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HUMANS OF NEW YORK, SHUT YOUR BLINDS

*Amanda DeFeo**

I. INTRODUCTION

The right of privacy has been called the most esteemed right of the civilized man.¹ However, it is the civilized man who, with his intellect, has contributed to a social evolution that allows for the invasion of individual privacy.² Today, invasive technologies allow for the disclosure of the sacred corners of domestic life.³ Due to societal advancements, the law must keep pace with the changing times and the progress of the human mind.⁴ It has become essential to redefine the nature and extent of an individual's protection of his or her personal privacy.⁵ Photographic technology, artistic trends, and cultural developments have raised several questions regarding the right of privacy.⁶ For example, the well-known project entitled Humans of New York has attracted over twenty million online

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¹ Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

² Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) [hereinafter *Right to Privacy*].

³ Foster v. Svenson, 7 N.Y.S.3d 96, 97-99 (App. Div. 1st Dep't 2015).

⁴ *Right to Privacy*, *supra* note 2; *Svenson*, 7 N.Y.S.3d at 106.

⁵ *Right to Privacy*, *supra* note 2; *See also Svenson*, 7 N.Y.S.3d at 106 (explaining that "in these times of heightened threats to privacy posed by new and ever more invasive technologies, we call upon the legislature to revisit this important issue.").

⁶ *The Privacy Panic Cycle*, <http://www2.itif.org/2015-privacy-panic.pdf> (last visited Mar. 4, 2017).

followers without violating New York Civil Rights Law.⁷ The Humans of New York project includes photographing random New Yorkers on the streets and posting their images on social media to create a catalog of New York residents and their stories.⁸ In contrast, the artist Arne Svenson and his project titled “The Neighbors” raised many questions regarding the scope of the New York Civil Rights Law, which provides the basis for the right of privacy.⁹ Many people would believe that circulating a photograph of a barely clothed child that was taken with a special lens through the window of the child’s home is an invasion of privacy. Yet, as exemplified by this Note, this is not redressed under New York State law.¹⁰ Currently, unlike other states, New York State’s privacy statute is too narrow to encompass this type of conduct, which was challenged in *Foster v. Svenson*.¹¹

⁷ See HUMANS OF NEW YORK, <http://www.humansofnewyork.com> (last visited Mar. 4, 2017); See N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009) (“Any person whose name, portrait, picture or voice is used within this state for advertising purposes . . . without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state.”). In addition, New York Civil Rights Law section 50 provides that it is a misdemeanor for “a person, firm or corporation that uses for advertising purposes, or for the purpose of trade, the name, portrait or picture of any living person without having first obtained . . . written consent . . .” N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009).

⁸ See HUMANS OF NEW YORK, *supra* note 7. All individuals are aware their photo is being taken and give consent that it be published on social media. HUMANS OF NEW YORK, *supra* note 7.

⁹ Eugene Volokh, *NY Court Legal to Surreptitiously Photograph People in Their Homes, and Sell Those Photos*, THE WASHINGTON POST, <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/04/10/n-y-court-legal-to-surreptitiously-photograph-people-in-their-homes-and-sell-those-photos> (last visited Mar. 4, 2017).

¹⁰ *Foster v. Svenson*, 2013 WL 3989038 (2013) at *1 (“While it makes Plaintiffs 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.”). *Id.*

¹¹ *Svenson*, 7 N.Y.S.3d at 105; Volokh, *supra* note 9.

In most states photographing someone in their home with a telephoto lens would indeed be tortious, under the “intrusion upon seclusion” tort; as the Restatement notes,

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

[Comment b:] The invasion may be by physical intrusion into a place in which the plaintiff has secluded himself, as when the defendant forces his way into the plaintiff’s room in a hotel or insists over the plaintiff’s objection in entering his home. It may also be by the use of the defendant’s senses, with or without mechanical aids, to oversee or overhear the plaintiff’s private affairs, as by looking into his upstairs windows with binoculars or tapping his telephone wire.

This Note will discuss the tension between two fundamental freedoms: an individual's right to privacy and "the touchstone of individual liberty"—the freedom of expression.¹² Part II of this Note will discuss the facts and procedural background of *Foster v. Svenson*. The Foster family alleged that their statutory right of privacy was violated when the highly acclaimed fine art photographer, Arne Svenson, published photographs of their barely clothed children.¹³ Svenson asserted that his photographs were constitutionally protected by his freedom of expression.¹⁴ Part III will discuss the decision of the First Department which immunized Svenson's conduct, finding it beyond the reach of the privacy laws.¹⁵ Part IV will examine the balancing test adopted by the federal courts, which balances the government's interest in protecting an individual's privacy against protecting freedom of expression.¹⁶ Although the federal courts place a heavy weight on the sacrosanct freedom encompassed within the First Amendment,¹⁷ in each generation and each situation, the theory underlying an individual's right to privacy and expression requires reevaluation.¹⁸ Part V will discuss the statutory right of privacy in New York Civil Rights Law sections 50 and 51.¹⁹ Mindful of the inherent tensions, the New York State legislature enacted a privacy statute, which is to be "narrowly construed and strictly limited to non-consensual commercial appropriations of the name, portrait or picture of a living person."²⁰ However, by implementing such a narrow approach, New York State courts have failed to consider an equitable balance between free

RESTATEMENT (SECOND) OF TORTS § 652B (1977).

¹² 5 TREATISE ON CONST. L. § 20.2.

¹³ *Foster v. Svenson*, 7 N.Y.S.3d 96, 96 (App. Div. 1st Dep't 2015).

¹⁴ *Id.*

¹⁵ *Svenson*, 7 N.Y.S.3d at 96.

¹⁶ See discussion *infra* Part IV.

¹⁷ See discussion *infra* Part IV.

¹⁸ T. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 894 (1929) [hereinafter *General Theory of the First Amendment*].

¹⁹ See N.Y. CIV. RIGHTS LAW § 51 (McKinney 2009) ("Any person whose name, portrait, picture or voice is used within this state for advertising purposes . . . without the written consent first obtained as above provided may maintain an equitable action in the supreme court of this state."). In addition, New York Civil Rights Law section 50 provides that it is a misdemeanor for "a person, firm or corporation that uses for advertising purposes, or for the purpose of trade, the name, portrait or picture of any living person without having first obtained . . . written consent . . ." N.Y. CIV. RIGHTS LAW § 50 (McKinney 2009).

²⁰ *Svenson*, 2013 WL 3989038, *1 (2013).

speech and privacy on multiple occasions. This failure is exemplified in the case of *Foster v. Svenson*, where the Appellate Division considered whether the New York Civil Rights Law granted an individual the right to prohibit a photographer from displaying his photographs in art galleries or whether the First Amendment instead allowed unlimited dissemination of such image.²¹ To grant an artist such broad First Amendment protection is to essentially eliminate the right of privacy.²² Thus, approximately one month following the decision, a bill, which is currently pending, was introduced in the New York State Assembly to amend the New York Civil Rights Law to prohibit conduct such as taking photographs of a person within the confines of his or her home where there is a reasonable expectation of privacy.²³ This Note will argue that in order to deal with the increasing threat to an individual's privacy evidenced in *Foster v. Svenson*, this amendment to the New York privacy statute should be enacted.²⁴ By adopting this amendment, the legislature would strike a balance between the interests of an artist's freedom of expression and the invasion of an individual's right of privacy within his or her home.

II. FACTUAL AND PROCEDURAL BACKGROUND OF *FOSTER V. SVENSON*

Martha and Matthew Foster brought a suit on behalf of their children when they learned through various media coverage that the defendant, Arne Svenson, had been secretly snapping photographs of three-year-old Delaney Foster and one-year-old James Foster from behind the curtains of his own apartment and displaying and selling the images to the public.²⁵ Svenson, an artist noted for his eerie and eccentric photography, embarked on a yearlong project in which he hid in the shadows of his darkened apartment, and waited for his neighbors to appear in the window.²⁶ He used a high powered

²¹ *Svenson*, 7 N.Y.S.3d at 96.

²² *Id.* at 102. "To give absolute protection to all expressive works would be to eliminate the statutory right of privacy." *Id.*

²³ Bill A. 07804, S. 0583.

²⁴ Bill A. 07804, S. 0583.

²⁵ *Svenson*, 2013 WL 3989038 at *1 (2013).

²⁶ *Id.*

camera that was originally used for capturing images of birds.²⁷ The floor to ceiling windowpanes of the neighboring building naturally framed the focal point of Svenson's still-life exhibit entitled "The Neighbors."²⁸ Svenson's images captured intimate family activities of several tenants residing at 475 Greenwich Street.²⁹ The residents were unaware they were being photographed while they were watching television, completing household tasks, and enjoying a meal at their dinner table.³⁰

There is no dispute that Svenson took the series of photographs without consent.³¹ Nevertheless, the photographs were exhibited in galleries in Los Angeles and New York, on gallery websites, as well as Svenson's personal website.³² When Mrs. Foster discovered a photograph which displayed James barely clothed, and a photograph which displayed Delaney in a bathing suit, she telephoned Svenson demanding removal of the pictures from every forum.³³ Svenson, acknowledging the photographs may invite a question of privacy, agreed to stop showing and selling the photograph of James.³⁴ However, he refused to do so with respect to the photograph of Delaney.³⁵ Subsequently, Mr. and Mrs. Foster retained counsel who sent cease and desist letters to the defendant, galleries, and websites, demanding removal of the photographs of the Foster children.³⁶ The defendant, galleries, and websites all complied.³⁷

Notwithstanding the Fosters' efforts, a photograph of Delaney appeared in various electronic articles, printed articles, and television

²⁷ *Id.*

²⁸ *Id.*

²⁹ Complaint at 17; *Svenson*, 7 N.Y.S.3d 96 (App. Div. 1st Dep't 2005).

