Street Photography: The Ever Present Tension Between the Freedom of Expression and the Right to Privacy

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I. INTRODUCTION

Thanks to affordable technology, digital cameras are incorporated into almost every cellphone, allowing anyone to photograph and document everyday life.[1] Social media websites, such as Facebook and Instagram, have

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encouraged individuals to document and "share" their everyday life experiences to what is virtually a worldwide audience on the Internet.[2] These images are readily available for anyone to view, download, and manipulate as they please.[3]

In May 2007, Google launched *street view*.[4] Google's *street view* is an added feature of Google Maps and allows users to search for a location, giving them the added capability to zoom into street-level images of the desired location.[5] Google captures images of the places using cameras mounted on cars or vans that create a 360-degree view of locations.[6]

In 2014, Google launched another product, *Google glass*, which is a wearable camera and computing device.[7] *Google glass* is expected to be used for a wide range of purposes.[8] It is predicted to become an educational, medical, historical, and artistic tool.[9]

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1. *See* Thomas Thorn, Flashback: the past, present, future of the camera phone, *available at* http://www.techradar.com/news/phone-and-communications/mobile-phones/flashback-the-past-present-and-future-of-the-camera-phone-1200385/1 (last accessed May 9, 2016). *See also* Tom de Castela, Five ways the digital camera changed us, *available at* http://www.bbc.com/news/magazine-16483509 (last accessed May 9, 2016).
2. *See* Facebook for Developers, Sharing on Facebook, *available at* https://developers.facebook.com/docs/sharing/overview (last accessed May 9, 2016). *See also* Instagram, How do I share from Instagram to other social networks?, *available at* https://help.instagram.com/365696916849749 (last accessed May 9, 2016).
3. *See* Nancy Messieh, Quick, Easy Ways to Download Photos From Facebook, Flickr, Instagram, Google+ & More, *available at* http://www.makeuseof.com/tag/quick-easy-ways-download-photos-facebook-flickr-instagram-google (last accessed May 9, 2016).
4. Doug Gross, What Google's Street View breach means for your privacy, *available at* http://www.cnn.com/2010/TECH/web/10/26/google.street.view (last accessed May 9, 2016).
5. *Id.*
6. *Id.*
7. The Economist, The people's panopticon, *available at* http://www.economist.com/news/briefing/21589863-it-getting-ever-easier-record-anything-or-everything-you-see-opens (last accessed May 9, 2016).
8. *Id.*
9. *Id.*

These rapid technological advances have allowed artists to create and innovate new forms of expression and artwork.[10] For instance, in 2012, artist Paolo Cirio grabbed attention for his project, Street Ghosts, which transferred the blurry images of pedestrians seen on Google's *street view* to the real world.[11]

Unfortunately, these new artistic forms and innovations have raised certain legal issues.[12] Technological advances have given individuals the ability to take "creep shots" — furtive pictures of breasts and bottoms taken in public places.[13] The proliferation of cameras in almost any personal electronic device has allowed hackers to take "voyeurism" to a whole new level.[14] Certainly, these technological advances allow unprecedented intrusion into our private lives, the likes of which have never been seen before.

The question now is — should new forms of art developed through these new forms of technology, which are in conflict with our right to privacy, be regulated? Certain authors, such as Joshua J. Kaufman, seem to think that restricting the subject matter of art may preclude the art world from creating Andy Warhol, Roy Fox Lichtenstein, or Robert Rauschenberg types and prevent new art genres from being born.[15]

Although the controversial technology is new, the tension between art and privacy has existed for many years. In 1890, Samuel D. Warren and Louis D. Brandeis published an article entitled *The Right to Privacy*,[16] pointing out the growing concern for the increasing invasion of privacy by reason of technological advances.[17] Warren and Brandies wrote —

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10. Elizabeth Reoch, What Art Movement are We in Today, *available at* http://www.elizabethreoch.com/what-art-movement-are-we-in-today (last accessed May 9, 2016).

11. Kieran Corcoran, Bringing Google's ghosts to life: Artist pastes eerie life-seize images of pedestrians from Street View at the very spot where they were captured, *available at* http://www.dailymail.co.uk/news/article-2424131/Rise-Google-ghosts-Artist-pastes-eerie-life-size-images-pedestrians-captured-Street-View-exactly-location-real-world.html (last accessed May 9, 2016).

12. *See* Remy Melina, Is Google Street View Legal?, *available at* http://www.livescience.com/9055-google-street-view-legal.html (last accessed May 9, 2016).

13. The Economist, *supra* note 7.

14. *Id.*

15. *See* Joshua J. Kaufman, *New York Court Examines Publicity Rights*, ART BUS. NEWS, Sep. 1994.

