penumbras of the singled out amendments, collectively, contained in them the implied power to "create zones of privacy." Justice Douglas declared that "privacy surrounding the marriage relationship" was one such zone, and thus allowed for the use of contraceptives unfettered by government intrusion.

After Griswold, the Court ruled on a series of cases that established a constitutional right to privacy in areas other than marriage. In 1973, the Court added the right to an

89. 389 U.S. at 350.
90. 381 U.S. 479 (1965).
91. Id. at 484.
92. Id.
93. Id. at 486.
abortion as an accepted zone of privacy in the *Roe v. Wade* decision. In *Roe*, the Court determined that the liberty clause in the Fourteenth Amendment provided the "penumbra" under which a woman could choose to have an abortion. Justice Blackmun wrote that "[t]his right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

This right has become known as the "decisional" aspect of constitutional privacy, by safeguarding decisions made by individuals. In practice, the Court has been circumspect in expanding the list of privacy protected zones, limiting them to rights relating to marriage, procreation, conception, family relationships, child rearing and education.

The technologies that spurred the Court's recognition of a constitutional right to privacy, contraceptive and abortion procedures, was clearly mingled with "religious, moral and safety concerns." These were not paramount issues with a prior technological trigger, but the effect of these medical advances led to the reshaping of privacy laws, in much the same way cameras and wire tapping equipment resulted in more privacy protections under common law and the Fourth Amendment.

### 4. Privacy Protections from State Constitutions

As a direct result of the Court rulings in *Katz* and *Griswold*, many state legislatures began in the early 1970s to integrate a specific clause protecting privacy in their state constitutions. For example, California's Constitution reads

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96. *Id.* at 152-53.
97. *Id.* at 153.
98. Decisional privacy is also described as fundamental-decisional privacy, reflecting the fact that this type of privacy is based on fundamental rights in how citizens make decisions regarding their own lives.
99. *Paul v. Davis*, 424 U.S. 693, 712-13 (1976) (recognizing "zones of privacy" which refined to be defined as those which were "fundamental" or "implicit in the concept of ordered liberty.").
100. *See Gormley*, supra note 18, at 1404 (noting that conceptional use and abortions were not new to society, but they had reached a level of perfection by the time of the fundamental-decisional privacy cases).
101. *See id.*
102. *Id.* at 1423-24 (surveying state responses to *Katz*, *Griswold*, and *Roe* as
that "[a]ll people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty . . . and pursuing and obtaining safety, happiness, and privacy." The remaining states have not explicitly written a right to privacy into their constitutions, but have found privacy "buried within the nooks, crannies and homegrown penumbras of their own constitutions." In the years following the more formal recognition of a constitutional right to privacy and state acknowledgement, state courts have proved to be useful in exploring the outer contours of privacy laws that the Court has yet to examine.

C. Recent Laws Affecting Camera Phone Technology

With the proliferation of camera phones, states may play a leading role in testing out new laws or applying existing statutes to address the technology. The difficulty in distinguishing between a camera phone and a regular phone will make detecting a violation difficult. States may choose to look to their local city municipalities for direction, as these entities have been actively contemplating camera phone restriction; guidance from the federal government has been somewhat forthcoming with the enactment of the Video Voyeurism Prevention Act of 2004.

1. Municipal Statutes

Local municipalities throughout the United States also have or are contemplating prohibitions against such use. The Chicago City Council banned the use of camera phones in public bathrooms and lockers last year and is now contemplating a ban in checkout lines and at ATM machines. An

103. CAL. CONST. art. I, § 1.
104. Gormley, supra note 18, at 1425.
105. Id. at 1425-27.
106. Unlike cameras or video equipment, camera phones do not distinguish themselves to individuals who are being photographed. Thus, the presence of cell phones aimed at an individual would not raise the same concerns as if someone were pointing a camera in his or her direction.
107. See discussion infra Part II.C.1.
108. The Act signed by President Bush limits the use of unauthorized photographing on federal property and military bases only. See discussion infra Part II.C.2.a.
110. Erin Gwinn, Window on the World, CHICAGO TRIBUNE ONLINE EDITION
attempt by the town of Seven Hills, Ohio, however, to ban the use of camera phones in certain public places, was recently scrapped amid fears of possible challenges and, ultimately, the city deciding that the matter would be best left to a state or federal action. Other municipalities have attempted a complete ban on camera phone use in certain public facilities.

