



## Transfixed in the Camera's Gaze: *Foster v. Svenson* and the Battle of Privacy and Modern Art

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### ABSTRACT

The battle between First Amendment expression and privacy interests in twenty-first century America is in full force. In *Foster v. Svenson*, a photographer used a high-powered camera to take snapshots of his neighbors. The New York court ruled that it was art and therefore immune from New York's privacy statute. Constrained by New York's ineffective privacy statute, the court's ruling included a cry for the New York legislature to act.

Privacy has become an increasingly powerful right in American law, especially with the growth of technology. Yet the problem with *Foster* and the New York statute is that the sole focus is on whether the First Amendment or privacy interests should prevail. While other American courts have provided more equitable solutions to this battle, New York's have fallen short. To ensure that the First Amendment's protections for art do not run roughshod over privacy rights, New York should move toward a more equitable solution: its legislature should revise the state's privacy statute and its courts should permit unjust enrichment claims to create a balance between these two rights. Doing so would help protect privacy rights against modern technological capabilities.

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## INTRODUCTION

When we are walking down Fifth Avenue or through Central Park, we have only the slightest expectation of privacy. We are entering a public space where others can see us going about our lives. The same is true with the Internet: every post or photo on social media is a step into the public space. At the opposite end of the privacy spectrum is our home, the place where we eat, sleep, and live with our families behind walls and windows. There is a longstanding principle in Western societies of the home being sacred.<sup>1</sup> Yet in the world of twenty-first century technology, even privacy in our homes is being whittled away by drones,<sup>2</sup> apps,<sup>3</sup> Alexa,<sup>4</sup> and even Roombas.<sup>5</sup>

It is this final frontier of personal privacy—the home—that was the focus of *Foster v. Svenson*.<sup>6</sup> When the Fosters sued Svenson for photographing them inside their home, the Appellate Division of the New York Supreme Court rejected the claim, upholding the photographs as protected art.<sup>7</sup> Effectively, this precedent permits New York photographers to snap pictures of their neighbors with little fear of repercussion. But while Americans have acquiesced their privacy interests in other contexts, they have generally expected some benefit in return.<sup>8</sup> Here, however, the Fosters' innermost privacy was violated without benefitting them. The modern technology of high-powered cameras stripped aside their privacy for all to see. While First Amendment rights of expression are all-important in the United States, the facts of *Foster v. Svenson* highlight the imbalance between expression and privacy under current New York law.

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<sup>1</sup> See, e.g., ABIGAIL BRUNDIN, DEBORAH HOWARD & MARY LAVEN, THE SACRED HOME IN RENAISSANCE ITALY 38–81 (2018); *Weimer v. Bunbury*, 30 Mich. 201, 208 (1874) (stating that the state constitution prohibits unreasonable searches and seizures “to make sacred the privacy of the citizen’s dwelling . . .”).

<sup>2</sup> María de Miguel Molina et al., *Ethics for Civil Indoor Drones: A Qualitative Analysis*, 10 INT’L J. MICRO AIR VEHICLES 340 (2018).

<sup>3</sup> Lori Andrews, *A New Privacy Paradigm in the Age of Apps*, 53 WAKE FOREST L. REV. 421, 457–60 (2018).

<sup>4</sup> Ethan Sacks, *Alexa Privacy Fail Highlights Risks of Smart Speakers*, NBC NEWS (May 26, 2018, 9:56 AM), <https://www.nbcnews.com/tech/innovation/alexa-privacy-fail-highlights-risks-smart-speakers-n877671> [<https://perma.cc/UW4K-PF7Y>].

<sup>5</sup> Maggie Astor, *Your Roomba May Be Mapping Your Home, Collecting Data That Could Be Shared*, N.Y. TIMES (July 25, 2017), <https://www.nytimes.com/2017/07/25/technology/roomba-irobot-data-privacy.html> [<https://perma.cc/NL6S-XGMZ>].

<sup>6</sup> 128 A.D.3d 150 (N.Y. App. Div. 2015).

<sup>7</sup> *Id.* at 154.