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

17. *Id.*

> Recent inventions and business methods call attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right ['']to be let alone.['] Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ['']what is whispered in the closet shall be proclaimed from the house-tops.['] *For years there has been a feeling that the law must afford some remedy for the unauthorized circulation of portraits of private persons*; and the evil of invasion of privacy by the newspapers, long keenly felt, has been but recently discussed by an able writer.[18]

This Article shall closely examine the tension between the freedom of expression and the right of an individual to privacy, particularly, its presence in the increasing conflict between street-photographers and their subjects. Part II shall highlight the case of *Foster v. Svenson*[19] in the Supreme Court of New York, which squarely tackles the issue of the right to privacy against an artistic photographer, who used a telephoto lens to photograph the interiors of apartments in a neighboring building. Part III shall explore the historical and legal basis of photography as an art form. Part IV shall delve into the current trends or biases of current jurisprudence in determining which of the two rights (freedom of expression and right to privacy) should prevail. Part V shall state personal recommendations based on United States (U.S.) case law and legislation on how to balance these two competing rights in today's day and age.

II. FOSTER V. SVENSON

Foster[20] was decided by the New York Supreme Court last 1 August 2013, and is crucial in understanding the current trend and possible trajectory of street photography as an art form. *Foster* highlights the ever growing tension between the right to privacy and the freedom of expression, and the increasing ability for privacy intrusion due to advances in technology. What makes *Foster* so fascinating is its expansion of the protection of the freedom of expression, and how it provides access by art and its authors into areas previously held "sacred," such as the private home or family dwelling.

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18. *Id.* at 195 (emphasis supplied).

19. Foster v. Svenson, No. 651826/2013, 2013 N.Y. Slip Op. 31782(U) (S.C. N.Y. Aug. 1, 2013) (U.S.).

20. *Id.* at *1. *See also* Raffi Khatchadourian, Stakeout, NEW YORKER, May 27, 2013, *available at* http://www.newyorker.com/magazine/2013/05/27/stakeout (last accessed May 9, 2016).

Arne Svenson is best known for his still life photographs; however, he recently became controversial because of his "wildlife" photography in New York City using a 500mm lens he reportedly "inherited" from a friend.[21] Svenson, a still life photographer, somehow ended up with a lens that is great for wildlife and sports photography.[22] Since Svenson lives in an apartment in TriBeCa, it is not surprising that when he looked out his window, he saw the apartment building across the street and started shooting.[23]

The Fosters claim that Svenson stands to profit handsomely from photographs he took of their family and incorporated in a collection called "The Neighbors."[24] According to the complaint, "[u]pon information and belief, Svenson intends to sell five prints of 'Neighbors #6' and 'Neighbors #12' for a total of $50,000–$75,000."[25] The statements released by Svenson to the press illustrate his utter disregard for the privacy of the Fosters.[26] According to reports, Svenson stated —

> For my subjects there is no question of privacy[.] [...] The neighbors don't know they are being photographed; I carefully shoot from the shadows of my home into theirs. I am not unlike the birder, quietly waiting for hours, watching for the flutter of a hand or the movement of a curtain as an indication that there is life within.[27]

The New York Supreme Court identified and limited the case to one essential issue — whether the photographs used by the photographer in a show or as examples of his art, qualified as a commercial use or for the purpose of advertising or trade.[28] The New York Supreme Court stated —

> It is uncontested that the images taken by [d]efendant were taken without consent. Additionally, there is no view that the individuals photographed were themselves of public interest. The question[,] then, is whether the photographs used by the photographer in a show or as examples of his art qualified as a commercial use or for the purpose of advertising or trade.[29]

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21. Khatchadourian, *supra* note 20.

22. *Foster*, 2013 NY Slip Op. 31782(U), at *1.

23. *Id.*

24. *Id.* at *5.

25. Adam Klasfeld, Parents Blast Photographer for Telephoto Shots, *available at* https://www.courthousenews.com/2013/05/24/57929.htm (last accessed May 9, 2016).

26. *Id.*

27. *Id.*

28. *Foster*, 2013 NY Slip Op. 31782(U), at *3.

29. *Id.*

In resolving the case, the New York Supreme Court held that the photographs taken by Svenson are art, and therefore, protected speech, which prevails over any privacy claims raised by the Fosters.[30] The New York Supreme Court held —

> Plaintiffs cannot establish a likelihood of success on the merits. Defendant's photos are protected by the First Amendment in the form of art[,] and [,]therefore[,] [are] shielded from New York's Civil Rights Law[,] [Sections] 50 and 51. Through the photos, [d]efendant is communicating his thoughts and ideas to the public. Additionally, they serve more than just an advertising or trade purpose because they promote the enjoyment of art in the form of a displayed exhibition. The value of artistic expression outweighs any sale that stems from the published photos.
>
> Further, since art is protected by the First Amendment, any advertising that is undertaken in connection with promoting that art is permitted. Defendant and the art gallery used [p]laintiff's photos to advertise "The Neighbors;" and the advertising is beyond the limits of the statute because it related to the protected exhibition itself. Further, "The Neighbors" exhibition is a legitimate news item because cultural attractions are matters of public and consumer interest. Therefore, news agencies and television networks are entitled to use [d]efendant's photographs of [p]laintiffs, which have a direct relationship to the news items — the photos are the focus of the newsworthy content.[31]