2. State and Federal Responses

Current anti-voyeurism and anti-paparazzi laws share similar goals in protecting individuals from privacy invasion that can be perpetrated by camera phone abuse. Current laws, however, have had limited success in dealing with the special nature of the phones—their ability to surreptitious capture and instantly transmit images over the Internet.

a. Anti-Voyeurism Laws

Existing laws against voyeurism have been the first line of defense against inappropriate use of camera phones. However, these laws share the same limitations that the common law of privacy torts possess—the resistance by courts to provide any protection to individuals in a public setting resulting in a legal loophole in most existing laws.

On December 1, 2003, a Washington state resident, Jack Le Vu, was the first person in the nation charged for a criminal act while using his camera phone to photograph females


111. Napolitano, supra note 10 (citing possible suits based upon citizen's need to use a phone during emergencies).

112. Id.

113. Of the two, however, only the anti-voyeurism law has been successful in obtaining a conviction. See discussion infra Part II.C.2.a.

114. Legal Loopholes Protect Video Voyeures, supra note 88.


from beneath their dresses (referred to as "upskirt" photos). The victim noticed the defendant with his cellular phone but did not suspect anything until a witness reported that the defendant had crouched under the victim, then stood up and began looking at his phone. The defendant was successfully convicted and later plead guilty to one count of voyeurism; he was sentenced to sixty days in jail and was required to register as a sex offender.

The case was an important test for Washington's revised voyeurism law, which borrowed from a similar California statue that expanded the right to privacy in the public setting. It was enacted in 2002 after the Washington State Supreme Court ruled that the previous law failed to protect another victim of an "upskirt" incident where the defendants used conventional cameras and video cameras. The ruling by the court highlighted the major difficulty in using voyeurism laws to control camera phone use: the lack of a formal recognition of privacy in public places. Except for a few exceptions, the Washington Supreme Court cited extensive legal history when it emphasized the lack of privacy afforded to those who venture out in public areas.

The court focused on the fact that "the physical location of the person . . . [is what] is ultimately at issue, not the part of the person's body." Accordingly, even though the defendant "engaged in disgusting and reprehensible behavior," the court concluded that the previous law did "not apply to
actions taken in purely public places and hence does not prohibit the ‘upskirt’ photographs they took."\(^{126}\) The court acknowledged that the law had sought to protect citizens by "expand[ing] the locations where a person would possess a reasonable expectation of privacy beyond those of a traditional ‘peeping tom,’"\(^ {127}\) but it did "not [go] so far as to include public locations."\(^ {128}\)

Some state legislatures, however, notably California and Hawaii, have crafted anti-voyeurism laws that give victims a cause of action even if the event occurred in a public place.\(^ {129}\) Other states are in the process of revising their existing voyeurism laws to reflect the advances in technology.\(^ {130}\) The California Senate legislative hearings regarding the law noted that "a person would likely have a limited expectation of privacy in a public place, in contrast with a locked dressing room in a clothing store."\(^ {131}\) Still, the expansion of privacy into the public space was an important concept that the Washington Supreme Court noted when it said the California law "focused on the nature of the invasion itself, rather than where the crime was committed."\(^ {132}\) The statute's application, however, is limited to a provision that the victim be identifiable, a provision added to help ensure the law's constitutionality.\(^ {133}\) Thus, perpetrators will escape prosecution if the images they took do not reveal any details that will link identity