³⁰ *Id.*

³¹ *Id.*

³² *Id.* The photographs were offered for sale for between \$5,000 and \$7,500 by an online art gallery called "Artsy.net." *Id.*

³³ Complaint at 17; *Svenson*, 7 N.Y.S.3d 96 (App. Div. 1st Dep't 2005).

³⁴ Raffi Khatchadourian, *Stakeout*, The New Yorker (May 27, 2013), <http://www.newyorker.com/magazine/2013/05/27/stakeout> (explaining how Svenson consulted with his lawyer prior to the commencement of this action when he was told, "In a city where people are so tightly crammed together, there is a scant presumption of privacy.").

³⁵ Brief of Plaintiff at 17; *Svenson*, 7 N.Y.S.3d 96 (App. Div. 1st Dep't 2005).

³⁶ *Id.*

³⁷ *Id.*

broadcasts, including NBC's "TODAY Show," where the Fosters' building address was revealed and Delaney's face was clearly recognizable.³⁸ Concerned with their children's safety, the Fosters immediately sued Svenson seeking injunctive relief pursuant to New York Civil Rights Law sections 50 and 51, which grants such right to an individual whose name or likeness is used without consent for commercial advantage.³⁹

In opposition to the motion for injunctive relief and cross-motion to dismiss the complaint, Svenson claimed exclusive proprietary rights to the photographs.⁴⁰ Svenson asserted that the First Amendment's freedom of expression protected his artwork.⁴¹ Bolstering this claim was the extensive critical acclamation from the artistic community regarding Svenson's creative work.⁴² The artistic community likened Svenson's photographs to other famous "surveillance photography" that may have challenged an individual's privacy yet were viewed as creative expressive works.⁴³ Counsel for Svenson pointed out other renowned artists and photographers such as Andre Kertesz, Michael Wolf, and Cartier-Bresson who have similarly photographed individuals through windows, but whose actions have not been challenged.⁴⁴ According to the artistic community, Svenson's work was an intellectual and artistic masterpiece that compelled society to consider central issues such as the societal boundary lines that divide the public from the private through the use of his photographs.⁴⁵

³⁸ *Id.*

³⁹ See *supra* note 19 (The Fosters only sued Svenson individually; they did not sue the news stations or the websites that displayed the images.).

⁴⁰ Brief of Plaintiff at 17, *Foster v. Svenson*, 7 N.Y.S.3d 96 (App. Div. 1st Dep't 2005).

⁴¹ Brief of Defendant at 17, *Foster v. Svenson*, 7 N.Y.S.3d 96 (App. Div. 1st Dep't 2005).

⁴² Brian Boucher, ARNE SVENSON BASKS IN COURT VICTORY, (Aug. 16, 2013) <http://www.artinamericamagazine.com/news-features/news/arne-svenson-basks-in-court-victory/>.

⁴³ *Id.* See also Rena Silverman, ANDRE KERTESZ WATCHING FROM ABOVE, (May 4, 2015), <http://lens.blogs.nytimes.com/2015/05/04/andr-kertesz-watching-from-above> (explaining the career of the artist Andre Kertesz and his experience and success with surveillance photography).

⁴⁴ *Id.*

⁴⁵ See THE NEIGHBORS, <http://mcadenver.org/arnesvenson.php>, (last visited Mar. 4, 2017) ("Capturing the lives of his neighbors (their habits, activities, tastes) over the course of a year, Svenson also used the geometry of the buildings' windows as his frame, creating various tableaux of domestic life unfolding. Presenting over 20 photographs from this series, *The Neighbors*, this exhibition explores in depth the central issues raised by these enigmatic

The Supreme Court of New York County held that the New York and Federal constitutions granted Svenson the freedom to display his photographs and thus the New York Civil Rights Law Section 51 did not apply.⁴⁶ The court rejected the Fosters' application for a preliminary injunction and granted Svenson's motion to dismiss the complaint for failure to show a likelihood of success based on sections 50 and 51 of the New York Civil Rights Law.⁴⁷ The court considered whether Svenson's use of the photographs qualified as the kind of commercial appropriation that the statute prohibited, and found that the photographs served to promote artistic creation rather than commercial gain.⁴⁸ The court held that the First Amendment shields Svenson's photographs from the reach of New York Civil Rights Law sections 50 and 51.⁴⁹ The court stated, "Art is considered free speech ... visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to full First Amendment protection."⁵⁰

III. THE FIRST DEPARTMENT'S DECISION

On appeal, the Appellate Division for the First Department affirmed the decision of the New York County Supreme Court to grant Svenson's motion to dismiss the complaint.⁵¹ The Appellate Division analyzed the legislature's intent to protect the rights prescribed by the First Amendment.⁵² To preserve legislative intent, the court recognized two fundamental principles. First, the statute

works: voyeurism, the increasingly imperceptible boundaries between privacy and the public, and the ubiquity of the camera in our surveillance-obsessed world." *Id.*

⁴⁶ *Svenson*, 2013 WL 3989038 at *1 (2013).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Foster v. Svenson*, 7 N.Y.S.3d 96, 96 (App. Div. 1st Dep't 2015).

⁵² See *General Theory of the First Amendment*, *supra* note 18, at 894 ("The values sought by society in protecting the right to freedom of expression may be grouped into four broad categories. Maintenance of a system of free expression is necessary (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society." *Id.*

prevents the commercial exploitation of an individual's likeness.⁵³ Second, the court held that the statute does not apply to any form of information which is considered newsworthy.⁵⁴ Since public interest is deemed essential, the court granted extensive leeway in classifying newsworthy speech.⁵⁵ The court held that newsworthiness extends to social trends, consumer reports, and political activities.⁵⁶ The court concluded that newsworthiness also applies to modes of artistic expression because they serve to provide aesthetic value to society and thus deserve to be disseminated in light of societal interests.⁵⁷

However, the court noted that to grant an unconditional right to disseminate all forms of newsworthy speech would eliminate privacy laws altogether.⁵⁸ The court explored two limits of the newsworthy exception and described two tests to determine when the defendant's publication of a photograph should be classified as newsworthy speech: 1) the "advertisement in disguise" test; and 2) the "no relationship" test.⁵⁹ Therefore, if the court found Svenson's photographs fell within one of the two limitations, his claim of newsworthiness would fail.

The first limitation to the newsworthy exception is the "advertisement in disguise" test, which applies to an image used primarily for a commercial purpose. The test asks whether an advertisement is being disguised as a non-commercial publication or whether the fundamental function is a commercial purposes.⁶⁰ The court cited *Beverley v. Women's Med. Ctr.*, which held that the defendant could not claim the newsworthy and public concern exception to escape the reach of the statute when the plaintiff's photograph was used in a calendar that was strictly meant to be an advertisement to promote sales of such calendars.⁶¹ The images of the Foster children aided in promoting Svenson's work and in turn

⁵³ Svenson, 7 N.Y.S.3d at 96; see *General Theory of the First Amendment*, *supra* note 18.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Svenson, 7 N.Y.S.3d 96 (App. Div. 1st Dep't 2015).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ Svenson, 7 N.Y.S.3d at 96.

⁶⁰ *Id.*

⁶¹ See *Beverley v. Women's Med. Ctr.*, 587 N.E.2d 275, 278 (N.Y. 1991) (explaining that the image displayed in the calendar was mistakenly used for a commercial purpose and therefore was not incidental).

produced revenue. Generally, art is created to be offered for sale. However, the court did not apply this “advertisement in disguise” limitation. The court said that even though profit may have been derived from the sale of the images, such profit does not diminish the constitutional protections afforded to them under the First Amendment.⁶²

The second limitation of the newsworthy exception is the “no real relationship test.”⁶³ To demonstrate when to apply the test, the court cited *Murray v. New York Mag. Co.*, where the defendant used the plaintiff’s photograph to supplement his article regarding the sale of drugs to which the plaintiff had absolutely no connection.⁶⁴ The New York Court of Appeals in *Murray* set forth a test, which states that if there is no relationship between the publication and the accompanying photograph, then it is implied that the image’s only purpose is to encourage the sale of the publication. In the case of *The Neighbors*, the newsworthy exception to the statute does not apply.⁶⁵ Most pictures in *The Neighbors* exhibit are aesthetically pleasing and fit into the general theme of capturing unanticipated moments in human life.⁶⁶ Notwithstanding the fact that the Fosters had absolutely no real or personal relationship to *The Neighbors* exhibit, the court did not apply this limitation; rather, it applied the newsworthy and public concern exception.⁶⁷ The court rejected the Fosters’ allegations and declined to adopt either of the limitations to the newsworthy exception.⁶⁸

The court found that the photographs were artistic expressions in the form of artwork and therefore a public interest. The very function of the newsworthy and public concern exception is to afford First Amendment protection to works of art.⁶⁹ The court reasoned

⁶² *Svenson*, 7 N.Y.S.3d at 96.