As to the fact of intrusion by Svenson into the private lives of the Fosters and images of the Foster children, the Court had this to say —

> Lastly, a balance of the equities does not favor granting the injunction. While it makes [p]laintiffs cringe to think their private lives and images of their small children can find their way into the public forum of an art exhibition, there is no redress under the current laws of the State of New York. Simply, an individual's right to privacy under the New York Civil Rights Law[,] [S]ections 50 and 51 yield to an artist's protections under the First Amendment[,] under the circumstances presented here. Accordingly, Plaintiffs motion for a preliminary injunction is denied.[32]

From the foregoing, it seems that the Court held paramount Svenson's freedom of expression over the right of the Fosters to their privacy.

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30. *Id.* at *4.

31. *Id.* at *5 (citing Hoepker v. Kruger, 200 F. Supp. 2d 340 (S.D.N.Y. 2002) (U.S.) & Bery v. City of New York, 97 F.3d 689 (2d Cir. 1996) (U.S.)).

32. *Id.* at *6.

On 5 September 2013, the Fosters filed their Notice of Appeal.[33] However, the Appellate Division of the New York Supreme Court affirmed the New York Supreme Court's 2013 decision on 9 April 2015.[34]

What is unsettling about the *Foster* decision is the easy and dismissive attitude of the Court in setting aside the privacy rights of the Fosters. In this case, the Fosters were in the privacy of their home and had a reasonable expectation of keeping intimate moments of their lives private. Furthermore, they are private individuals whose everyday lives are not of public interest. The Court utterly failed to sufficiently address these important issues, which should deserve legal and logical reasoning if they are to be disregarded.

III. PHOTOGRAPHY AS AN ART FORM

Today, photography is generally accepted as an art form.[35] This is evident from the numerous art galleries and museums that feature and sell photographs.[36] In 2011, when Andreas Gursky sold his photograph entitled "Rhein II" for a record $4.3 Million,[37] it seemed that all debates as to whether photography was a legitimate art form were settled.

The crucial question now is — *when is photography art?*

Since its early days, photography has been criticized as "too literal to compete with works of art"[38] because it was unable to "elevate the

33. Marie-Andree Weiss Law Office, Plaintiffs Appeal in Manhattan Privacy Case, *available at* http://www.maw-law.com/privacy/plaintiffs-appeal-in-manhattan-privacy-case (last accessed May 9, 2016).

34. Foster v. Svenson, 128 A.D.3d 150 (N.Y. 2015) (U.S.).

35. *See* Sean O'Hagan, Photography: an ever-evolving art form, *available at* http://www.theguardian.com/artanddesign/2012/nov/16/sean-ohagan-photography-art-form (last accessed May 9, 2016). *See also* Corydon Ireland, When photography became art, *available at* http://news.harvard.edu/gazette/story/2010/10/when-photography-became-art (last accessed May 9, 2016).

36. *See e.g.*, Timeout, Best photo galleries, *available at* http://www.timeout.com/newyork/art/best-photography-galleries-galleries (last accessed May 9, 2016); Visitlondon.com, Photography Galleries in London, *available at* http://www.visitlondon.com/things-to-do/sightseeing/london-attraction/gallery/photography-galleries (last accessed May 9, 2016); & I amsterdam, Photography museums, *available at* http://www.iamsterdam.com/en/visiting/what-to-do/museums-and-galleries/photography-museums (last accessed May 9, 2016).

37. Christie's The Art People, Andreas Gursky (B.1955), *available at* http://www.christies.com/lotfinder/photographs/andreas-gursky-rhein-ii-5496716-details.aspx (last accessed May 9, 2016).

38. Michael Prodger, Photography: is it art?, *available at* http://www.theguardian.com/artanddesign/2012/oct/19/photography-is-it-art#start-of-comments (last accessed May 9, 2016).

imagination."[39] Photography has never really been able to disassociate itself from this criticism as a mechanical and literal medium.[40] However, what fine art photographers recognized almost immediately was that "photographs, like paintings, are artificially constructed portrayals [—] they too had to be carefully composed, lit[,] and produced."[41]

The artistic genre known as *street photography* has a long and colorful pedigree, which has contributed to the world's most iconic images of the past 100 years.[42] These images were taken by photographers roaming city streets, looking for a story and trying to capture that "decisive moment" to compose and immortalize.[43] Few images are better known than the famous *V-J Day* in Times Square, photographed by Alfred Eisenstaedt, capturing a sailor kissing a nurse.[44]