126. Id.
127. Id. at 151.
128. Id.
129. CAL. PENAL CODE § 647(k)(1) (West 1999 & Supp. 2005) (referring to the use of a "motion picture camera" in an area where one has a "reasonable expectation of privacy"); HAW. REV. STAT. § 711-1111(d) (Year & Supp. 2005) (defining a violation of privacy in the second degree when a person captures an image of "another person's intimate area underneath clothing, by use of any device, and such image is taken while that person is in a public place"). A "public place" is defined as "an area generally open to public." Id. § 711-1112(2).
130. See generally Jerome R. Stockfisch, High-Tech Voyeurs Lead to Update of Law, TAMPA BAY ONLINE NEWS, Jan. 5, 2004 (discussing Florida legislative efforts to revise voyeurism statutes) (on file with the Santa Clara Law Review).
133. See Erwin Chemerinsky, Newsgathering and Privacy Rights: Protecting Privacy From Technological Intrusions, 1999 ANN. SURV. AM. L. 183, 188-91 (1999) (arguing that the California law is valid because it "could meet strict scrutiny as being narrowly tailored to achieve a compelling purpose," or the law could also be validated on a lower level of scrutiny).
of the victim to the photograph.\footnote{134}

The Video Voyeurism Prevention Act of 2004 was signed into law in December 2004 and reflects federal efforts to thwart video voyeurism. The Act aims to prohibit knowingly capturing by videotape, photograph, film, or any electronic means an improper image that would violate individual privacy, in situations where an individual had a reasonable expectation of privacy.\footnote{135} Though the law is limited only to public space on federal lands such as national parks and federal buildings, the authors opine that it can be used as a basis for further state efforts in the privacy realm.\footnote{136} Notably, the federal effort creates an expansion of privacy protections to public places in an effort to stem the realities of current technological advances.\footnote{137}

\section*{b. California's Anti-Paparazzi\footnote{138} Statute}

The death of Princess Diana in 1997 resulted in efforts to create civil liability for the overzealous actions of the press with California passing the nation's first anti-paparazzi statute in 1999.\footnote{139} Opponents of the law claimed it would be unconstitutional on vagueness and First Amendment grounds, but supporters, such as noted constitutional scholar Professor Erwin Chemerinsky, argued that the law was "clearly constitutional,"\footnote{140} since it applied "where the expectations of privacy are the greatest and where there are only minimal First Amendment interests involved."\footnote{141}

The notable characteristic of the law is that it creates a
constructive invasion of privacy. The statute creates liability for actions that constitute an invasion of privacy by use of auditory or visual enhancing technologies but do not involve an actual physical trespass. Professor Chemerinsky reasoned that "the existing tort law of trespass and privacy [from Prosser's earlier work] is based on concepts of physical intrusion. There is a need to expand this law to create a cause of action against those who use technological enhancing equipment to accomplish the same invasions of privacy." The California Senate's analysis of the "constructive" invasion prong echoed the arguments of Professor Chemerinsky in that an invasion of privacy cause of action could proceed even without a physical trespass against the victim.

The statute's "constructive invasion" element requires that there exists a "reasonable expectation of privacy," thus sharing the same standard as California's voyeurism law and the Fourth Amendment test promulgated by the Supreme Court under Katz. Though the test's application is rooted in criminal search and seizure cases, both the legislative record and Professor Chemerinsky's analysis of the law indicate that California's civil statute lifts the crucial test from the Court's Fourth Amendment jurisprudence.

142. The pertinent section reads as follows:
A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image . . . of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy . . . regardless of whether there is a physical trespass, if this image . . . could not have been achieved without a trespass unless the visual . . . enhancing device was used.
CAL. CIV. CODE § 1708.8(b).
143. Chemerinsky, supra note 134, at 183.
144. Id.
145. See Hearing on A.B. 182, supra note 132.
146. CAL. CIV. CODE § 1708.8(b) (referring to circumstances where one has a "reasonable expectation of privacy").
147. CAL. PENAL CODE § 647(k)(1) (referring to an area where one has a "reasonable expectation of privacy"); Katz, 389 U.S. at 361.
148. See discussion supra Part II.B.2.
III. IDENTIFICATION OF THE LEGAL PROBLEM

The unique threat caused by camera phones is the marriage of surreptitious photography matched with the instantaneous ability to transfer the images worldwide through the Internet. Camera phones give any individual, not just the press, police, or paparazzi, the discrete ability to simultaneously capture, store, and disseminate images and video of others. Currently, this threat to privacy is only haphazardly addressed by local, state, and federal laws. It would certainly be a dire result if unchecked camera phone use restricted an individual’s reasonable expectation of privacy to “stay inside your house with the blinds closed.”