⁶³ *Svenson*, 7 N.Y.S.3d at 96.

⁶⁴ 267 N.E.2d 256 (N.Y. 2010).

⁶⁵ *Id.*

⁶⁶ *Supra* note 45.

⁶⁷ *Svenson*, 7 N.Y.S.3d at 103 (“Similarly, when a court determines that there is no real relationship between the use of the plaintiff’s name or picture and the article it is used to illustrate, the defendant cannot use the newsworthy and public concern exception as a defense Applying the newsworthy and public concern exemption to the complaint herein, we conclude that the allegations do not sufficiently plead a cause of action under the statutory tort of invasion of privacy.”).

⁶⁸ *Id.*

⁶⁹ *Id.* at 100.

that the images themselves constitute a work of art, and the advertising and sale of the photographs were encouraged in this case.⁷⁰ However, the court also noted that no question was presented as to whether a particular photograph should be considered a work of art. Svenson's ability to sell photographs of the Fosters' likenesses and call them "art" is the fundamental issue in this case. For example, New York's Civil Rights Law expressly prohibits the *sale* of a person's image for the use of advertising or trade without his or her consent. But, the court stated, "part of the protection of free speech is the right to disseminate the 'speech,' and that includes selling it."⁷¹ This conclusion assumes that Svenson's photographs are in fact "art." However, consider the following: How close to the Fosters' home could Svenson place his camera before his photographs cross the fine line between "art" and "intrusion"? What if Svenson used a camera with night vision capability to capture images at night? These inquiries highlight the fact that the current law does not address rising privacy concerns. To resolve this issue, the court was obliged to rely heavily on legislative history and case law⁷² but ultimately observed that the case's specific facts prompt attention from the Legislature. The court stated:

To be sure, by our holding here—finding no viable cause of action for violation of the statutory right to privacy under these facts—we do not, in any way, mean to give short shrift to plaintiffs' concerns. Undoubtedly, like plaintiffs, many people would be rightfully offended by the intrusive manner in which the photographs were taken in this case. However, such complaints are best addressed to the Legislature the body empowered to remedy such inequities.⁷³

The current structure of New York's privacy law does not cover the issues that have arisen in the past few decades in the world of photography. The traditional rationale the legislature relied upon to enact the privacy law is strictly limited to unauthorized commercial use of a person's image. However, in *Foster v. Svenson*, the issue is

⁷⁰ *Id.*

⁷¹ *Svenson*, 7 N.Y.S.3d at 103 (quoting *Simeonov*, 602 N.Y.S.2d 1014 (Sup. Ct. 1993)).

⁷² *See supra* Part I (explaining the basis for the right of privacy).

⁷³ *Svenson*, 7 N.Y.S.3d at 106.

not the commercial use of the photographs but rather the way in which the photographs were taken. This course of action infringed upon the reasonable expectation of privacy within one's home. The photographs were advertised, sold for profit, and obtained without consent, yet the court found that Svenson's photographs were not used for "advertising purposes" or for the purposes of "trade" under the meaning of the statute.⁷⁴ The court mentioned the absence of legal authority regarding the holding. The court explained, "We are *constrained* to find that the invasion of privacy of one's home that took place here is not actionable . . . pursuant to sections 50 and 51 of the Civil Rights Law. . . [W]e are *constrained* to apply the law as it exists."⁷⁵ In other words, the court was *obliged, forced or compelled* to find that the "troubling facts" in *Foster v. Svenson* did not fall under the protection of New York's narrow statutory right of privacy.⁷⁶ The conduct in *Foster v. Svenson* raises both social and legal issues that should now be addressed by the New York courts or the legislature.

IV. THE FEDERAL APPROACH

The First Amendment of the United States Constitution states in pertinent part, "Congress shall make no law . . . abridging the freedom of speech, or of the press."⁷⁷ Federal courts have consistently favored granting broad First Amendment protection to preserve the essential liberty of a free nation.⁷⁸ The First Amendment grants the freedom of expression to advance knowledge of society and discover truth.⁷⁹ However, the directive to make no law "abridging the freedom of speech" is not absolute or without exceptions.⁸⁰ Federal courts engage in a balancing test to determine

⁷⁴ *Id.*

⁷⁵ *Svenson*, 7 N.Y.S.3d at 98 (emphasis added).

⁷⁶ *Id.* at 106 (emphasis added).

⁷⁷ U.S. CONST. amend. I. The New York State Constitution upholds with more specificity the same fundamental rights guaranteed in the Constitution of the United States. The New York State Constitution provides, "Every citizen may freely speak, write, and publish his or her sentiments on all subjects . . . and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. CONST., art. I § 8.

⁷⁸ See *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Hoepker v. Kruger*, 200 F. Supp. 2d 340 (S.D.N.Y. 2002).

⁷⁹ See *General Theory of the First Amendment*, *supra* note 18.

⁸⁰ 4 WILLIAM BLACKSTONE, COMMENTARIES, 151-52 (1765-1769).

the scope of the First Amendment by evaluating freedom of speech versus other compelling individual rights such as the right of privacy.⁸¹ According to the federal courts, art is considered protected speech because it conveys ideas and emotions by transcending the boundaries of language and culture.⁸² Art is a classic form of speech and a core value that is entitled to First Amendment protection.⁸³ The federal court has taken the position that “the First Amendment doctrine does not disfavor nontraditional media of expression,” like modern art, but “protects all forms of peaceful expression.”⁸⁴ Thus, if a photograph is deemed an artistic expression, it is entitled to the First Amendment’s protection.⁸⁵ However, this traditional legal precedent is called into question by our society when a photograph is considered an artistic expression and simultaneously an invasion of an individual’s reasonable expectation of privacy.

When a constitutional provision and a statute conflict, the court is obligated to exercise its judicial review.⁸⁶ In order for the New York privacy statute to limit the power of First Amendment rights, the court must interpret the statute under strict scrutiny and find that the limit is narrowly tailored to preserve a compelling state interest.⁸⁷ According to the federal courts, there is a compelling state interest to provide society with a reasonable expectation of privacy and unwanted intrusions within a person’s home.⁸⁸ However, federal courts have also held that newsworthy or public interest speech transcends statutory privacy rights.⁸⁹ The general rule is that the government should not restrict speech if it is related to suppression of free expression.⁹⁰ Therefore, when a photograph invades an

⁸¹ 5 TREATISE ON CONST. L. § 20.7 (b) (1) (2014).

⁸² *Id.*

⁸³ *Hoepker*, 200 F. Supp. 2d at 350.

⁸⁴ *Id.* at 352.

⁸⁵ *Id.*

⁸⁶ See generally *Marbury v. Madison*, 5 U.S. 137 (1803) (granting the Supreme Court the power of judicial review).

⁸⁷ 5 TREATISE ON CONST. L. § 16.1 (d) (2015).

⁸⁸ *Hoepker*, 200 F. Supp. 2d at 348.

⁸⁹ *Id.* “[P]ure first amendment speech in the form of artistic expression . . . deserves full protection, even against . . . statutorily-protected privacy interests.” *Id.*

⁹⁰ 5 TREATISE ON CONST. L. § 16.1 (d) (“The general rule is that the government may restrict speech if it meets a four part test: (1) if it is within the constitutional power of the Government; (2) if it furthers an important or substantial government interest; (3) if the governmental interest is unrelated to the suppression of free expression; and (4) if the

individual's reasonable expectation of privacy, the federal courts will favor the freedom of expression.⁹¹ The federal courts have mentioned three compelling state interests, which weigh heavily in favor of the freedom of expression that is granted by the First Amendment.⁹²

One compelling interest which justifies the broad freedom of expression is the circulation of news and information. The United States Supreme Court, in *Cox Broadcasting Corp. v. Cohn*, represents the majority's interpretation of the First Amendment that individual privacy fades when publicly known information is reported as news.⁹³ The Court in *Cox* held that the press is free to disseminate public information that is already part of the public domain.

In *Cox Broadcasting Corp.*, defendant Wassell was employed as a news reporter whose sole function was to investigate newsworthy events and subsequently televise them.⁹⁴ The rape and murder of seventeen-year-old Cynthia Cohn was the topic of his next report.⁹⁵ In order to gain information for the news report, Wassell personally attended the criminal trial.⁹⁶ During the court recess, Wassell approached the court clerk and requested a copy of the murder and rape indictments that listed the name and identity of the victim.⁹⁷ The court did not dispute that this information gathered was public knowledge.⁹⁸ However, Mr. Cohn, the victim's father, filed this action when he learned the local television station had released personal information including the name of his daughter and the details of the incident.⁹⁹ The father was appalled to find that the

incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”).

⁹¹ *Id.*

⁹² See *supra* section IV for a full discussion of federal compelling state interests.

⁹³ *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975).

