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Criminal Law - When Upskirting Was Not Illegal: a Court Ordered Legislative Fix - Commonwealth v. Robertson, 5 N.E.3D 522 (Mass. 2014)

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**CRIMINAL LAW— WHEN “UPSKIRTING” WAS
NOT ILLEGAL: A COURT ORDERED
LEGISLATIVE FIX— *COMMONWEALTH V.
ROBERTSON*, 5 N.E.3D 522 (MASS. 2014).**

Massachusetts prohibits “videotap[ing] or electronically surveil[ling] another person who is nude or partially nude” despite such person’s expectation that it would not be photographed in such manner.¹ In *Commonwealth v. Robertson*,² the Massachusetts Supreme Judicial Court (“SJC”) considered whether Massachusetts General Law chapter 272, section 105(b) includes the act of secretly photographing underneath a woman’s dress or skirt, also known as “upskirting.”³ The SJC held that the statute does not apply to “upskirting” because the act of “upskirting” does not necessarily satisfy the element of nude or partially nude, as outlined by the statute.⁴

On August 11, 2010, the defendant, Michael Robertson, while riding a train in the city of Boston, was observed taking a photograph with his cellphone up a woman’s skirt.⁵ A few hours later that same day, another witness reported that while on the train she saw the defendant photographing a passenger’s crotch area.⁶ Due to the two incident reports,

¹ MASS. GEN. LAWS ch. 272, § 105 (2014). Massachusetts General Laws chapter 272 section 105 provides that “[w]hoever willfully photographs, videotapes or electronically surveils another person who is nude or partially nude, ...when the other person in such place and circumstance would have a reasonable expectation of privacy in not being so photographed” will be punished. *Id.* Section 105 states that “partially nude” is the “exposure of the human genitals, buttocks, pubic area or female breast below a point immediately above the tip of the areola” *Id.*

² 5 N.E.3d 522 (Mass. 2014).

³ *Id.* at 523 (deciding whether upskirting involves an area protected by section 105).

⁴ *Id.* at 527-30 (reasoning language in statute requires strict interpretation).

⁵ *See* *Com. v. Robertson* 5 N.E.3d 522, 523-24. A witness observed the defendant hold his cell phone at his waist and take a picture of a woman in a skirt who was seated across from him. *Id.* The witness could see an image of the woman’s upper leg depicted on the cellular screen. *See* Brief for Defendant/Appellant Michael Robertson at 2, *Commonwealth v. Robertson*, 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 56667077, at *2. The witness reported that the woman being photographed appeared to be unaware of the defendant’s actions. *Robertson*, 5 N.E.3d at 524; *see also* Brief for Commonwealth on Appeal from a Judgment of the Boston Municipal Court at 2, *Commonwealth v. Robertson*, 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 5667078, at *2 (same).

⁶ *See Robertson*, 5 N.E.3d at 524 (detailing police investigation). The woman used her cellphone to capture images of the defendant, which she sent to the police. *See* Brief for Defendant/Appellant Michael Robertson, *supra* note 5, at *2, (same); *see also Robertson*, 5

transit police officers initiated a decoy operation the following day, where police had a female officer in a skirt board the trolley and sit directly across from the defendant.⁷ Officers could see the defendant directing the lens of the cellular phone towards the decoy officer, while focusing on the crotch region for approximately one minute.⁸ The defendant was immediately arrested, and had his cell phone seized by the police, who noticed that the red light on the cell phone was illuminated, demonstrating the phone had been recording as suspected.⁹

Two criminal complaints were issued charging the defendant with attempting to photograph, videotape, or electronically survey a nude or partially nude person in violation of MASS. GEN. LAWS ch. 272, section 105 (b). The defendant filed a motion to dismiss both of the complaints, which was denied by the Boston Municipal Court.¹⁰ In the motion to dismiss, the defendant argued the conviction would be unreasonable because his conduct did not constitute a violation of MASS. GEN. LAWS ch. 272, section 105, and if the court chose to apply the statute to his conduct it would adjudicate it unconstitutionally vague and overbroad.¹¹ Thereafter, the defendant sought an interlocutory appeal of the denial of his motion by petitioning the SJC, pursuant to MASS. GEN. LAWS. ch. 211, section 3.¹²

In 2004, the General Court passed G.L. chapter 272, section 105,

N.E.3d at 523-24 (discussing sufficient evidence to identify defendant).