The way in which courts and legislatures choose to react to camera phones has potentially far reaching implications, not only in addressing proper camera phone use, but as a template to address future technology that shares the same potent characteristics of camera phones. The initial responses have been the simple prohibition of the technology’s use in certain locations such as in health clubs. Current anti-voyeurism and anti-paparazzi laws could attempt to regulate the use of camera phones. Ultimately, the rights of citizens would be best served with a coherent, workable approach that sets clear legal boundaries for camera phone use and that could apply to future technologies that share the device’s characteristics discussed above.

IV. ANALYSIS

Addressing camera phones use implicates two legal theories: first, whether there can be any right to privacy in a public setting; and, second how technology has adjusted to what

150. The seamless ability to capture, store, and disseminate on an internet-wide scale is different than the threat posed by conventional camera or video devices that do not have the ability to instantaneously broadcast the images captured. Whereas, an individual can reasonably suspect that a camera pointed at them is being used to take his or her photo, a similarly directed cell phone would not normally raise such a suspicion.
151. See Napolitano, supra note 10. At this time, local municipalities and health clubs have been most active in addressing the matter. Id.
152. See discussion supra Part II.C.2.
153. See generally McClurg, supra note 54, at 990.
154. See discussion supra Part II.C.2.
155. See discussion infra Parts IV.A-IV.B.
society expects as a reasonable expectation of privacy. Reaching an acceptable response to both will assist in forging a robust legal solution. Privacy in a public setting is generally an unrecognized right under the common law and criminal application of the Fourth Amendment.

A. Privacy in Public Places

1. Common and Civil Law Context

Recent laws have been chipping away at the lack of recognition by finding a cause of action under certain circumstances and in certain locations. Proposed and existing local laws against the use of camera phones are focused on where a citizen has a reasonable expectation of privacy in public locations such as public showers and changing rooms. Local officials appear to be more willing to err on the side of safety than allowing camera equipped cell phone users unfettered freedom of use while in a public setting. Eventually, however, these statutes may face challenges as they impinge upon the general freedoms of cell phone users.

On a national level, the scope of the federal ant voyeurism law's intends to cover camera phone use as well.

156. See discussion infra Part IV.C.

157. See discussion supra Parts II.B.1-II.B.2. The definition of "public" setting was not explicitly developed in either of the articles by Warren and Brandeis or Prosser. However, both articles defined by example what was considered public, such as putting oneself in the public domain or walking on a street. See Prosser, supra note 49, at 391-92; Warren & Brandeis, supra note 19, at 199-200. For purposes of this article, the term "public space" will reflect any location an individual is not restricted by statute or property rights. For example, the case of California v. Greenwood, 486 U.S. 35 (1988), stood for the proposition that an individual's garbage was in the public setting and thus free of the limitations of the Fourth Amendment.


159. Id. One such official, Chicago's Elk Grove Park District Commissioner, Ron Nunes, commented on the ban of cameras in park showers by saying he would "rather protect the children and the public more than someone who wants to call home and see what's for dinner." Id.

160. Id. Attorney L. Richard Fischer noted that "[y]ou have to do it [passing camera phone laws] very selectively or you really are treading on people's rights." Id. See also A. Michael Froomkin, Cyberspace and Privacy: A New Legal Paradigm? The Death of Privacy?, 52 STAN. L. REV. 1461, 1511 (2000) (citing restrictions on general photography implicating First Amendment rights).