Should photographs, such as *V-J Day,* be considered art? The case of *Burrow-Giles Lithographic Co. v. Sarony*[45] settled a similar issue in 1884. The case involved photograph no. 18 of Oscar Wilde, a famous playwright during the day.[46]

In *Burrow-Giles Lithographic Company v. Sarony*, the Court distinguished fine art photographs from ordinary photographs. The Court held —

> But it is said that an engraving, a painting, a print, does embody the intellectual conception of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the constitution in securing its exclusive use or sale to its author, *while a photograph is the mere mechanical reproduction of the physical features or outlines of some object, animate or inanimate, and involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in shape of a picture.* That while the effect of light on the prepared plate may have been a discovery in the production of these pictures, and patents could properly be obtained for the

39. *Id.*

40. *Id.*

41. *Id.*

42. Jeffrey L. Loop, *Street Photography Runs into New York Laws on the Right to Privacy: When is a Photograph of a Person "Art" Protected by the First Amendment to the U.S. Constitution?*, 3 SPENCER'S ART LAW J. 1, 14 (2012).

43. *Id.*

44. Ray Sanchez & Aaron Cooper, V-J Day: A War, a kiss, a mystery, *available at* http://edition.cnn.com/2015/08/14/us/vj-day-kissing-sailor (last accessed May 9, 2016).

45. Burrow-Giles Lithographic Company v. Sarony, 111 U.S. 53 (1884).

46. *Id.* at 54.

> combination of the chemicals, for their application to the paper or other surface, for all the machinery by which the light reflected from the object was thrown on the prepared plate, and for all the improvements in this machinery, and in the materials, the remainder of the process is merely mechanical, with no place for novelty, invention, or originality. *It is simply the manual operation, by the use of these instruments and preparations, of transferring to the plate the visible representation of some existing object, the accuracy of this representation being its highest merit.*
>
> *This may be true in regard to the ordinary production of a photograph, and that in such case a copyright is no protection.* On the question as thus stated we decide nothing.
>
> [...]
>
> The third finding of facts says, in regard to the photograph in question, that it is a 'useful, new, harmonious, characteristic, and graceful picture, and that plaintiff made the same [...] entirely from his own original mental conception, to which he gave visible form by posing the said *Oscar Wilde* in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement, or representation, made entirely by plaintiff, he produced the picture in suit.' *These findings, we think, show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author, and of a class of inventions for which the constitution intended that congress should secure to him the exclusive right to use, publish, and sell, as it has done by Section 4952 of the Revised Statutes.*[47]

It would seem from the foregoing that when the photograph is but a mere visible representation of what already exists, then the photograph cannot be considered art. However, where the photograph is the product of the photographer's own intellectual invention, evidenced by his unique composition and artistic direction of the content, then the photograph should be considered art.

IV. CURRENT TRENDS AND BIASES ON THE TENSION BETWEEN THE FREEDOM OF SPEECH AND THE RIGHT TO PRIVACY

A. Art as Protected Speech

The First Amendment has proven to be a powerful ally for artists.[48] Through the years, a number of courts have upheld the primacy of art as protected

47. *Id.* at 58-60 (emphases supplied).

48. *See e.g.*, Altbach v. Kulon, 302 A.d. 2d 655 (N.Y. App. Div. 2003) (U.S.); Simeonov v. Tiegs, 159 Misc.2d 54 (N.Y. Civ. Ct. 1993) (U.S.); & Hoepker v. Kruger, 200 F. Supp.2d 340 (N.Y. Dist. Ct. 2002) (U.S.).

free speech over the individual's right to privacy.[49] In the case of *Simeonov v. Tiegs*,[50] the New York Civil Court articulated the importance of art in a free society. The Court succinctly explained —

> Without people having the freedom to disseminate ideas, a society is not free. Works of art, including sculptures, convey ideas, just as do literature, movies[,] or theater. Although a person[']s right of privacy as protected by Civil Rights Law [Sections] 50 and 51 is also a very significant right, it must fall to the constitutionally protected right of freedom of speech.[51]

Nevertheless, the right to privacy does have its own set of supporters and advocates.

B. The Right to Privacy: A Brief History

Samuel Warren and Louis Brandeis introduced to the general public what they claimed to be the common law principle of the right to privacy.[52] In 1890, Warren and Brandies co-authored an article entitled *The Right to Privacy*.[53] They advanced the existence of the common law principle of the right to privacy and argued that it was analogous to the common law principle of copyright.[54] In addition, they claimed that the right to privacy is not rooted in the principle of private property, but that of an inviolate personality.[55]

In 1902, the New York Court of Appeals heard *Roberson v. Rochester Folding Box Co.*,[56] where Abigail M. Roberson sued Rochester Folding Box for printing her picture on the outside of their flour bags without her consent.[57] Roberson alleged as basis for the complaint the invasion of her right of privacy.[58] The Court of Appeals traced the principle of the right o

49. *See e.g.*, *Altbach*, 302 A.d. 2d; *Simeonov*, 159 Misc.2d; & *Hoepker*, 200 F. Supp.2d.