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Cox Broadcasting*, 420 U.S. at 469.

⁹⁹ *Id.* The televised report stated, “Six youths went on trial today for the murder-rape of a teenaged girl. ‘The six Sandy Springs High School boys were charged with murder and rape in the death of seventeen-year-old Cynthia Cohn following a drinking party last August 18th. The tragic death of the high school girl shocked the entire Sandy Springs community. Today the six boys had their day in court.’” *Id.* at 475.

name of his daughter was released to the public via a local station and that he knew many of the viewers.

The procedural history of the *Cox* case emphasizes the two opposing arguments regarding the specific issue of protecting information that is already public. In the trial court, the broadcasting company argued that the broadcast should be protected under the First Amendment's freedom of speech.¹⁰⁰ The court rejected the argument and granted summary judgment in favor of the father based on a criminal statute.¹⁰¹ On appeal, the Georgia Supreme Court agreed with the trial court's holding that the First Amendment did not automatically protect the defendant because "the rights guaranteed by the First Amendment do not totally abrogate the right of privacy."¹⁰² The court found that the trial court erred in applying the criminal statute to a civil case, and instead found that the relevant cause of action was invasion of privacy: the tort of public disclosure.¹⁰³ The court also found that summary judgment was improper because a question of fact remained as to whether the publication actually invaded the father's "zone of privacy."¹⁰⁴ Thus, on the motion for rehearing before the Georgia Supreme Court to determine the privacy issue, the broadcasting company asserted the newsworthy exception, but the court denied it.¹⁰⁵ As a matter of policy, the court relied on the statute as an authoritative declaration that the name of a rape victim is not a matter of public interest even though it was public knowledge at the court proceedings.¹⁰⁶ The court balanced the government's interest of protecting a father's invasion of privacy against protecting the freedom of speech. The Georgia Supreme Court found in favor of the father's right of privacy and held that the statute was a limitation of the freedom of speech.¹⁰⁷ This reasoning supports the position that despite the public nature of the photographs, the Fosters should be protected by the privacy statute as a matter of public policy. Nevertheless, the United States Supreme

¹⁰⁰ *Cox Broadcasting*, 420 U.S. at 469.

¹⁰¹ *Id.*

¹⁰² *Id.* at 475 (citing *Briscoe v. Reader's Digest*, 4 Cal. 3d 529, 541 (1971)).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Cox Broadcasting*, 420 U.S. at 469.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

Court reversed the decision in *Cox*.¹⁰⁸ The Court reasoned that the facts in *Cox* did not permit the state to protect the father's right of privacy.¹⁰⁹ The Court conceded "there is a zone of privacy surrounding every individual . . . where the state may protect him from intrusion by the press."¹¹⁰ This zone of privacy should prevail when the press oversteps its rights by publishing private information.¹¹¹ In such situations, the Court stated there should be a remedy for such alleged abuses.¹¹² However, the Court concluded that the facts in *Cox* did not merit the protection since the information was a matter of public record.¹¹³ Similarly, it can be argued that the Fosters' zone of privacy within their home was relinquished when they opened the blinds, which subjected them to the intrusion of the press.

This discussion begs for answers to the fundamental questions regarding the Fosters' right of privacy--Why did the Fosters fail to shut their blinds if they did not want the public gazing inside the windows of their apartment? Similar to the information in *Cox* that was already public knowledge, the opened blinds subjected the Fosters to neighboring eyes of the public. Further, did the Fosters waive their expectation of privacy by keeping their blinds open? Even if the Fosters assumed the public could gaze inside their apartment windows, did they expect anyone would be taking pictures of their children getting dressed? Even if people could reasonably gaze into an apartment, people would generally not expect that their image would be captured. Was this degree of intrusion reasonable? Moreover, did the Fosters expect anyone to share those pictures with the public? The Restatement (First) of Torts states that in a privacy action, liability is measured by the defendant's conduct and whether he should have realized that his conduct would be offensive to persons of ordinary sensibilities.¹¹⁴ It is only where the defendant's intrusion has gone beyond the limits of decency that liability accrues.¹¹⁵ Since the Fosters kept their blinds open, they left

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Cox Broadcasting*, 420 U.S. at 487.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ RESTATEMENT (FIRST) OF TORTS § 867 (1939).

¹¹⁵ 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 207 (2012).

themselves open to the possibility of someone looking in from the outside. However, very few New York City residents would reasonably expect that a camera lens is capable of capturing the subjects inside the window of a four-story apartment building.¹¹⁶ The reasonable expectation of privacy should not disappear simply because the fourth-story window is open. It would be an improper extension of this argument to conclude that the Fosters subjected themselves to having their picture taken and published to the public. The Fosters expected that no one would take their photo even if the blinds were open. Nevertheless, even if we concede that Svenson rightfully obtained the photographs since the Fosters' blinds were open, the question then becomes -- Was what Svenson proceeded to do with the photographs permitted under the law?

The federal courts' general position is the following: if the information that is being published gives further publicity to information that is already part of the public domain, the court will not impose liability.¹¹⁷ Further, the Court in *Cox* emphasized the government's responsibility to provide society with informative news coverage of matters regarding legitimate public concerns and found that the facts presented fell within the public's concern.¹¹⁸ Therefore, federal courts encourage the spread of information, news, and media that are already public knowledge.¹¹⁹ Whether Svenson's images of the Fosters represent information that was already part of the public domain is one question that does not seem to have a clear answer.

The Supreme Court's ruling in *Cox* which granted First Amendment protection is distinguishable from the holding in *Zacchini v. Scripps-Howard*, which did not grant First Amendment protection.¹²⁰ Two years after *Cox*, the United States Supreme Court in the seminal case, *Zacchini*, revisited the issue in *Cox* and held that the protection of an individual's privacy from intrusion of the press is

¹¹⁶ Complaint at 3 (The Fosters live on the fourth floor of a modern building composed of glass walls located in Tribeca. Svenson lives in a second-floor loft located across the street.).

¹¹⁷ See *infra* Part V.

¹¹⁸ *Cox Broadcasting*, 420 U.S. at 494.

¹¹⁹ *Id.*

¹²⁰ 433 U.S. 562, 578 (1977); Compare *Cox Broadcasting*, 420 U.S. 494, with *Zacchini*, 422 U.S. at 574.

itself a compelling state interest.¹²¹ The right of privacy includes the right to prohibit a person from using an individual's name or likeness for commercial gain, known as the right of publicity. The benefit from the use of a person's proprietary interest in his or her own image may be given with consent.¹²² However, in *Zacchini*, the plaintiff did not grant that consent. Therefore, plaintiff brought an action against the broadcasting company for violating his right of publicity by recording and airing the entire performance of a human cannon ball stunt on television.¹²³ Although the plaintiff did not want his stunt to be aired to the public, the broadcasting company recorded and aired the entire performance.¹²⁴ The performance held personal value to the plaintiff because it reflected his hard work and was to remain only within the family.¹²⁵ By airing the entire performance on television, the broadcasting company reduced the incentive for viewers to watch the plaintiff's act live and thus inhibited the plaintiff's ability to earn his livelihood. The trial court granted the broadcaster's summary judgment motion.¹²⁶ On appeal, the Ohio Court of Appeals reversed the decision in favor of the plaintiff's right to protect his performance from being shown on the air.¹²⁷ Subsequently, the Ohio Supreme Court reversed on First Amendment grounds.¹²⁸ The court found that "entertainment, as well as news, enjoys First Amendment protection" and neither the public nor the plaintiff will be deprived of this benefit so long as the plaintiff receives adequate compensation.

The United States Supreme Court granted certiorari to decide whether the First Amendment diluted the right of publicity when the speech concerns matters of public interest.¹²⁹ Balancing the

¹²¹ *Zacchini*, 433 U.S. 562, 578 (1977). ("There is no doubt that entertainment, as well as news, enjoys First Amendment protection."); *See also* *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) ("The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform.").

¹²² *Id.*

¹²³ *Zacchini*, 422 U.S. at 567.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Zacchini*, 422 U.S. at 567. *Zacchini* deals specifically with the tort of the right of publicity, which is one of the four branches within the right of privacy. *Zacchini*, 422 U.S. at 2855.

¹²⁹ *Id.*

government's dual interests, the Court in *Zacchini* held the scale tipped in favor of the right of publicity. The Court did not dispute that the First Amendment granted wide-ranging permission to report on matters of public interest that may in turn invade a person's realm of personal privacy.¹³⁰ However, the Court's holding was based on the policy behind the right of privacy, which is closely analogous to the goals of patent and copyright law.¹³¹ In cases of entertainers, there is usually no objection to the broadcasting of a performance so long as the entertainer is compensated.¹³² The policy behind the right of publicity according to the Court has little to do with protecting feelings or reputation, but is more concerned with protecting a proprietary interest of the individual and rewarding him for his endeavors.¹³³ The Court stated, "We are quite sure that the First Amendment . . . do[es] not immunize the media when they broadcast a performer's entire act without his consent."¹³⁴

Similar to the reporter in *Zacchini*, Svenson displayed the Fosters' images in several museums, which in turn furthered his career, and resulted in increased attention from the media and certainly compensation. Furthermore, the Fosters were not paid to be subjects of The Neighbors exhibit. When one party is enriched based on a detriment to the other party, the court generally finds unjust enrichment. The Court pronounced that the First Amendment does not protect deceitful or egregious conduct used to achieve a personal goal and it can be argued that Svenson's conduct was deceitful.¹³⁵ In a situation when one party is unjustly enriched due to an invasion of privacy, federal courts are more willing to find in favor of an individual's right to privacy.¹³⁶ The question becomes whether Svenson was unjustly enriched through the use of the Fosters' images. Similar to the plaintiff in *Zacchini*, the Fosters did not consent to the use of their children's images. Furthermore, it can be argued that Svenson was unjustly enriched and benefited from the use of the Fosters' photographs. The law as it exists protects individuals

¹³⁰ *Id.* at 567.