⁷ See *Robertson*, 5 N.E.3d at 524 (detailing sting of defendant). Officers observed the defendant enter the trolley and boarded the trolley with him. *Id.* The defendant stood at the stairwell of the trolley while the decoy officer sat two to three feet across from him. *Id.*

⁸ See *Robertson*, 5 N.E.3d at 523-24; see also Brief for Commonwealth on Appeal from a Judgment of the Boston Municipal Court at 2, *Commonwealth v. Robertson*, 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 5667077, at *2 (discussing placement of cellular phone's lens held at vantage point to capture underneath decoy's skirt).

⁹ See *Robertson*, 5 N.E.3d at 524 (discussing arrest and identification of defendant); see also Brief for Appellant at 2-3, *Commonwealth v. Robertson*, 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 5667077, at *23.

¹⁰ See *Robertson*, 5 N.E.3d at 524-25 (denying defendant's motion to dismiss); see also Brief for Defendant-Appellant Michael Robertson, *supra* note 5, at *3 (noting filing of Motion to Dismiss).

¹¹ See Brief for Defendant/Appellant Michael Robertson, *supra* note 5, at *3 (discussing arguments incorporated into motion).

¹² See MASS. GEN. LAWS ch. 211, § 3 (2012) (allowing Supreme Judicial Court to correct errors of law). The defendant argued that the motion was inadequately denied because § 105 could not apply to an individual who photographed up a female's skirt, and therefore he was entitled to the extraordinary relief provided by the statute. See Brief for Appellee at 8-13, *Commonwealth v. Robertson*, 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 5667078 AT *8-13; see also Brief for Defendant/Appellant Michael Robertson, *supra* note 5, at *4 ("A single Justice (Lenk, J.) reversed and reported the case without decision for determination by this court.").

which made it a felony to capture an image of an undressed individual.¹³ In 2011, a bill was introduced to propose amendments to MASS. GEN. LAWS ch. 2772, section 105 that would punish the surveillance of another individual's intimate areas.¹⁴ The amended bill was introduced to the statute to punish surveillance of "the intimate areas of another person."¹⁵ "Intimate areas" would be defined as "the naked or undergarment clad genitals, buttocks or any portion of the person's breast below the top of the areola of a person which the person intended to be protected from public views."¹⁶ "At the conclusion of the 2011-2012 session, the Judiciary Committee reported that it took no action on the bill."¹⁷ Again, in 2013 similar amendments were proposed for section 105 to both the House and the Senate.¹⁸ Finally, in 2014 the General Court passed a bill, which would prohibit the act of photographing or recording video under an individual's clothing.¹⁹

Prior to the enactment of the latter bill, the preceding statute failed to define certain terminology, such as "exposure," when determining whether the victim was "partially nude" at the time the image was

¹³ See S.B. 21-44, 175th Gen. Ct. (Mass. 2004). Originally, the bill made it a felony to "utilize any device whatsoever for the purpose of capturing the image of a person undressed or in the act of undressing." *Id.* In *Commonwealth v. Wright*, where the defendant had concealed a video camera in the bathroom at the defendant's work, the court noted that there is no express statutory prohibition in utilizing visual images or recording. See 814 N.E. 2d 741, 740-42 (Mass. App. Ct. 2004). *But see* *Commonwealth v. LePore*, 666 N.E.2d 152, 156 (Mass. App. Ct. 1996) (holding chapter. 272, § 53 applied to "Peeping Tom" matters without express prohibition of voyeurism).

¹⁴ See Brief for Defendant-Appellant Michael Robertson, *supra* note 5, at *6-8 (noting proposed legislation).

¹⁵ See H.B. 500, 187th Gen. Ct. (Mass. 2011)

¹⁶ See *id.* (discussing possible definition for statute).

¹⁷ Brief for Defendant/Appellant Michael Robertson, *supra* note 5, at *7.

¹⁸ See H.B. 500, 187th Gen. Ct., Stat. Add.3 (Mass. 2011). In subsection (b), "to another person who is nude or partially nude" would be replaced with "an intimate area of another person." *Id.* at 6, 11. Further, in subsection (a), "partially nude" would be stricken from subsection (a) and substituted with "intimate area" as "human genitals, buttocks, pubic area, or female breast below a point immediately above the tip of the areola, whether naked or covered by undergarments." *Id.*