50. *Simeonov*, 159 Misc.2d.

51. *Id.* at 59.

52. Leah Burrows, To be let alone: Brandeis foresaw privacy problems, *available at* https://www.brandeis.edu/now/2013/july/privacy.html (last accessed May 9, 2016).

53. Warren & Brandeis, *supra* note 17.

54. *See* Warren & Brandeis, *supra* note 17.

55. *Id.* at 205.

56. Roberson v. Rochester Folding Box Co., 64 N.E. 442 (N.Y. Ct. App. 1902) (U.S.).

57. *Id.*

58. *Id.* at 443.

privacy to the Warren and Brandeis article mentioned above.[59] However, the Court denied that the right to privacy existed in common law and merely observed that "[t]he legislative body could very well interfere and arbitrarily provide that no one should be permitted for his own selfish purpose to use the picture."[60]

In 1903, allegedly in response to the *Roberson* decision, New York passed its privacy statute, particularly Sections 50 and 51 of the New York Civil Rights Law.[61] Section 50 provides —

> Section 50. A person, firm[,] or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait[,] or picture of any living person without having first obtained the written consent of such person, or if a minor[,] of his or her parent or guardian, is guilty of a misdemeanor.[62]

In the years that followed, several states expanded the common law right to privacy considerably.[63] In 1971, Professor William L. Prosser categorized four distinct kinds of invasions to the right to privacy:

(1) Intrusion upon one's physical solitude or seclusion;

(2) Public disclosure of private facts;

(3) Publicity that places someone in a false light in the public's eye; and

(4) Appropriation of one's name or likeness for another's benefit.[64]

The current notion of the right to privacy does not prohibit any publication of matter which is of public interest. The purpose of regulating the freedom of expression pursuant to an individual's right to privacy is to protect those persons, with whose affairs the general public has no legitimate concern, from being dragged into an undesired publicity, and to protect all individuals of whatever station in life from having matters which they may properly prefer to keep private, made public against their will.[65] It is this

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59. *Id.*

60. *Id.* at 449.

61. GENELLE I. BELMAS, ET AL., MAJOR PRINCIPLES OF MEDIA LAW 221 (2016 ed.).

62. N.Y. CIV. RIGHTS LAW, § 50 (McKinney 1999 & Supp. 2000) (U.S.).

63. *See e.g.*, Lawrence v. A.S. Abell Co., 475 A.2d 448 (Md. Ct. App. 1982) (U.S.); Tellado v. Time-Life Books, Inc., 643 F.Supp. 904 (Dist. Ct. N.J. 1986) (U.S.); & Vassiliades v. Garfinckel's, Brooks Bros., 492 A.2d 580 (D.C. Ct. App.1985) (U.S.).

64. William L. Prosser, *Law of Torts,* § 117 (4th ed. 1971).

65. Warren & Brandeis, *supra* note 17, at 214-15.

unjustified invasion of individual privacy which should be prevented, or at the very least, regulated.[66]

C. Recent Court Decisions on Street Photography as Protected Speech

Foster is not alone in the expansion of the protection given by the freedom of expression towards artists and the content of their artwork. Art, as a form of expression, seems to have prevailed over other important rights as well.

1. Freedom of Religion

In the case of *Nussenzweig v. DiCorcia*,[67] the New York Supreme Court upheld the freedom of expression over one's right to practice his religion.[68] Philip-Lorca DiCorcia was an artist and photographer who took candid photographs of individuals walking through Times Square.[69] None of those photographed were aware that DiCorcia had taken their picture.[70] In 2001, DiCorcia exhibited these candid photographs at an art gallery owned by defendant Pace/MacGill, Inc.[71] One of the images was that of Erno Nussenzweig, who commenced an action asserting that his statutory right of privacy as set forth in the New York Civil Rights Law, Sections 50 and 51, and his *constitutional right to practice his religion*, had been violated.[72]

In deciding the case in favor of DiCorcia, the Court argued that the supremacy of the freedom of expression is the price every person must be prepared to pay "in a society which information and opinion flow freely."[73] The New York Supreme Court explained —

> Plaintiff argues that the use of the photograph interferes with his constitutional right to practice his religion. The free exercise clause, however, restricts state action. *There is no state action complained of in this case, only the private actions of defendants. Thus, this situation is distinguishable from circumstances where the government required a photograph that was claimed to be a violation of a fundamental religion's belief.* The issues raised by plaintiff do rise to constitutional consideration.

66. *Id.*

67. Nussenzweig v. DiCorcia, 9 N.Y.3d 184 (N.Y. App. Div. 2007) (U.S.).

68. *Id.*

69. *Id.* at 187.