¹³¹ *Id.* at 576-78. The goals of patent and copyright law are to avoid unjust enrichment by recognizing the reward to the owner. *Id.*

¹³² *Id.* at 573.

¹³³ *Id.*

¹³⁴ *Zacchini*, 422 U.S. at 574-76.

¹³⁵ *Zacchini*, 422 U.S. at 574.

¹³⁶ *Id.*

from being unjustly enriched. However, this remedy would not solve the problem in *Foster v. Svenson*. If the Fosters wanted compensation for the use of their image, the court could have awarded damages based on the right of publicity.¹³⁷ The right of publicity grants a public figure compensation when his or her name, likeness, or image is used for a commercial purpose to sell or endorse a product.¹³⁸ However, the Foster family was not looking for compensation nor did they give consent to use their images. Instead, the Fosters wanted protection within their home and freedom from the intrusion of the press.

In *Titan Sports, Inc. v. Comics World Corp.*, the United States Court of Appeals for the Second Circuit stated that First Amendment protection is not granted to a publication that is used for purpose of trade.¹³⁹ Were Svenson's photographs obtained solely to promote his exhibit and the sale of his work? The Fosters claimed that the photographs were used for the "purpose of trade" and therefore were not entitled to First Amendment freedom of expression.

In *Titan Sports*, the court set forth the "incidental use" test to determine if a publication was considered used for the purpose of trade according to the statute.¹⁴⁰ World Wrestling Federation, also known as Titan Sports, Inc. ("Titan"), owned all publicity rights concerning the wrestlers' likenesses.¹⁴¹ Titan sold licenses to third parties that wished to make products that bore the wrestlers' names and likenesses.¹⁴² The suit was brought against the publishing company for publication of a magazine, which included full size posters of the wrestlers without their consent or without obtaining a license from Titan.¹⁴³ The United States District Court for the

¹³⁷ *Id.* at 573.

¹³⁸ *White v. Samsung*, 971 F.2d 1395 (9th Cir. 1992).

¹³⁹ *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85 (2d Cir. 1989). Titan agreed that the photographs were used for *advertising purposes*; the issue was whether they were used for the "*purpose of trade*." *Id.* The *Titan* court said, "The fact-finder should consider a variety of factors to determine the purpose of trade, including but not limited to the nature of the item, the extent of its relationship to the traditional content of a magazine, the ease with which it may be detached from the magazine, whether it is suitable for use as a separate product once detached, and how the publisher markets the item." *Id.*

¹⁴⁰ *Id.* at 87-89.

¹⁴¹ *Id.* at 87.

¹⁴² *Id.*

¹⁴³ *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85 (2d Cir. 1989). "The disputed photographs are printed in full color on pages four times as large as the pages comprising the

Southern District of New York granted summary judgment for the publisher on the basis that the magazine is a newsstand publication and therefore the magazine together with the posters stapled within the magazine are entitled to full First Amendment protection.¹⁴⁴ In contrast, the Court of Appeals found that there was an issue of fact as to whether these posters were used for the purpose of trade.¹⁴⁵ The issue before the court in *Titan Sports* was whether the posters displaying the wrestlers' images were entitled to First Amendment protection because of their placement in a magazine, or instead, not entitled to First Amendment protection because they were used solely to promote the sale of the magazine. The court distinguished between classic public interest as displayed in *Cox*, and public interest that is "merely incidental to its commercial use" and therefore not protected by the First Amendment.¹⁴⁶ Unlike *Cox*, incidental commercial use exists when there is an insignificant public interest aspect of the publication but the primary function is commercial.¹⁴⁷ In this instance it seems the court agreed that the publication should not enjoy First Amendment protection because the posters' placement within the magazine was seen as a mere avenue to promote Comics World sales.¹⁴⁸ The Second Circuit stated, "[C]ourts have recognized that presentation of an item *within* a publication generally entitled to First Amendment protection may constitute a use for purposes of trade, which is not entitled to First Amendment protection."¹⁴⁹ Since there was a question of fact as to the purpose of the posters, the court reversed the summary judgment and remanded the case to the district court noting, "[I]t seems clear that photographs marketed as posters are used for the purposes of trade" in which case they will not be protected by the First Amendment.¹⁵⁰

balance of the Comic World publications. Up to ten of these photographs are folded and stapled into the center of each publication so that they may not be viewed in their entirety unless unstapled and removed. The blurb '10 FULL COLOR WRESTLING POSTERS! HUGE SIZE!' or some variation of this theme appears on the cover of Comics World's publication." *Id.*

¹⁴⁴ *Titan Sports, Inc.* 870 F.2d at 85.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Titan Sports, Inc.* 870 F.2d at 85.

¹⁵⁰ *Id.* at 88. The court did not discuss how the photographs were taken. *Id.*

Do the actual photographs of the Foster children have any significant public interest aspect? There are certainly arguments for both sides of this query. On one hand, the exhibit itself creates a commercial interest in the Foster children by depicting them in a manner which speaks to social norms and artistic meaning. In *Titan Sports*, there was a question of fact as to whether the photographs of Titan wrestlers had a commercial interest because they were used to encourage the sale of a magazine.¹⁵¹ The photographs of the Titan Wrestlers were placed in a magazine for sale and the photographs of the Foster children were placed in an art exhibit for sale. The difference between Svenson's use and Titan Sports' use of the photographs is minor—both commercial. However, once the photographs are deemed “artwork,” the public interest increases and the commercial interest decreases. For example, before the creation of the exhibit, the Foster children had little commercial interest as they were not public figures or personalities. Svenson's exhibit in effect created a public interest in the images.

Is classifying the individual photographs “art” incidental to the underlying purpose--to promote the commercial sale of the name and likeness of the Fosters? The court in *Foster* said no, and did not apply the incidental use test adopted by the federal courts. If the court did apply the incidental use test, the court would have found the images to be merely an avenue to produce sales for Svenson and thus deem the photographs a commercial use prohibited by the statute. Instead, the court in *Foster* held that Svenson's photographs were considered works of art, and any advertising in connection with the photographs was permissible. Counsel for the Fosters argued that the images were exploited to both advertise the photograph collection and the retail outlets exhibiting them. The court found that the primary purpose of Svenson's photographs was to promote creativity and any profit that subsequently resulted was ancillary to the main function of the artwork. While this is true, this determination does not resolve the issue which is whether an artist may use another person's image and classify it as art when that image was obtained in an intrusive manner. The current rubric of the New York Civil Rights Law is outdated because it only addresses issues regarding the commercial use of an image. The focus should not be solely on

¹⁵¹ *Id.*

whether Svenson's photographs were used for the purpose of trade or advertising but should include whether the photographs violated a reasonable expectation of privacy and whether the photographs were obtained in a manner that intruded on an individual's reasonable expectation of privacy. The current New York statute only covers the unauthorized use of an individual's image for a commercial purpose. Here, defendant made an unauthorized use of an individual's image obtained in a manner which should be deemed unlawful.

A. The Federal Approach Applied to *Foster*

Similar to the magazine in *Titan Sports*, which enjoyed First Amendment protection, Svenson's exhibit entitled "The Neighbors" is artwork, which generally enjoys the fundamental protection of the First Amendment. If the court in *Foster* were to apply the incidental use test, the question becomes: Should the actual photographs captured by Svenson's camera be protected by the freedom of expression because they are assembled together in an exhibit titled "the Neighbors" and called "artwork"? What if an accountant rather than an artist took and sold the photographs? Would those photographs still be considered art?

The federal approach recognizes that the publication of people's images can be "characterized as having several possible purposes—they may inform the public [as in *Cox*], they may entertain [as in *Zacchini*], or they may be designed to sell a product, and thus be essentially commercial in nature [as in *Titan Sports*]."¹⁵² If the publication is "essentially commercial in nature" the federal courts will not grant First Amendment protection.¹⁵³ However, the court in *Foster* rejected the latter two purposes exemplified in *Zacchini* and *Titan Sports*. The court refused to find that the photographs were used for a commercial purpose and rejected the idea that Svenson was unjustly enriched.¹⁵⁴ Thus, similar to the result in *Cox*, the court held that the First Amendment extends to Svenson's artwork since it was viewed as a publication meant to inform the public.¹⁵⁵ In other words, the First Amendment's protections trump

¹⁵² *Supra* note 120.

¹⁵³ *Titan Sports, Inc.* 870 F.2d at 85.