¹⁹ See H.B. 500, 187th Gen. Ct. (Mass. 2011). The amended statute deleted "who is nude or partially nude" following "visual image of another person, inserted "which depicts a person's sexual or other intimate parts," and defined "sexual or other intimate parts" to mean "human genitals, buttocks, pubic area or female breast below a point immediately above the tip of the areola, whether naked or covered by clothing or undergarments." *Id.* *But see* Samuel Goldberg, *Massachusetts Legislature Passes Rushed Anti-Upskirting Bill and Adds More Confusion to State Sex Crime Laws*, BOSTON CRIM. LAW BLOG (March 11, 2014), http://www.bostoncriminallawyerblog.com/2014/03/massachusetts_legislature_pass_2.html (criticizing passage of new bill as Legislature's attempt to gather support). "Because we seem to clap our little hands when someone does something that smells like a "tough on crime" stance. You make illegal. You prosecute. We love you." *Id.*

captured.²⁰ Section 105 states that “partially nude” is the “exposure of the human genitals, buttocks, pubic area or female breast below a point immediately above the top of the areola”, and because the word “exposure” is not defined in the statute, the “usual and accepted meaning” must be considered in evaluating the term.²¹ A person may become “exposed” or “bare” through the actions of another, who will ultimately be held accountable.²² Further, a conviction may not be granted for “open and gross lewdness,” which requires genitals, breasts or buttocks to be exposed, where the act of masturbating is performed over clothes because the requisite “exposure” of genitals is lacking.²³ The statute also neglected to define the reasonable expectation of privacy requirement, leading some to believe it applies to the location of where the photograph is taken.²⁴ Other

²⁰ See MASS. GEN. LAWS ch. 272, § 105; see also *Commonwealth v. Williamson*, 971 N.E.2d 250, 253-54 (Mass. 2012) (noting acceptance of using sources in understanding meaning of terms in statute); *Bldg. Inspector of Mansfield v. Curvin*, 494 N.E.2d 42, 43 (Mass. App. Ct. 1986) (“Sound principles of statutory construction dictate that interpretation of provisions having identical language be uniform.” (quoting *Webster v. Bd. of Appeals of Reading*, 206 N.E.2d 92, 93 (Mass. 1965))).

²¹ See MASS. GEN. LAWS ch. 272, § 105; *Williamson*, 971 N.E. 2d at 253-54 (Mass. 2012) (noting acceptance of using sources regarding meaning of terms in statute); see also *Bldg. Inspector of Mansfield v. Curvin*, 494 N.E.2d 42 (Mass. App. Ct. 1986) (“Sound principles of statutory construction dictate that interpretation of provisions having identical language be uniform.”).

²² See *Commonwealth v. Morales*, 968 N.E.2d 403, 409-10 (Mass. 2012) (exposing of defendant’s buttocks while lifting shirt to retrieve drugs amounted to significant intrusion); see also *Commonwealth v. Arthur*, 650 N.E.2d 787, 788, 791 (Mass. 1995) (finding defendant needs to expose genitals or buttocks for indecent exposure conviction); *Moses v. Commonwealth*, 611 S.E.2d 607, 610 (Va. Ct. App. 2005) (finding term “exposure” amounts to some degree of nudity). There, the court discussed that though displaying genitals can mean any “demonstration or manifestation,” there still needs to be a degree of nudity. See *Moses*, 611 S.E.2d at 610.

²³ See *Commonwealth v. Blackmer*, 932 N.E.2d 301, 305-07 (Mass. App. Ct. 2010) (discussing limits of statute). The SJC has refused to impose criminal liability where genitals were not actually visible. See *Commonwealth v. Arthur*, 650 N.E.2d 787, 788 (Mass. 1995) (declining to find exposure of pubic hair, without displaying genitalia, constituted indecent exposure); see also *Commonwealth v. Provost*, 636 N.E.2d 1312, 1313 (Mass. 1994) (finding visibility of nude portions of genitals is sufficient for conviction); see also Brief for Appellant at 14, *Commonwealth v. Robertson*, 5 N.E.3d 522, 524 (Mass. 2014) (No. SJC-11353), 2013 WL 56667077 (arguing § 105 protects people whose private parts are visible).

²⁴ See MASS. GEN. LAWS ch. 272, § 105. In determining the meaning intended by the Legislature, the words at issue should be analyzed. See *Int’l Org. of Masters, Mates and Pilots v. Woods Hole, Martha’s Vineyard & Nantucket S.S. Auth.*, 467 N.E.2d 1331, 1332 (Mass. 1984) (noting each word in legislation should be given meaning); Brief for Appellee at 2, *Commonwealth v. Robertson*, 5 N.E.3d 522, 524 (Mass. 2014) (No. SJC-11353), 2013 WL 5667078, at *2. In a Fourth Amendment context, Massachusetts’s courts utilize a two-part test to determine a reasonable expectation of privacy: (1) whether an individual has a subjective expectation of privacy; and (2) whether that expectation of privacy is one that society recognizes as reasonable. See *Commonwealth v. Montanez*, 571 N.E.2d 1372, 1380-81 (Mass. 1991) (describing two part test); *Commonwealth v. Pina*, 549 N.E.2d 106, 109 (Mass. 1990) (reiterating

discussions have caused reasonable belief that “expectation of privacy” refers to a right not be photographed in the manner in which the individual was photographed.²⁵