70. *Id.*

71. *Id.*

72. *Id.*

73. Nussenzweig v. DiCorcia, No. 108446/05, 2006 N.Y. Slip Op. 50171(U) at *8 (N.Y. Sup. Ct. 2006) (U.S.).

> Clearly, plaintiff finds the use of the photograph bearing his likeness deeply and spiritually offensive. The sincerity of his beliefs is not questioned by defendants or this court. While sensitive to plaintiff's distress, it is not redressable in the courts of civil law. *In this regard, the courts have uniformly upheld Constitutional* [*First*] *Amendment protections, even in the face of a deeply offensive use of someone's likeness.* Thus, in *Arrington*, the Court of Appeals recognized that an African American man's image was being used in a manner that conveyed viewpoints that were offensive to him. It nonetheless found the use of the image protected. In *Costlow v. Cusimano*, [ ] the court held that the parents of children who died by suffocation when they trapped themselves in a refrigerator could not assert a privacy claim to prevent defendant from publishing an article with photographs of the premises and the deceased children, because the article was [']newsworthy[.]['] These examples illustrate the extent to which the constitutional exceptions to privacy will be upheld, notwithstanding that the speech or art may have unintended devastating consequences on the subject, or may even be repugnant. They are, as the Court of Appeals recognized in *Arrington*, *the price every person must be prepared to pay for in a society in which information and opinion flow freely*.[74]

2. Right of Exclusion

The United States Supreme Court has repeatedly held that the "right to exclude others" is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[75] However, recent jurisprudence, such as *Foster*, seems to have given this doctrine little importance when the freedom of expression is involved. This sentiment echoed the case of *Howell v. The New York Post*,[76] where the Court held that trespass into private property in order to take a photograph is not an actionable wrong.

In the case of *Howell*, a New York Post photographer trespassed onto the very discreet Four Winds hospital, a private psychiatric facility, and used a telephoto lens to take outdoor photographs of Pamela J. Howell and Hedda Nussbaum.[77] The New York Post published two photographs — one of Nussbaum taken in November 1987, shortly after her arrest in connection with Lisa Nussbaum's death, and another of Nussbaum walking with

74. *Id.* at *7-8 (citing Costlow v. Cusmano, 311 N.Y.S.2d 92 (1970) (U.S.) & Arrington v. New York Times, 55 N.Y.2d 433 (1982) (U.S.)) (emphases supplied).

75. *See e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 384 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1044 (1992); & Nollan v. California Coastal Commission, 483 U.S. 825, 831 (1987).

76. Howell v. The New York Post, 612 N.E.2d 699 (N.Y. Ct. App. 1993) (U.S.).

77. *Id.* at 702.

Howell, taken the previous day at Four Winds.[78] Although Howell's name was not mentioned in the caption or article published by the New York Post, her face was readily discernible.[79] Alleging she experienced emotional distress and humiliation, Howell filed an action against the New York Post, the photographer, and two writers, seeking multi-million dollar damages for alleged violations of the New York Civil Rights Law Sections 50 and 51.[80] In finding no actionable wrong on the part of the New York Post, the Court held —

> The core of plaintiff's grievance is that, by publishing her photograph, defendants revealed to her friends, family[,] and business associates that she was undergoing psychiatric treatment [—] a personal fact she took pains to keep confidential. *There is, of course, no cause of action in this State for publication of truthful but embarrassing facts.* Thus, a claim grounded in the right to privacy must fall within Civil Rights Law [Sections] 50 and 51.[ ]
>
> [...]
>
> That does not conclude our analysis, for plaintiff additionally complains that the manner in which her photograph was obtained constituted extreme and outrageous conduct contemplated by the tort of intentional infliction of emotional distress.
>
> Courts have recognized that [news gathering] methods may be tortious and, to the extent that a journalist engages in such atrocious, indecent[,] and utterly despicable conduct as to meet the rigorous requirements of an intentional infliction of emotional distress claim, recovery may be available. *The conduct alleged here, however [—] a trespass onto Four Winds' grounds [—] does not remotely approach the required standard.*[81]

Like *Foster*, *Howell* reiterated the primacy of the freedom of expression over the individual's right to privacy, even in the case of trespass into private property (psychiatric ward) where there should be a reasonable expectation for privacy.[82]

As stated by authors and courts alike, art, as an exercise of our freedom of expression, is indeed fundamental to a free and democratic society.[83] However, the abovementioned trends, expanding the freedom of expression to allow certain intrusions into our private lives are unsettling. This is

78. *Id.*

79. *Id.* at 703.

80. *Id.*

81. *Id.* at 708-10 (emphases supplied).

82. *Howell*, 612 N.E.2d.

83. *See e.g.*, *Foster*, 128 A.d.3d 150 & *Howell*, 612 N.E.2d.

especially true today, where technology, allows not just your typical "peeping tom" photographer to take snapshots of your private lives through a window, but likewise allows hackers to hijack your phone or other personal computing devices and observe your most intimate moments from well-within your home.[84] Indeed, certain legislation should be developed, and common law principles recognized, in order to craft an acceptable balance between the artists and their subjects.