But, the bill averts the bulk of the problem by focusing solely on federal lands and avoiding any jurisdiction over regular public settings. Indeed, the bill's goal is "just trying to define the problem and take a rifle-shot approach." State efforts to carve out a privacy cause of action in a public setting have not yet been tested by the appellate process. In fact, only one known conviction of camera phone use exists under Washington's revised anti-voyeurism statute.

The precedent from *Daily Times Democrat*, however, indicates that the rights of the general public to see and collect data by photographic means can be curtailed by a privacy tort. In *Daily Times Democrat*, the court rebuffed the defendant's general First Amendment claim by noting that the photograph of the plaintiff was not newsworthy and, thus not afforded the usual protections of speech and the press. The defendant also claimed that since the photograph was taken at a public setting, the plaintiff had no cause of action under an invasion of privacy tort. The court dispensed with the argument by stating that a "purely mechanical application of legal principles [no privacy in public setting] should not be permitted to created an illogical conclusion." The "illogical conclusion" that the court sought to avoid was "[t]o hold that one who is involuntarily and instantaneously enmeshed in an embarrassing pose forfeits her right of privacy merely because she happened at the moment to be part of a public scene." The lack of volition on the part of the plaintiff allowed her recovery under the privacy tort. Nothing in the ruling limited other potential circumstances from carving out another exception to the general rule of no privacy in a public setting. Thus, the significance of the *Daily Times Democrat*...
ruling is that it allowed any other court to create its own exception under a different set of circumstances. 170

2. Criminal Law Context

Prior to Kyllo, the Supreme Court clearly followed the generalization that what was held out to be public was afforded no protections from Fourth Amendment protections. 171 Certainly, under the reasonable expectation test promulgated under the Katz ruling, individuals had no expectation of privacy in a public setting. 172

The Court in Kyllo, however, appears to have carved out an exception to the general rule much the same as the Daily Times Democrat court did in the common law. Notably, the Court rejected Justice Steven's contention that since the resident's heat waves were exposed to the public like garbage or a backyard, it was unreasonable to have an expectation of privacy. 173 Justice Scalia, writing for the majority, countered that the Katz "expectation of privacy" test had been "criticized as circular, and hence subjective and unpredictable." 174 He went on to state that there was a "minimal expectation of privacy that exists" when it came to the interior of a home. 175 The Court held that a search was defined as "obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,' . . . at least where (as here) the technology in question is not in general public use." 176

The Court's bright line rule stands as a backdrop for the trend against prior jurisprudence that that held the public has no Fourth Amendment protection. 177 Whether the Court

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170. McClurg, supra note 54, at 1046.
171. For example, the case of California v. Greenwood, 486 U.S. 35 (1988), stood for the proposition that an individual's garbage was in the public setting, and, thus, an individual had no expectation of privacy.
174. Id. at 34.
175. Id. (emphasis omitted).
176. Id. (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)) (internal citation omitted).
177. Justice Scalia may have hedged this question by specifying that the technology need not be generally available to the public. From his opinion, one
will hold narrowly to the facts of *Kyllo* or choose to extend its principles of protection is yet to be seen, but the door seems to have been left open for further rulings from the Court that assign privacy rights to what is nonetheless exposed to the public.

**B. Reasonable Expectations Revisited**

The test promulgated by the Court in *Kyllo* seemed to distance itself from any use of Katz's "reasonable expectations" test. The Court instead spoke of a "minimal expectation of privacy" in devising its ruling. The use of "reasonable expectations" has been the foundation of the Fourth Amendment jurisprudence since *Katz* and forms the basis for many state statutes that serve to protect privacy rights of citizens. *Kyllo*'s opinion may be the subtle recognition that relying on the expectations of citizens, particularly with the respect to ever-increasing technological advances, does not afford them the protections envisioned by the authors of the Constitution. Arguably, citizens could reasonably expect that there is nothing done in their homes that could not be heard or recorded by some sort of high-tech device, such as those used in airports or seen in popular movies. *Kyllo* prevents this loss of privacy, albeit only with respect to unique technologies.