In order for statutes not to be considered vague, the statute must give fair warning as to the prohibited activities.²⁶ The statute may even be

elements of two part test). The court also considers factors that aid in their decision, such as the nature of the place involved and whether the individual took precautions to protect her privacy. *See* Commonwealth v. Colon, 866 N.E.2d 412, 420 (Mass. 2007); *see also* Commonwealth v. Bly, 862 N.E.2d 341, 356-57 (Mass. 2007) (leaving behind cigarettes failed to manifest expectation of privacy); Commonwealth v. A Juvenile, 580 N.E.2d 1014, 1016-17 (Mass. 1991) (finding voluntary display of item in plain view forfeits privacy interest). In William Donnino’s practice commentary, the explanation of the phrase “place and time when a person has a reasonable expectation of privacy” with regard to New York’s unlawful surveillance statute, contained a subjective expectation of privacy in dressing or undressing inside of a car in a public street, is not one that is objectively recognized by society. *See* Brief for Defendant/Appellant, Michael Robertson, *supra* note 5, at *18. The defendant argues the absence of an expectation of privacy in a non-private place does not constitute “upskirting” illegal. *Id.* at 24; *see* State v. Glas, 54 P.3d 147, 149-50 (Wash. 2002) (discussing “expectation of privacy” applies to locations where individual can disrobe in privacy). There, the court even went as far as to note an individual may possess an expectation of privacy in places where they would not generally disrobe, such as a female choosing to breast feed in an enclosed office, but there still is no expectation of privacy in public locations. *See* Glas, 54 P.3d 149-150; *see also* State v. Gilliland, No. M2008-02767-CCA-R3-CD, 2010 WL 2432014 at *4 (Tenn. Crim. App. June 17, 2010) (allowing specific public places, such as tanning beds, to contain expectation of privacy). In *Durant v. State*, the Appeals Court looked to the statute that outlawed non-consensual viewing of an individual who is in a place where they have the right to an expectation of privacy and held that the statute did not cover the photographing up a female’s skirt in a public place. *See* *Durant v. State*, 188 P.3d 192, 194 (Okla. Crim. App. 2008). The court decided regardless of the image taken and what part of the body it is, the statute did not prohibit the act when performed in a public setting. *Id.*

²⁵ *See* Brief for the Commonwealth on Appeal from a Judgment of the Boston Municipal Court at 14, Commonwealth v. Robertson, 5 N.E.3d 522, 524 (Mass. 2014) (No. SJC-11353) 2013 WL 5667078, at *14. The defendant contends “reasonable expectation of privacy” references where the photograph was taken but neglects to consider the meaning of each word in the sentence. *See* MASS. GEN. LAWS. ch. 272, § 105(b) (“[T]he other person in such place and circumstance would have a reasonable expectation of privacy in not being so photographed”); Commonwealth v. McLeod, 771 N.E.2d 142, 148 (Mass. 2002) (stating Court will not add words to statute nor can words be omitted). In *Commonwealth v. Welch*, “so” is defined to mean “under this circumstance” or “in this way.” 825 N.E.2d 1005, 1011 (2005). The question that arises from incorporating “so” into the statute is whether the “individual had a reasonable expectation of privacy not to be so photographed in the way she was photographed while in the place where she was photographed.” *Id.*; *see* Brief for the Commonwealth on Appeal from a Judgment of the Boston Municipal Court at 14, Commonwealth v. Robertson, 5 N.E.3d 522, 524 (Mass. 2014) (No. SJC-11353) 2013 WL 5667078, at *14-15. Voyeurism statutes in other states fail to contain such “so photographed” language. *See* CAL. PENAL CODE § 647 (2015) (“[U]nder circumstances in which the other person has a reasonable expectation of privacy.”); N.Y. PENAL LAW § 250.40 (2007) (“[P]lace and time when a person has a reasonable expectation of privacy, means a place and time when a reasonable person would believe that he or she could fully disrobe in privacy.”).