V. BALANCING OF INTERESTS — LIMITATIONS TO STREET PHOTOGRAPHY AS FINE ART

There has always been tension between an individual's right to privacy and artistic content as an expression of free speech. In the modern day and age, however, both technology and jurisprudence seem to tip this delicate balance in favor of the freedom of expression. The objective is to formulate guidelines in an attempt to regain the equilibrium between the right to privacy and freedom of expression in the context of art. This portion of the Article shall highlight the following:

(1) Property rights and the right to exclude others;

(2) The distinction between public figures and private individuals; and

(3) Commercialization, as a possible limitation on street photography as protected free speech.

A. Property Rights and the Right to Exclude

Warren and Brandies once wrote —

> The common law has always recognized a man's house as his castle, impregnable, often, even to his own officers engaged in the execution of its command. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?[85]

Long before the idea of privacy rights as they exist today had developed, laws on property were effectively excluding intruding eyes and ears from the private spheres of life.[86] This right to exclude others is regarded as one of the most essential sticks in the bundle of rights that are commonly characterized

84. The Economist, *supra* note 7.

85. Warren & Brandeis, *supra* note 17, at 220.

86. John A. Humbach, *Privacy and the Right of Free Expression*, 11 FIRST AMEND. L. REV. 16, 74 (2012).

as property rights.[87] This close relation between property rights and the right to privacy has been overlooked, although long existing.[88]

The freedom of expression has often been easily justified by the courts to prevail over an individual's rights to privacy; however, the same should not be true when the freedom of expression is pitted against property rights. It can be said that, since property rights are essentially protected by the U.S. Constitution (Fifth and Fourteenth Amendments), they are at "equal" footing with the freedom of expression, and should be held to be in a stronger position than the common law or legislated right to privacy. This equality between the two essential rights was squarely discussed in *Lloyd Corp., Ltd. v. Tanner*.[89] *Lloyd Corp*. explained that

> [t]he basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against *all* handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case. They provide that ['']no person shall [...] be deprived of life, liberty, or property, without due process of law.['] There is the further proscription in the Fifth Amendment against the taking of ['']private property [...] for public use, without just compensation.['']
>
> Although accommodations between the values protected by these three Amendments are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court has recognized that it is not necessarily available for speaking, picketing, or other communicative activities.[90]

From the foregoing, a distinction must be made between public and private property. When courts allow photographers or artists to "trespass" or intrude into private property, the courts condone the violation of the *right to exclude others* possessed by property owners as an indispensible part of their property rights. Courts should be more sensitive to privacy, especially the

87. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

88. Humbach, *supra* note 86, at 75.

89. Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972).

90. *Id.* at 567-68.

right to exclude others. Otherwise, the courts run the risk of eroding this fundamental and equally important right enshrined in the Constitution.

B. Distinction between Public Figures and Private Individuals

The right to privacy is intended to defend the common private person from unwanted public exposure and the potential emotional damage, which can possibly be inflicted.[91] A distinction should therefore be recognized between a private individual and a public person. A private individual should be protected against the publication of any portraiture or photograph of himself; but where an individual becomes a public character, the case is different.[92] A statesperson, author, artist, or inventor, who asks for and desires public recognition, may be said to have surrendered this right to the public.[93] In the case of *Corliss v. E. W. Walker Co.*,[94] the Court recognized the difference between a public and private individual. It stated the following —

> Independently of the question of contract, [ ] the law [is] that a private individual has a right to be protected in the representation of his [or her] portrait in any form; that this is a property as well as a personal right; and that it belongs to the same class of rights which forbids the reproduction of a private manuscript or painting, or the publication of private letters, or of oral lectures delivered by a teacher to his [or her] class, or the revelation of the contents of a merchant's books by a clerk. In the case of [*Prince Albert v. Strange*], [...] this doctrine was extended so far as to prohibit the publication of a catalogue of private etchings. But, while the right of a private individual to prohibit the reproduction of his [or her] picture or photograph should be recognized and enforced, this right may be surrendered or dedicated to the public by the act of the individual, just the same as a private manuscript, book, or painting becomes (when not protected by copyright) public property by the act of publication. The distinction in the case of a picture or photograph lies [...] between public and private characters. A private individual should be protected against the publication of any portraiture of himself, but where an individual becomes a public character[,] the case is different. A states[person], author, artist, or inventor, who asks for and desires public recognition, may be said to have surrendered this right to the public. When any one obtains a picture or photograph of such a person, and there is no breach of contract or violation of confidence in the method by which it was obtained, he [or she] has the right to reproduce it, whether in a newspaper, magazine, or book. It would be extending this right of protection too far to say that the general public can be prohibited from knowing the personal appearance of great public

91. Amiel B. Weisfogel, Comment, *Fine Art's Uncertain Protection: The New York Right to Privacy Statute and the First Amendment*, 20 COLUM. J.L. & ARTS 91, 92 (1995).