The erosion of privacy expectations has been clear in the criminal law context. The diminishing of privacy expecta-

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178. *Kyllo*, 533 U.S. at 34 (noting criticism of the test, Justice Scalia proceeds to deliver the holding without reference to "reasonable expectations" of the individual or society). See also David Sullivan, *A Bright Line in the Sky? Toward a New Fourth Amendment Search Standard for Advancing Surveillance Technology*, 44 ARIZ. L. REV. 967, 984 (discussing lack of explicit reference to the *Katz* "reasonable" test in Justice Scalia’s ruling).

179. *Kyllo*, 533 U.S. at 34.


181. See *Kyllo*, 533 U.S. at 34. Justice Scalia’s opinion attempted to preserve the privacy the authors of the Fourth Amendment afforded to citizens against present and future technologies. By moving away from a "reasonable expectations" test to a "minimum" test, the Court's solution would appear to put less faith in the former rule. See id.

182. See discussion supra Part II.B.2.
tions is also evident in the common law tort of intrusion into privacy. Privacy expectations apparently are easily altered when technology becomes more prevalent and courts recognize fewer expectations for privacy held by citizens. The matter is worsened as society seems to desire more voyeuristic news which further erodes what is expected to be reasonably expected.

Amidst this erosion, citizens face perhaps a more disturbing problem with the Court’s potential inability to even accurately discern what is a “reasonable expectation” of privacy. A study by professors Christopher Slobogin and Joseph Schumacher recorded the expectations of privacy of two hundred participants. The study found that citizens’ expectations did not equate with those the Court had ruled on in both the criminal arena and in the workplace. One author concludes that perhaps “Supreme Court justices, who are secluded in a marble palace... aren’t terribly good at predicting how much privacy ordinary Americans expect in the workplace.” It would appear that the subjective nature of the test is not easily quantified by the Court, leaving the usefulness of the test further in question.

The “reasonable expectations” test, in both the criminal and common law setting, may be ultimately ill equipped in this new technological age to provide citizens sufficient protection of their privacy rights. Though the test is still the accepted norm and used in many privacy related statues, citizens may be better served with the bright line rule that Kyllo attempted to create to accommodate existing and future technological advances. The key is formulating protection that prevents “invasions [of privacy that] no citizen in a civilized

183. See discussion supra Part II.B.1.
184. See generally Note, Privacy, Technology and California’s “Anti-Paparazzi” Statute, supra note 78, at 1374-76 (noting that courts have seemingly provided less privacy protection in the tort of intrusion with advancing technologies and that changing social norms are more open to voyeuristic news, thus, further eroding what one views as being a reasonable expectation of privacy).
186. Id. at 739, 742.
188. See discussion supra Part II.B.2.
society should endure, regardless of whether expectations of privacy have been diminished by technology."

V. PROPOSAL

This comment proposes a solution to address the privacy concerns surrounding the use of camera phones and technologies with similar capabilities. The proposal would recognize a right to privacy in a public setting where one would have a minimum expectation of privacy. This "minimum expectation" standard is borrowed from Kyllo and would abandon the use of the "reasonable expectations" test to determine whether an individual has a right to privacy, a test which continues to be eroded by technological advances. This new right to a minimum expectation of privacy in a public setting would allow the designation of certain locations that are protected from the use of any type of data gathering technology, however surreptitious or obvious. Though this right would be based a common law tort remedy, the use of the Kyllo standard of "minimum expectations" could help to further accelerate the adoption of the standard in the criminal law setting.

A. Designated "Safe Places" Where Minimum Expectation of Privacy Rights Exist

The Court in Kyllo designated an individual's home as a location where the citizen had a "minimum expectation" of privacy and where intrusion would not be allowed by technology that was not readily available. Transferring its application to non-criminal situations, a modified approach would stipulate that in the public setting, there would exist certain designated "safe areas" the use of any data gathering device, irregardless of its availability. The targeted data gathering devices would be any form of electronic device that enhances an individual's natural senses. This definition would exclude the trivial case of pencils, papers and even that of an individual's memory. In addition, by borrowing from the Court's opinion in Kyllo, the new privacy right would be shielded from challenges to its constitutionality.