²⁶ *See* Commonwealth v. Orlando, 359 N.E.2d 310, 311-12 (Mass. 1977) (requiring statute to give warning as to proscribed activities); *see also* Commonwealth v. Quinn, 789 N.E.2d 138, 141 (Mass. 2003) (vacating defendant’s conviction for “open and gross lewdness” because statute did

considered overbroad if it tends to prohibit constitutionally protected conduct.²⁷ Further, statutes that have regulated the capturing of images in public places have raised First Amendment concerns.²⁸

In *Robertson*, the Supreme Judicial Court interpreted the statutory language, which stated “a person who is nude or partially nude.”²⁹ The SJC rejected the Commonwealth’s interpretation of section 105(b) and rather accepted the defense’s argument that “partially nude” referred to the lack of clothing over private body parts.³⁰ In adopting the defense’s

not provide notice); *Commonwealth v. Sefranka*, 414 N.E.2d 602, 607-08 (Mass. 1980) (vacating conviction because “lewd, wanton and lascivious persons” statute did not provide fair notice); Brief for Defendant-Appellant Michael Robertson at 37, *Commonwealth v. Robertson*, 5 N.E.3d 522 (Mass. 2014) *Robertson*, 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353) 2013 WL 5667077, at *37 (“[A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.”).

²⁷ See *Planned Parenthood League of Mass. Inc. v. Operation Rescue*, 550 N.E.2d 1361, 1369 (Mass. 1990) (declaring statute overbroad if it reaches constitutionally protected activities); see also *Commonwealth v. Ora*, 451 Mass. 125, 129 (2008) (holding conduct forbidden if prohibition serves substantial government interest); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954-55 (Mass. 2003) (regulating conduct necessary to secure health, safety, and general welfare of society). The government also maintains a substantial interest in sheltering the public from undesired invasions of privacy. See *Commonwealth v. Carey*, 974 N.E.2d 624, 630 (Mass. 2012) (discussing government’s interest in discouraging criminal activity). But see Brief for Appellant at 46, *Commonwealth v. Robertson*, 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 56667077 (noting different government interest at play).

²⁸ See Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 395, 398 (2011) (acknowledging statutory backing for image capturing). Image capturing in public places observes that traditional criminal or tort actions concerning non-consensual image capture of private, “intimate situations are a far cry from banning spontaneous image capture by the holders of cell phones in public venues.” *Id.* For example, many recordings committed in public have influenced history, such as the beating of Rodney King. *Id.*; see *Winters v. NY*, 333 U.S. 507, 510 (1948) (addressing difficulty in distinguishing between protected and unprotected expression); see also Brief for Appellant at 48-49, *Commonwealth v. Robertson* 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 56667077, at *49-49. In order to determine whether the First Amendment is implicated in a particular case, (1) there must be intent to convey a particularized message; and (2) the likelihood must be great that those who perceived it would understand the message. See *Ex parte Thompson*, 442 S.W.3d 325, 331 (Tex. Crim. App. 2014) (citing *Texas v. Johnson*, 491 U.S. 397 (1989)). In *Kaplan v. California*, the United States Supreme Court held the First Amendment extends to pictures, films, paintings, drawings, and engravings. 413 U.S. 115 (1973). Further, statutes restricting photographs have previously been determined to violate First Amendment rights. See *Thompson*, 442 S.W.3d at 349 (holding statutory proscription of taking photographs facially unconstitutional).

²⁹ See MASS. GEN. LAWS ch. 272, § 105 (“[W]hoever willfully photographs, videotapes or electronically surveils another person who is nude or partially nude . . . shall be punished...”); see also *Robertson*, 5 N.E.3d at 522 (considering defendant’s challenges to § 105(b)’s language).

³⁰ See *Robertson*, 5 N.E.3d at 527 (exploring § 105(b) language and interpretation). The Commonwealth argued that “partially nude” includes “exposure” of an intimate area caused by another, regardless of whether that area is covered by clothing or not. See Brief for Appellee at 11, *Commonwealth v. Robertson*, 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL

argument, the court focused its analysis on the word “is” in determining that a partially nude person will be an individual who has a private part of the body exposed in plain view in § 105(b)’s “a person who is . . . partially nude.”³¹ The word “is” denotes a state of a person’s being, not a visual image of the person. Moreover, this person who is partially nude should be defined with reference to the other category of person included in the same sentence, namely, ‘a person who is nude.’”³² The SJC also had to determine whether the individual had an expectation of privacy in not being photographed in the manner in which he/she was.³³