¹⁵⁴ *Foster v. Svenson*, 7 N.Y.S.3d 96, 96 (App. Div. 1st Dep't 2015).

¹⁵⁵ *Id.*

an individual's right of privacy. If the court in *Svenson* were to adopt the federal approach in *Titan Sports* that the photographs were merely incidental to the commercial use of the Fosters' images, First Amendment protection would not apply. However, the court held that the money made from selling artwork is not considered a commercial use and stated that "[t]he value of artistic expression outweighs any sale that stems from the published photos."¹⁵⁶

It can be argued that the way in which the Fosters' photographs were obtained separates them from the classic type of artwork. The method in which the photographs were taken is what disturbed the Fosters.¹⁵⁷ *Svenson* is not the only artist who has produced surveillance photography. Artist Michele Iversen created a series of photographs called *Night Surveillance*.¹⁵⁸ She stated:

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

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

¹⁵⁶ *Id.* at 104.

¹⁵⁷ Complaint at 17.

¹⁵⁸ *Night Surveillance Series*, MICHELE IVERSON, <http://micheleiversen.com/nsseries.html> (last visited Mar. 29, 2017).

compelled to make these images and to expose the voyeuristic tendencies inherent in human culture.¹⁵⁹

It is not unreasonable to conclude that Svenson's and Iversen's surveillance would offend most people. It is clear why Judge Rakower called upon the New York legislature to revisit this issue. Surveillance photography reveals intimate moments which may intrude on an individual's realm of privacy. The court in *Foster* stated that while Svenson's actions are indeed considered an intrusion into the home, they do not rise to the level of "atrocious, indecent and utterly despicable" and concluded there is no viable cause of action for invasion of privacy.¹⁶⁰

Another issue presented by *Foster v. Svenson* is the status of surveillance photography as art. Surveillance photography is not an original work of art created on a canvas with paint. Instead, it is merely a snapshot of a moment in time. Under the copyright laws a minimal degree of creativity is required to secure copyright protection.¹⁶¹ Similar to the copyright law, the right of publicity is based on the doctrine of fair use. Simply stated, the doctrine of fair use allows individuals to use materials that are protected by copyright if that use is transformative and does not negatively affect the market for the original work.¹⁶² In the case of *Foster v. Svenson*, would there be more or less artistic originality if instead Svenson painted the Foster children in a lifelike manner? Is there more creative skill involved in a painting than taking a photograph? While many photographs are considered art, the question becomes how much originality is required before the photograph evolves from "stalking" to "artwork"? The courts, however, have refused to define what is considered art.¹⁶³

Nevertheless, the right of publicity is an intellectual property right of every human being to control the commercial use of his or her identity.¹⁶⁴ In New York, the photograph at issue in *Foster* contains a type of property right--the Foster children's image and likeness which the right of publicity should protect. In an attempt to

¹⁵⁹ *Id.*

¹⁶⁰ *Foster v. Svenson*, 7 N.Y.S.3d 96, 105 (App. Div. 1st Dep't 2015).

¹⁶¹ 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 207 (2012).

¹⁶² *Appropriated Moments*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 103 (2015).

¹⁶³ *Foster v. Svenson*, 7 N.Y.S.3d 96, 96 (App. Div. 1st Dep't 2015).

¹⁶⁴ *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003).

reconcile the dubious gaps in privacy law, one may argue that the photographs should be considered used for a commercial purpose because they incorporate not just artistic creation, but the subjects' property, their right of publicity. If the Foster children wanted to claim that their right of publicity was violated they would also have to prove that they, and therefore Svenson, had commercial value in their image and likeness. Ironically, a New York federal court was the first to acknowledge an individual's right of publicity.¹⁶⁵ However the only right of publicity accepted by the New York courts is encompassed within New York's Civil Rights Law.

V. NEW YORK'S RIGHT OF PRIVACY STATUTE

New York's right of privacy is set forth in New York Civil Rights Law sections 50 and 51, which prohibit the unauthorized and commercial use of a person's likeness.¹⁶⁶ Penal in nature, section 50 provides that it is a misdemeanor, whereas section 51 provides injunctive relief for a violation of the statute.¹⁶⁷ However, New York's statutory right of privacy is not absolute.¹⁶⁸ In order to maintain a balance between the right of privacy and the New York Constitution, the legislature engrafted exceptions within the language of the statute.¹⁶⁹ New York courts adopt a narrow meaning of the terms "advertising and trade."¹⁷⁰ This narrow interpretation essentially decreases the scope of protection afforded by the statute.¹⁷¹ Similar to the federal approach, the New York Court of Appeals adopted the newsworthy exception and applied it liberally.¹⁷²

¹⁶⁵ *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953); Leonard M. Marks & Robert P. Mulvey, *Celebrity Rights Law Needed in New York* 4, N.Y. L.J. (Nov. 6, 1995) (stating that in *Haelan*, the federal courts of New York were the first to recognize an independent common law right protecting plaintiffs' economic interests).

¹⁶⁶ *See supra* note 7.

¹⁶⁷ *See supra* note 7.

¹⁶⁸ *Gautier v. Pro-Football*, 304 N.Y. 354, 360 (N.Y. 1952).

¹⁶⁹ *Jaime Messenger v. Gruner + Jahr Printing*, 727 N.E.2d 550 (N.Y. 2000) ("A Civil Rights Law claim may lie [only] if (1) a plaintiff's picture is used purely for trade purposes, and (2) not in connection with a newsworthy article."). *Id.* at 550.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See supra* Part III for a discussion on the two limitations to the newsworthy exception; *see also* *Finger v. Omni*, 77 N.E.2d 141 (N.Y. 1990) (explaining that questions of 'newsworthiness' are better left to reasonable editorial judgment and discretion; judicial

Therefore, even though New York grants a so-called statutory right of privacy, the courts apply the statute only in limited circumstances to promote legislative intent.

The New York legislature enacted sections 50 and 51 in response to the decision in *Roberson v. Rochester*.¹⁷³ The defendant, a company in the business of manufacturing and selling white flour, created and circulated 25,000 lithographic prints of the plaintiff's likeness for the purpose of profit and personal gain.¹⁷⁴ The prints showed the plaintiff's face, together with the company's name, manufacturer, and logo.¹⁷⁵ The advertisement was displayed in stores, warehouses, and public places specifically in the area where the plaintiff resided, as well as in other areas of the United States and abroad.¹⁷⁶ The plaintiff sustained humiliation and shock from the public display of her image.¹⁷⁷ The Court of Appeals of New York held the right of privacy is a non-actionable right because it is "purely sentimental" in character.¹⁷⁸ As a result, defendant's flour company was unjustly enriched by the unauthorized use of the plaintiff's photograph.¹⁷⁹ The unfairness of the decision prompted an outcry from the public over the unauthorized use of plaintiff's photograph and emphasized the need for the authority to afford protection for an individual's privacy.¹⁸⁰

In the *Foster* decision, the court asked the legislative body to consider the creation of a statute that would prohibit the use of a person's image without his or her consent solely for the furtherance of his own personal benefit.¹⁸¹ The New York State legislature was the first to recognize a statutory right of privacy founded on the belief

intervention should occur only in those instances where there is 'no real relationship' between a photograph and an article or where the article is an 'advertisement in disguise.').

¹⁷³ 64 N.E. 442 (N.Y. 1902).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Roberson*, 64 N.E.2d at 544 (The Court of Appeals of New York was hesitant that if a plaintiff had a right of privacy to his own likeness, there would be a vast amount of "absurd" litigation.). *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* "Needless to say, as illustrated by the troubling facts here, in these times of heightened threats to privacy posed by new and ever more invasive technologies, we call upon the Legislature to revisit this important issue, as we are constrained to apply the law as it exists." *Foster v. Svenson*, 7 N.Y.S.3d 96, 106 (App. Div. 1st Dep't 2015).

that “a man has a right to pass through the world without having his picture published.”¹⁸² In 1903, the New York legislature enacted sections 50 and 51 of the New York Civil Rights Law to rectify the negative result in *Roberson*.¹⁸³ The privacy statute was drafted to apply specifically in situations similar to *Roberson*, which concern only the commercial use of a photograph.¹⁸⁴

A. The New York Approach

It is well established that when a publication causes tension between privacy and free speech, New York’s privacy statute asks whether the specific publication falls in either the category of “advertising or trade” or in the “newsworthy exception.”¹⁸⁵ As exemplified in the cases discussed below, these categories are ambiguous and have resulted in different interpretations. However, the common consensus of New York courts has been to limit granting protection under sections 50 and 51.

In *Arrington v. New York Times*, the court determined the meaning of “trade” proscribed by the statute.¹⁸⁶ The *Arrington* test ignores the motive for creating the work, and instead focuses on the underlying nature of the work itself.¹⁸⁷ If the nature of the work itself is newsworthy, then it is not considered used “for the purpose of trade.”¹⁸⁸ Since the enactment of the privacy statute in 1903, courts have held that the fact that a publication is produced for profit or even that a picture is included in the publication for the sole purpose of increasing profit, does not constitute a “use for trade.”¹⁸⁹ Further, the statute does not define the term “advertising,” but the court in *Flores v. Monler* stated that advertising has been understood to mean “a use in, or as part of, an advertisement or solicitation for

¹⁸² Supra note 76; see also *Right to Privacy*, supra note 2, at 195.