92. Atkinson v. John Doherty, 80 N.W. 285, 287 (Mich. 1899) (U.S.).

93. *Id.*

94. Corliss v. E. W. Walker Co., 64 F. 280 (1st Cir. 1894) (U.S.).

> characters. Such characters may be said, of their own volition, to have dedicated to the public the right of any fair portraiture of themselves.[95]

In the case of *Mendonsa v. Time Incorporated*,[96] the Court went further and held that a private individual should not be picked from a crowd when photographed. The Court in *Mendonsa* held —

> As the *Gautier* court noted, *Blumenthal* illustrates the area of privacy which may not be invaded —
>
> > One travel[l]ing upon the public highway may expect to be televised, but only as an incidental part of the general scene. So, one attending a public event such as a professional football game may expect to be televised in the status in which he attends. If a mere spectator, he may be taken as part of the general audience, but may not be picked out of the crowd alone, thrust upon the screen[,] and unduly featured for public view.[97]

This Article suggests a consciousness and sensitivity in the distinction between a public and private individual. There exists a substantial distinction between the two and a rational basis to treat the two groups differently, just as they are in other cases, such as libel.

C. Commercialization

The attempt of privacy statutes to flesh out the meaning of "trade purposes" or "commercial use" is confusing at best. "Trade purposes," as one author describes it, is a nebulous term, which has not been afforded a clear-cut definition.[98] In *Davis v. High Society Magazine*,[99] the court noted that the "use for the purposes of trade" in the New York Statute is not susceptible to ready definition.[100] One indicator of "trade purpose" or "commercial use," which has been the subject of some controversy, is the limited number of copies of the artwork. In *Simeonov,* the court suggested that if artwork is sold in limited numbers, then this could be an indication that the work of art is not for commercial use or for the purpose of trade, and therefore does not

95. *Id.* at 281-82 (citing Prince Albert v. Strange, 1 Mac. & G. 25, 42 (1849) (U.K.)).

96. Mendonsa v. Time Incorporated, 678 F.Supp. 967 (1st Cir. 1988) (U.S.).

97. *Id.* at 292 (citing Gautier v. Pro-Football, Inc., 107 N.E.2d 485, 489 (N.Y. 1952) (U.S.) & Blumenthal v. Picture Classics, 257 N.Y.S. 800 (N.Y. App. Div. 1932) (U.S.)).

98. Weisfogel, *supra* note 91, at 99.

99. Davis v. High Society Magazine, 90 A.d.2d 374 (N.Y. App. Div. 1982) (U.S.).

100. *Id.* at 377.

violate the privacy laws.[101] *Simeonov* held that "[a]n artist may make a work of art that includes a recognizable likeness of a person without her or his written consent and sell at least a limited number of copies thereof without violating Civil Rights Law [Sections] 50 and 51."[102]

Statutes and the courts should clarify and flesh out the definition of "trade purposes." This suggestion by the *Simeonov* court, although controversial, makes sense. The number of copies or "original" prints circulating in public is a good indicator of the primary motivating force behind the circulation of the work. In addition, limiting the number of copies of artwork sold or circulated of a private individual who has *not* consented to the use of his or her image or likeness, also limits the potential harm or damage to the individual by reason of the unwanted publication.

VI. CONCLUSION

William Pitt, the first Earl of Chatham, also known as Pitt the Elder, once wrote —

> The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail — its roof may shake — the wind may blow through it — the storm may enter — the rain may enter — but the King of England cannot enter.[103]

Street photography is a legitimate art form, which deserves the highest degree of respect and protection afforded by the Constitution. However, as advances in technology continue to shape and evolve this form of expression, technology has also expanded the limits of this form of expression deeper into the private lives of individuals. Articulating the legal limitations on street photography, considering the rapid pace of technological advancement, is not easy. However, as the cited cases and authors have demonstrated, the legal issues we face today are not new, although the technology may be different. The freedom to express one's self and one's ideas are certainly essential for an open and democratic society. However, this freedom should be balanced with other fundamental rights, which are held to be equally valued in a free society. The right to exclude others from the privacy of our home and our most intimate moments, and the right to be left alone, are just as important as the freedom to express one's ideas. These two fundamental rights are not mutually exclusive but can co-exist, as they have for years. Street photography can and should remain in the "streets" and away from private homes, where individuals have a

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101. *Simeonov*, 159 Misc.2d at 59.

102. *Id.* at 60.

103. Phrases.org, An Englishman's home is his castle, *available at* http://phrases.org.uk/meanings/an-englishmans-home-is-his-castle.html (last accessed May 9, 2016).

reasonable expectation to privacy and the right to exclude others. Furthermore, the difference between public and private individuals should be recognized. There should be a stricter standard in allowing the use of the image of a private individual without his or her consent.