5667078 (articulating counter argument to 105(b) interpretation); *see also* *Commonwealth v. Morales*, 968 N.E.2d 403, 409 (Mass. 2012) (illustrating officer’s act of lifting shirt to retrieve drugs constituted significant intrusion). “[T]he Commonwealth’s reading is inconsistent with the statute’s plain language. Section 105 prohibits photographing ‘another person who is nude or partially nude.’ This provision is clearly designed to protect a person who is in an exposed state from being photographed, without his or her knowledge, in that state.” Reply Brief for Appellant at *4, *Commonwealth v. Robertson*, 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 5667079. The defendant argued that the definition of “partially nude” under § 105(a) that encompasses “the exposure of the human genitals, buttocks, pubic area or female breast below a point immediately above the top of the areola,” refers to a lack of clothing, and the act of uncovering private parts. Brief for Appellant at 15, *Commonwealth v. Robertson* 5 N.E.3d 522, 524 (D. Mass 2014) (No. SJC-11353), 2013 WL 5667077 (stating everyday language construes “partially nude” to mean absence of clothing on private body parts). The defendant reached this conclusion by interpreting the word “exposure”. *See* Brief for Appellant at 14, *Commonwealth v. Robertson* 5 N.E.3d 522, 524 (Mass. 2014) (No. SJC-11353), 2013 WL 5667077 (using Merriam Webster Online to define “exposure” as meaning “bare” or “presented to view”); *see also* *Moses v. Commonwealth*, 611 S.E.2d 607 (Va. Ct. App. 2005) (illustrating “exposure” requires element of nudity). The defendant also relied on the Massachusetts code, chapter 272 section 29A, a law that prohibits the exhibition of naked children, within its definition of “nudity.” *See* Brief for Appellant at 15, *Commonwealth v. Robertson*, 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 5667077 (defining “nudity” to as uncovered human genitals, pubic areas, and human female breasts in § 29A); *see also* *Commonwealth v. Provost*, 636 N.E.2d 1312 (Mass. 1994) (holding complete nudity unnecessary when genital region is visible). “Nudity” under § 29A and “partially nude” under § 105 similarly require that some portions of a private areas be “nude” and visible to the naked eye. *See Provost*, 636 N.E.2d at 1313 (articulating similarities in language); *see also* Brief for Appellant at 16-17, *Commonwealth v. Robertson* 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 5667077. The defendant reaches this conclusion by reasoning that “partially nude” placed the clothed person beyond the scope of § 105. *Id.* at 16.

³¹ *See Robertson*, 5 N.E.3d at 527.

³² *See Commonwealth v. Brooks*, 319 N.E.2d 901, 905 (Mass. 1974) (considering words in light of additional surrounding terms). Therefore, the SJC understood “a person who is . . . partially nude” to denote an individual not wearing clothes that cover a particular private body part, such as human genitals. *See Robertson*, 5 N.E.3d at 527 (explaining “partially nude” definition and interpretation). “A female passenger on MBTA trolley who is wearing a skirt, dress, or the like covering these parts of her body is not a person who is ‘partially nude,’ no matter what is or is not underneath the skirt by way of underwear or other clothing.” *Id.* Where the SJC concludes that “exposure” entails the display of an intimate area to be in plain view, any other images revealing intimate areas, are not included. *See id.*

³³ *See* MASS. GEN. LAWS. ch. 272, § 105(b) (“[I]n such place and circumstance [where the person] would have a reasonable expectation of privacy in not being so photographed”). The

The court's analysis focused greatly on the language set forth in § 105 statute.³⁴ The court misinterpreted the language of the statute when considering whether there was a reasonable expectation of privacy in not being "so photographed."³⁵ The SJC rejects the Commonwealth's argument for the word "so" and instead insists that "[t]he "so photographed" language in connection with the "place and circumstance" language requires that the person being photographed be in a state of complete ("nude") or partial ("partially nude") undress, and present in a place, private or not, where in the particular circumstances she would have a reasonable expectation of privacy in not being willfully and secretly photographed while in that state." Adopting defendant's argument, the SJC noted that because the image capturing occurred on the MBTA, a public place, the victims were not in a location that could be construed as containing a reasonable expectation of privacy.³⁶ In examining the "so photographed" language, the Court connected the language to whether the victim was nude or partially nude at the time rather than the manner in which the victim was depicted.³⁷ With such a meaning at mind the court,

defendant argued that the statutory language referred to an individual's right to not be photographed in an inappropriate manner when that individual is in a private location. *See* Brief for Appellant at 25, *Commonwealth v. Robertson* 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 5667077; *see also* *State v. Glass*, 54 P.3d 147 (Wash. 2002) (discussing "expectation of privacy" refers to areas where individual can disrobe in private); *Durant v. State*, 188 P.3d 192 (Okla. Crim. App. 2008) (holding inappropriate images do not infringe on privacy when captured in public); *c.f.* *State v. Gilliland*, No. M 2008-02767-CCA-R3-CD 2010 WL 2432014 at *4 (Tenn. Crim. App. Jun. 17, 2010) (finding expectation of privacy in public areas, such as tanning beds). Conversely, the Commonwealth argued that a "reasonable expectation of privacy in not being 'so photographed' ought to be construed to mean that the individual has an expectation of privacy in not having an area of her body be photographed, especially where the part is covered. *See* Brief for Commonwealth on Appeal from a Judgment of the Boston Municipal Court at 2, *Commonwealth v. Robertson*, 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 5667078, at *14-15.