¹⁸³ See supra note 76 at 908.

¹⁸⁴ *Arrington v. New York Times Co.*, 434 N.E.2d 1319, 1321 (N.Y. 1982) (“It is noteworthy, therefore, that, while concern engendered by this decision prompted the Legislature to enact sections 50 and 51, these were drafted narrowly to encompass only the commercial use of an individual’s name or likeness and no more.”).

¹⁸⁵ See supra Part V.

¹⁸⁶ *Arrington v. New York Times*, 434 N.E.2d 1319, 1329 (N.Y. 1982).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Stephano*, 474 N.E.2d at 580; *Gautier v. Pro-Football*, 304 N.E.2d at 359; *Arrington v. New York Times*, 434 N.E.2d at 1329.

patronage.”¹⁹⁰ As exemplified in this Note, the precise meaning of these terms caused uncertainty in the case of *Foster v. Svenson*.

In 1984, the New York Court of Appeals in *Stephano v. News Group* explained that any publication concerning a matter of public interest cannot be considered used for the purpose of trade or advertising.¹⁹¹ In *Stephano*, a professional model sued a publishing company for displaying an image of her modeling a bomber jacket in a magazine without her consent.¹⁹² The image was displayed alongside an article in New York magazine with information about new products available in the area and described the bomber jacket as a “cotton-twill version with ‘fun fur’ collar features the same cut at a far lower price—about \$225. It’ll be available in the stores next week.”¹⁹³

The New York County Supreme Court granted judgment for the defendant reasoning that the article informed the public about the fashion industry, and therefore the newsworthy exception applied.¹⁹⁴ The Appellate Division of the First Department disagreed with the lower court’s reasoning and reversed in favor of the model.¹⁹⁵ The First Department said that any rational person would conclude that the publishing company used the image for the purpose of advertising its product.¹⁹⁶

However, the New York Court of Appeals disagreed with the First Department and found that the statute should not only apply to matters of public concern, such as political news and social trends, but also to articles that offer information to consumers.¹⁹⁷ In *Stephano*, the court held that the plaintiff’s photograph was a public interest protected by the newsworthy exception because the model’s image was used to convey the availability of a new clothing item.¹⁹⁸

Regardless of the existence of advertising and trade in *Stephano*, due to the use of a model’s image in order to display the

¹⁹⁰ *Flores v. Monler*, 7 N.Y.2d 276 (1959).

¹⁹¹ *Stephano v. News Group Inc.*, 474 N.E.2d 580 (N.Y. 1984).

¹⁹² *Id.* at 581.

¹⁹³ *Id.* at 582.

¹⁹⁴ *Id.* at 585-87.

¹⁹⁵ *Stephano*, 474 N.E.2d at 580. The First Department decided *Foster v. Svenson* in the contrary. See discussion *supra* Part III.

¹⁹⁶ *Id.*

¹⁹⁷ *Stephano*, 474 N.E.2d at 580.

¹⁹⁸ *Id.*

clothing to consumers, the court reasoned that the fashion industry is a mode of public interest.¹⁹⁹ In other words, a consumer would consider the image an advertisement. It is inherent in the nature of a publication that it produces profit, but such motive is not the determining factor in deciding newsworthiness. Instead, it is the content of the article itself that is considered newsworthy.²⁰⁰ The Court of Appeals' holding in *Stephano* illustrates the broad application of the newsworthy exception, finding that it applies not only to classic news reports such as political happenings and social trends, but also to fashion articles aimed towards interested and paying consumers.²⁰¹ This decision applies the newsworthy exception broadly to include even articles of consumer interests including developments in the fashion world.²⁰²

B. The New York Approach Applied to Artwork

The issue of whether the statute should exempt an artistic expression would be an issue of first impression for the New York Court of Appeals. However, some lower court decisions demonstrate that an artistic expression falls outside the confines of the statute²⁰³ and have facilitated the distinction between privacy law and artistic expression.

In 1993, the Civil Court of New York in *Simeonov v. Tiegs* held that an artist could portray a person's likeness without written consent and sell some limited number without violating the statute.²⁰⁴ An Appellate Term, First Department order left open the question of whether the defendant's actions constituted "trade" and were therefore prohibited by the statute.²⁰⁵ The suit arose out of a dispute between an artist and his model. Artist Mihail Simeonov created a

¹⁹⁹ *Stephano*, 474 N.E.2d at 580.

²⁰⁰ *Id.*

²⁰¹ See *Finger*, 77 N.Y.2d at 143 (explaining that classic news is not the only type of speech protected by the newsworthy exception); see also *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 578 (1977) (stating that "[t]here is no doubt that entertainment, as well as news, enjoys First Amendment protection.").

²⁰² *Stephano*, 474 N.E.2d at 580.

²⁰³ *Altbach v. Kulon*, 754 N.Y.S.2d 709 (App. Div. 3d Dep't 2003); *Nusseenzweig v. Dicorcia*, 832 N.Y.S.2d 510 (App. Div. 1st Dep't 2007); *Simeonov v. Tiegs*, 602 N.Y.S.2d 1014 (Sup. Ct. 1993).

²⁰⁴ *Simeonov v. Tiegs*, 602 N.Y.S.2d at 1014.

²⁰⁵ *Id.*

plaster casting of the head of a fashion model Cheryl Tiegs. Although Simeonov had Tiegs' consent to create the plaster castings of her head, he did not have consent to produce a modified cast created from the original cast. Simeonov intended to make ten bronze copies of the mask and sell them for \$20,000 each.²⁰⁶ However, he never got the chance to do so because a maintenance worker accidentally broke the mask beyond repair.²⁰⁷ Simeonov sued Tiegs to recover the money he intended to make from the masks. Tiegs claimed as a defense that Simeonov never had permission to make the modified casts and argued that Simeonov's creation of the plaster mask violated New York's Civil Rights statute because he used her image without her consent for the purpose of trade or advertising.²⁰⁸ Tiegs alleged that Simeonov's reproduction of her likeness harmed her because she did not want her image circulated. The court held that an artist can create a work of art that includes a person's likeness and sell a limited number of copies without consent and without violating the New York Civil Rights statute.

The court reasoned that by their very nature, works of art are created for the purpose of human expression, not for purpose of trade, and asked why can only a limited amount be sold?²⁰⁹ The fact that profit is subsequently derived is not a determination of commercial use.²¹⁰ If the nature of the work is considered a matter of public interest as in *Stephano*, the Court of Appeals of New York has consistently held that the statute does not apply because the work is not being produced for advertising or trade, as long as only a limited number of copies is sold. This raises the question --where should the court draw the line on that limitation? The fact that there is no direct answer to this question is one reason why New York Civil Rights Law should be amended. *Simeonov* correctly applied the rule of law stated in *Stephano*—the motivation to raise profit is not the only factor in the determination of whether a work was used for trade; it is the content and the limited amount sold that counts.²¹¹

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Simeonov v. Tiegs*, 602 N.Y.S.2d at 1014.

²¹⁰ *Id.*

²¹¹ *Id.* at 1018.

Ten years after *Simeonov*, the Third Department of the New York State Supreme Court Appellate Division provided clarification in *Altbach v. Kulon* and held that if a painting constitutes a parody, it is considered an artistic expression exempt from the statute.²¹² In *Altbach*, an artist created an oil painting depicting a caricature of a local Town Justice with devil's horns.²¹³ When the Town Justice sued, the Supreme Court granted an injunction prohibiting the artist from displaying the image. Subsequently, the Supreme Court imposed a \$3,850 fine for the violation of the injunction when a newspaper featured a photograph of the artist holding up the painting.²¹⁴ The Third Department affirmed the Supreme Court's decision and concluded that even the newspaper article displaying the name and photograph of the Justice is ancillary to the painting because it helped to communicate a message through an artistic expression.²¹⁵ The court found that both the oil painting and the image in the newspaper were "part and parcel" of a parody.²¹⁶ This decision stands for the possibility of an additional exception carved out by the majority of New York courts--that the unauthorized use of a photograph may fall outside the reach of the statute if there is a message or transformative element added to the photograph.²¹⁷ The court found that the newsworthy exception did not apply in this case because of the exception for works of art which states that any advertising done in connection with such works is protected by the First Amendment.²¹⁸

VI. CALIFORNIA'S RIGHT OF PRIVACY STATUTE

The deficiency of the New York's Civil Rights Statute is illustrated by a comparison with the privacy laws in other states. In an influential article, Dean Prosser outlined four different types of

²¹² *Altbach*, 754 N.Y.S.2d at 657.

²¹³ *Id.* at 655.

²¹⁴ *Id.* at 657.

²¹⁵ *Id.* at 658-59.

²¹⁶ *Id.*

²¹⁷ *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1171 ("For purposes of determining whether parody of copyrighted work is "fair use," inquiry focuses on whether new work merely supersedes object of original creation or whether and to what extent it is "transformative" and alters original work with new expression, meaning or message.").