How a "safe area" would be determined would left to the discretion of local communities which have already begun this

190. See discussion supra Part II.B.2.
process, designating areas in which individuals have a de facto “safe area” created by statute.191 Presumably, a residence, a changing room, and public bathrooms would be such “safe areas.” Thus, citizens do not have to guess whether it is reasonable to be secure in a public restroom. As technology advances, society still knows that in designated “safe areas,” use of the new devices would be an illegal invasion into another individual’s privacy.

B. A Right to Privacy in Public Places

It would be impractical to completely ban the use of camera phones or any future, similar technology. Enforcement is also difficult since a victim would have to be reasonably certain that an individual pointing a cell phone in his or her direction actually took an image. To strike a proper balance, a multi-factor test would be able to balance the legitimacy of the intrusion against any mitigating facts. Professor McClurg proposed such a revision of the tort of intrusion that adds “whether in a private physical area or one open to public inspection” to the existing tort text.192

In order to determine if the act is offensive to a reasonable person, the McClurg’s suggested test advances seven factors to guide the determination.193 These tests help to prevent

191. See discussion supra Part II.C.1.
192. The Restatement (Second) of Torts defines “Intrusion upon Seclusion” as “[o]ne 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.” RESTATEMENT (SECOND) OF TORTS, supra note 53, § 652B. Professor McClurg suggests the following definition of “Intrusion upon Seclusion:”

One who intentionally intrudes, physically or otherwise, upon the private affairs or concerns of another, whether in a private physical area or one open to public inspection, is subject to liability to the other for invasion of her privacy, if the intrusion would be highly offensive to a reasonable person.

McClurg, supra note 54, at 1058.
193. The seven factors are as follows:
   1. the defendant’s motive;
   2. the magnitude of the intrusion, including the duration, extent, and the means of intrusion;
   3. whether the plaintiff could reasonably expect to be free from such conduct under the habits and customs of the location where the intrusion occurred;
   4. whether the defendant sought the plaintiff’s consent to the intrusive conduct;
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any and every perceived intrusion from clogging the courts. For instance, an individual who takes random camera phone shots on the street for his website would not likely be liable because his motive was innocuous. If, however, he took pictures that documented the daily whereabouts of a single individual for consecutive days, posting them on his website and advertising them to those who wished to harass the victim, he would likely be liable for the tort of intrusion by implicating several of its factors: motive, magnitude of the intrusion, and dissemination of the information.

The test is particularly resilient with respect to current technologies, such as normal cameras and camera phones, as well as any future sort of device that might be able to record even more data in even less obtrusive means. The test also affords protection to legitimate uses of the camera phone. If the images captured have a legitimate public interest, such as the commission of a crime, the responsible party would be immune from any civil action for his conduct. In addition, acceptance of this revised tort would ensure the legitimacy of the various existing state statues regarding voyeurism.

VI. CONCLUSION

The nature of technology is that it advances. What often retreats in reaction is privacy. The historic development of American privacy, however, owes much of its creation to technological catalysts that create new forms of privacy protections. One could muse that over one hundred years after the extensive use of cameras spurred the birth of modern U.S. privacy rights, cameras again are a trigger for yet another chapter in the development of these rights.

At this junction, the formal recognition of privacy rights in the public may be the most effective means of protection in an era when technology is subtle yet certain to cause signifi-

5. actions taken by plaintiff which would manifest to a reasonable person the plaintiff's desire that the defendant not engage in the intrusive conduct;
6. whether the defendant disseminated images of the plaintiff or information concerning the plaintiff that was acquired during the intrusive act; and
7. whether images of or other information concerning the plaintiff acquired during the intrusive act involve a matter of legitimate public interest.

McClurg, supra note 54, at 1058-59.
cant disruption to an individual’s private space. Designations of “safe places” would also ensure that citizens could expect privacy in places other than their homes. These preemptive efforts would certainly strengthen privacy rights by putting society one step ahead of technology’s reach.