³⁴ *See* MASS. GEN. LAWS ch. 272, § 105 (2014); *see also* *Robertson*, 5 N.E.3d at 525 (discussing statute).

³⁵ *See* *Robertson*, 5 N.E.3d at 527-28 (analyzing language of §105). The Supreme Judicial Court held that a person who is nude or partially nude "when the other person in such place and circumstance would have a reasonable expectation of privacy in not being so photographed, the 'so photographed' language in connection with the 'place and circumstance' language requires that the person being photographed be in a state of complete or partial undress." *Id.*

³⁶ *See* *Robertson*, 5 N.E.3d at 529 (applying definition of public place to MBTA).

³⁷ *See* *Robertson*, 5 N.E.3d at 529. Adopting the defendant's argument, the court held the word "so" refers to preceding language in the subsection addressing the act of photographing. *Id.* The preceding language holds that a person must be nude or partially nude; therefore, the Supreme Judicial Court connected "so" with the individual in a state of nudity. *Id.* *But see* *Commonwealth v. Welch*, 825 N.E.2d 1005, 1011-12 (Mass. 2005) (defining "so" to mean "under this circumstance" or "in this way"). "[T]he statute, by its express language, asks whether an individual had a reasonable expectation of privacy not to be photographed in the way she was photographed while in the place where she was photographed." Brief for Appellant at 15,

should have considered whether the defendant's act of taking a photograph up the victim's skirt violated her expectation of privacy rather than deem that "so" did not refer to the manner in which she was photographed but whether she was nude or partially nude.³⁸

Further, in misinterpreting "so photographed" it caused the court to misinterpret the "expectation of privacy" element as set forth in the statute.³⁹ The court failed to determine that there is an "expectation of privacy" in areas of an individual's body, as Massachusetts courts have recognized in the past.⁴⁰ The court should have analyzed this element using the two-prong test set forth in *Commonwealth v. Montanez*.⁴¹ The

Commonwealth v. Robertson 5 N.E.3d 522, 524 (Mass. 2014) (No. SJC-11353).

³⁸ Brief for Appellant at 15, *Commonwealth v. Robertson*, 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 5667077 (discussing meaning of "so").

³⁹ See *Robertson*, 5 N.E.3d at 379 (noting court's misinterpretation).

⁴⁰ See MASS. GEN. LAWS ch. 272, § 105 (failing to define "expectation of privacy" and therefore requiring analysis); see also *Int'l Org. of Masters, Mates and Pilots v. Woods Hole, Martha's Vineyard & Nantucket S.S. Auth.*, 467 N.E.2d 1331, 1332 (Mass. 1984) (noting each word in statute should be given meaning).

⁴¹ 571 N.E.2d 1372 (Mass. 1991). Within the context of the Fourth Amendment, the Massachusetts courts have utilized a two-part test to determine a reasonable expectation of privacy: (1) whether an individual has a subjective expectation of privacy; and (2) whether that expectation of privacy is one that society recognizes as reasonable. *Id.* In addition, courts may consider additional factors to aid in their decision, such as the nature of the place involved and whether the individual took precautions to protect her privacy. See *Commonwealth v. Colon*, 866 N.E.2d 412, 419-20 (Mass. 2007) (citing *Montanez*, 571 N.E.2d at 1372). The court will also consider whether the defendant has taken reasonable precautions in protecting their privacy. See *Commonwealth v. Bly*, 862 N.E.2d 341, 351 (Mass. 2007) (leaving behind cigarettes failed to manifest expectation of privacy). Here, the victim protected her intimate area by wearing clothes eliminated any exposure. See *Commonwealth v. Robertson*, 5 N.E.3d 522, 524 (Mass. 2014) (discussing victim wearing skirt); see also *Commonwealth v. A Juvenile*, 580 N.E.2d 1014, 1016 (1991) (finding voluntary display of item forfeits privacy interest). Such precautions taken by the victims should constitute a reasonable subjective expectation of privacy, as required by the test set for in *Montanez*. See *Montanez* at 301 (determining two part test for reasonable expectation of privacy). Further, the victim would have an objective reasonable expectation of privacy. *Id.*

Massachusetts courts have recognized that an individual has such an expectation of privacy in her body, that strip searches—searches in which clothing is removed by the police—have to be supported by probable cause. Such searches, this Court has noted, impinge seriously on a person's privacy and are demeaning, dehumanizing, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission. Strip searches are a significant intrusion of privacy because they involve unconsented to observations of intimate and private areas. The photograph here is likewise- a significant intrusion of privacy. The individual, like a defendant before he is strip searched, is clothed. She, like a defendant who is stripped searched, is not consenting to the observations of her body.