²¹⁸ *Altbach*, 754 N.Y.S.2d at 658.

privacy.²¹⁹ The United States Court of Appeals stated that “the right of privacy and the right of publicity protect fundamentally different interests and must be analyzed separately.”²²⁰ The right of privacy generally protects the right to be let alone while the right of publicity protects a celebrity’s pecuniary interest in the commercial exploitation of his or her identity.²²¹ California recognizes a statutory right of publicity, statutory right of privacy, and a common law right of publicity.²²² The California right of privacy statute says that if an artist’s skills and talents are manifestly subordinate to the overall goal of creating a portrait that commercially exploits a celebrity’s fame, then the artist’s First Amendment right is outweighed by his right of publicity. However, New York does not recognize a statutory right of publicity nor a common law right of privacy or publicity.²²³ Furthermore, California’s privacy statute was recently amended to incorporate protection in visual images. The privacy statute states:

A person is liable for a *physical* invasion of privacy if the person knowingly commits an act of trespass in order to physically invade the privacy of the plaintiff “with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity, and the invasion occurs in a manner that is offensive to a reasonable person.”²²⁴

A person is liable for a *constructive* invasion of privacy in these circumstances, regardless of whether there is a physical trespass, if the visual image, sound recording, or other physical impression could not have been achieved without a trespass unless a visual or auditory enhancing device was used.²²⁵

Separate and apart from the right of publicity statute which deals with the commercial use of a person’s likeness, this privacy

²¹⁹ Restatement (Second) of Torts § 652A (Am. Law Inst. 1977).

²²⁰ *Carson v. Here’s Johnny Portable Toilets, Inc.*, 698 F.2d 831, 833 (6th Cir. 1983).

²²¹ *Id.*

²²² ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY, <http://www.rightofpublicityroadmap.com/law/california>, (2017).

²²³ *Id.*

²²⁴ (C.C. 1708.8(a).).

²²⁵ (C.C. 1708.8(b).).

statute deals specifically with the type of conduct in *Foster v. Svenson*. The statute specifically mentions that an invasion of privacy occurs if a person used a visual enhancing device to capture a visual image. If applied to *Foster v. Svenson*, it is likely the court would find a constructive invasion of privacy due to Svenson's use of a visual enhancing device to obtain the images. For example, In *Hilderman v. Enea TekSci, Inc.*, the United States District Court in California stated that the elements for invasion of privacy are: (1) an intentional intrusion into a private place, conversation, or matter (2) in a manner highly offensive to a reasonable person.²²⁶ If Svenson photographed the Fosters in California the application of this statute may have resulted in a different outcome for the Fosters. The California right of privacy is not absolute; it must also be balanced against the public interest in the dissemination of news and information under the constitutional guaranties of freedom of speech and the press.²²⁷

VII. BALANCING THE EQUITIES

In the wrestling match between the freedom of speech and the right of privacy, New York and federal courts balance the equities and have reached different results.²²⁸ In the specific situation when an artist's right to artistic expression is in tension with a person's right to control his image, New York should adopt a new approach. The decision of *Foster v. Svenson* demonstrates the existence of a gap in New York's privacy law, which fails to cover situations that may arise in the developing field of art and photography. Photographers have had the ability to take photographs through unblocked windows for a long time and have not been faced with lawsuits. Nevertheless, the court in *Foster* admits that the mere classification of "art" should

²²⁶ 551 F. Supp. 2d 1183. To prevail on the first element, the plaintiff must show that he had a reasonable expectation of seclusion or solitude in the place, conversation, or data source. *Medical Lab.*, 306 F.3d at 812–13. In determining whether an alleged intrusion is "highly offensive" for purposes of the second element, relevant considerations include "the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded. *Id.*"

²²⁷ *Gill v. Hearst Pub. Co.*, 40 Cal. 2d 224, 228 (1953).

²²⁸ See discussion *supra* Parts IV and V.

not protect the invasive manner in which such art is created.²²⁹ However, in order to encourage artistic creation, the freedom of expression has consistently been afforded to individuals despite invasiveness. Implementing a broader privacy statute may leave room for possible First Amendment issues although First Amendment rights do not completely abrogate the right of privacy.²³⁰ However, the New York courts seem to find just the opposite. The New York approach has essentially swallowed the statute's protection by applying the newsworthy exception in virtually every situation which implicates the First Amendment. Simply put, the protection granted by the statute will not apply to artwork if the term "commercial purpose" does not apply to artwork.²³¹ In contrast, a broader privacy statute must not violate the First Amendment. Thus, the perfect balance between these equities have been established in the proposed amendment to sections 50 and 51 of the New York Civil Rights Law which is currently pending before the legislature.

VIII. THE PROPOSED AMENDMENT TO § 50 AND 51

The New York State Assembly proposed a legislation to amend the New York Civil Rights law in relation to capturing the visual image of a person in a dwelling. The purpose of the amendment is specifically to prevent people from having their images taken within their homes. The summary of the amendment's provisions is as follows:

Section 1 - Amends § 50 of the civil rights law to include a prohibition on knowingly capturing the image of another person within a dwelling, when that person has a reasonable expectation of privacy. A person in violation of this section will be guilty of a misdemeanor.

Section 2 - Amends § 51 of the civil rights law, allowing a person whose image is captured in

²²⁹ *Svenson*, 7 N.Y.S.3d at 96.

²³⁰ *Id.* at 475.

²³¹ *Id.*

violation of § 50 to maintain an equitable action, and to also sue for any damages incurred.²³²

In order for a more equitable result in situations where an artist's First Amendment rights invade an individual's privacy, New York Civil Rights Law sections 50 and 51 should be amended with this clear language. The statute should be interpreted to adopt a balance between the government's interest in encouraging artistic creation against the interest of protecting an individual's right of privacy. By implementing strict scrutiny this amendment addresses compelling governmental interests. If the First Department were to apply this balance in *Foster v. Svenson*, the result could have been different for the Foster family. For example, Svenson's photographs can be considered artistic expression that should be protected by his First Amendment rights if they were obtained in a non-intrusive manner. On the other side, this grant of freedom should not infringe other fundamental rights such as the right of privacy. Svenson's rights under the First Amendment should depend on the purpose for which the photographs are used and the means by which they are secured. The court should balance these factors in determining this issue.²³³ The photographs are highly intrusive into the sacred corners of the Fosters' home. The images invade the privacy of the Fosters' children. In this case, a judge may find the balance of privacy interest of an individual child to outweigh an artist's freedom to display these images to the public. Under this solution, the court will maintain the legislative intent by protecting both the freedom of expression and the right of privacy. The amendment will uphold both constitutional rights and privacy rights and will withstand constitutional scrutiny so long as it is narrowly tailored to deal strictly with the type of conduct it intends to remedy. The directive to make no law "abridging the freedom of speech" is not absolute. A statute may be enacted if it satisfies the government's test of strict scrutiny. The amendment will withstand strict scrutiny if its purpose

²³² See Amendment to N.Y. CIV. RIGHTS LAW §§ 50-51.

²³³ *Cox Broadcasting v. Cohn*, 420 U.S. 469, 489 (1975) (confronting potentially conflicting privacy and free speech claims with long-standing doctrinal support, the Court balanced the relevant interests).

is to provide society with a reasonable expectation of privacy within their homes.²³⁴

IX. CONCLUSION

Over one hundred years ago, the famous Warren and Brandeis article suggested that the law must keep pace with the changing times and the progress of the human mind.²³⁵ This statement is even more true today. Such progress of the human mind produces new technologies that change the way society conducts itself. The camera first appeared in the 1820s and operated in commercial establishments with bulky equipment and complicated techniques.²³⁶ Today, the camera is a portable device that anyone can use to capture an intimate moment with one snap of a button. With the growth of modernistic art, such as surveillance photography, the New York legislature must also anticipate the growth of privacy concerns in this field. Thus, the legislature should consider the surrounding circumstances when there is a conflict between privacy and the freedom to create art.

Similar to the unfair result in *Roberson*, which prompted the creation of the statute, there is also an unfair result in *Foster v. Svenson*. This result should alert the legislature to the need to once again revisit privacy rights. Due to the gap in the New York statute, the privacy of the Foster children was invaded with no avenue of judicial relief. Perhaps this Note will encourage a new discussion on the issue of the right of privacy in our generation.

The increased complexity and intensity of modern civilization and the development of man's spiritual sensibilities have rendered man more sensitive to publicity and have increased his need of privacy, while the great technological improvements in the means of communication have more and more subjected the intimacies of his private life to exploitation by those who pander to commercialism

²³⁴ When a challenged action burdens a fundamental right, the standard is heightened scrutiny which will be upheld only if the government establishes a compelling justification.

²³⁵ *Right to Privacy*, *supra* note 2.

²³⁶ TODD GUSTAVASON, CAMERA: A HISTORY OF PHOTOGRAPHY FROM DAGUERRETYPE TO DIGITAL 2-4 (2009).

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and to prurient and idle curiosity. A legally enforceable right of privacy is deemed to be proper protection against this type of encroachment upon the personality for the individual.²³⁷

²³⁷ Gill v. Curtis Publishing Co., 38 Cal. 2d 273 (1952).