Brief for Appellee at 21, *Commonwealth v. Robertson* 5 N.E.3d 522 (Mass 2014) (No. SJC-11353), 2013 WL 5667078 (internal quotation marks and citations omitted). The victim here rightfully has an expectation of privacy whether it is objective or subjective that deems a photo

victim manifested protection over her intimate parts when she took precautions to cover them, and did not display them or consent to the photograph.⁴²

The court's analysis focused greatly on the interpretation of § 105 (b)'s "nude or partially nude" requirement.⁴³ In seeking aid with their interpretation, the court focused on § 105(a) which defined "nude or partially nude" as the "exposure" of human genitals, buttocks, pubic area or female breast.⁴⁴ But, the main issue in question was the meaning of "exposure, which the court properly interpreted to mean an individual who was not wearing clothes covering their genitals, buttocks, pubic area or female breast and "is" in a state of partially nudity at the time the photograph is taken.⁴⁵ Courts have not imposed criminal liability where genitals were not actually visible, and thus "exposed."⁴⁶

In *Commonwealth v. Robertson*, the court addressed whether Section 105 of Chapter 272, which forbids the act of furtively photographing a person when they are nude or partially nude, includes the act of "upskirting." In attempting to answer this, the court focused on certain language contained within the statute. The court focused its attention on the meaning behind "so photographed" and "nude and partially nude" as contained in § 105. The SJC rejected the Commonwealth's interpretation of § 105(b), and instead held that inclusion of the word "so"

may not be taken up her skirt. *See Montanez*, 571 N.E.2d at 301 (determining two part test for reasonable expectation of privacy).

⁴² Brief for Appellee at 6-7, *Commonwealth v. Robertson*, 5 N.E.3d 522 (Mass. 2014) (No. SJC-11353), 2013 WL 5667078.

⁴³ *See Robertson*, 5 N.E.3d at 366.

⁴⁴ *Id.*

⁴⁵ *Robertson*, 5 N.E.3d at 378. "[A] person who is ... partially nude, ... is partially clothes but who has one or more of the private parts of body exposed in plain view at the time that the putative defendant secretly photographs her." *Id.*; *see also* Merriam Webster Dictionary *supra*, note 30 (defining exposure as "open to view" or "bare"). Other statutes that have incorporated "exposure" in their language to mean an open view of an intimate area that may become displayed by the actions of another. *See Commonwealth v. Morales*, 968 N.E.2d 403 (determining officer's actions exposing defendant's buttocks while lifting shirt amounted to significant intrusion). Whether the defendant causes the exposure or it is done by another, courts have held that there a display of genitals or buttocks is necessary to satisfy the statute. *See Commonwealth v. Kessler*, 817 N.E.2d 711, 713 (Mass. 2004) (finding defendant must expose genitals or female breasts "open and gross lewdness" conviction); *see also Commonwealth v. Arthur*, 650 N.E.2d 787, 788 (Mass. 1995) (concluding defendant needs to expose genitals or buttocks for indecent exposure conviction). Though the act of displaying genitals may mean any "demonstration or manifestation" of them, some degree of nudity is still required. *See id.*

⁴⁶ *See Commonwealth v. Blackmer*, 932 N.E.2d 301, 305-06 (Mass. App. Ct. 2010) (citing *Commonwealth v. Quinn*, 789 N.E.2d 138, 146-47 (Mass. 2003) (finding masturbation performed over clothes does not qualify as "open and gross lewdness"); *see also Arthur*, 650 N.E.2d 787 (declining exposure of pubic hair, without displaying genitalia, constitutes indecent exposure).

referred to a state of being undressed. Further, in determining the meaning behind “nude or partially nude,” the court relied on 105 (a) and properly concluded that such language includes an individual not wearing clothes that cover intimate areas.. Lastly, the court failed to analyze where there is an “expectation of privacy” in areas of an individual’s body, as other courts have recognized in the past.

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