<sup>8</sup> See *infra* Part I.

This Article advances the solutions of statutory reform and unjust enrichment to correct this inequitable situation caused by too great of a focus on whether privacy or expression should win. First, this Article traces the historical development of privacy, as it has been consolidated as a central right under American law that is only abridged through an overriding interest or personal benefit, even in the face of privacy-infringing new technologies. Second, it shows how using privacy as a medium of artistic expression is popular but does not require actual infringement. Third, it discusses how Svenson violated the Fosters' privacy, but the New York courts failed to provide an equitable solution for the Fosters. Fourth, it details how, despite the tension between freedom of expression and privacy, equitable options for protecting privacy still exist. Fifth, it investigates how other courts have developed far more equitable solutions to conflicts between art and privacy than New York's have. Finally, it offers suggestions for how New York can create a more equitable compromise between expression and privacy by both reforming its privacy statute and utilizing the unjust enrichment doctrine.

## I. HISTORY OF PRIVACY

Privacy is an important right with contours that have been expanded and defined over the past 125 years, overlapping and conflicting with artistic expression since the start. Samuel D. Warren and Louis D. Brandeis first articulated the importance of a right to privacy in their seminal 1890 law review article.<sup>9</sup> From the beginning, they were worried about the risks technology posed to privacy.<sup>10</sup> Warren and Brandeis were concerned that "the press is overstepping in every direction the obvious bounds of propriety and of decency."<sup>11</sup> They warned, "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."<sup>12</sup>

Warren and Brandeis were not alone in fearing that portable cameras would destroy privacy. An article published in the *Hawaiian Gazette* the same year warned,

Have you seen the Kodak fiend? Well, he has seen you. He caught your expression yesterday while you were in recently talking at the Post Office.

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<sup>9</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>10</sup> *Id.* at 195.

<sup>11</sup> *Id.* at 196.

<sup>12</sup> *Id.* at 195 (citation omitted).

He has taken you at a disadvantage and transfixed your uncouth position and passed it on to be laughed at by friend and foe alike. His click is heard on every hand. He is merciless and omnipresent and has as little conscience and respect for proprieties as the veriest hoodlum. What with Kodak fiends and phonographs and electric search lights, modern inventive genius is certainly doing its level best to lay us all out bare to the gaze of our fellow-men.<sup>13</sup>

The problem was that common law remedies did not protect the right to privacy. Suits for slander, libel, breach of contract, and violation of property rights all fell short. Warren and Brandeis concluded that there should be a tort for damages and perhaps an injunction as remedies for infringements of the “general right of the individual to be let alone.”<sup>14</sup>

Soon, states began to recognize Warren and Brandeis’ privacy torts, ingraining the notion of a right to privacy into the law. In 1903, New York enacted a statute providing a cause of action for the invasion of privacy.<sup>15</sup> In 1905, the Georgia Supreme Court recognized a tort for invasion of privacy.<sup>16</sup> Over the next fifty years, several other legislatures and courts followed suit.<sup>17</sup> Despite this slow stream of recognition, however, privacy remained a tort of last resort, often attached to claims of intentional infliction of emotional distress.<sup>18</sup> By 1940, only fourteen states recognized privacy torts.<sup>19</sup>

Change soon came from another legal scholar, William L. Prosser, whose seminal 1960 law review article articulated his division of torts on privacy into four distinct categories,<sup>20</sup> which were later codified in the Second Restatement of Torts.<sup>21</sup> This led the remaining thirty-six states to adopt privacy torts.<sup>22</sup> Around the same time, the Supreme Court of the United States revolutionized the scope for protecting privacy. Cases such as *Mapp v.*

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<sup>13</sup> *The Kodak Fiend*, HAWAIIAN GAZETTE, Dec. 9, 1890, at 5 (quoted in LORI ANDREWS, I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY (2012)).

<sup>14</sup> Warren & Brandeis, *supra* note 9, at 205, 219.

<sup>15</sup> N.Y. CIV. RIGHTS LAW §§ 50–51.

<sup>16</sup> *Pavesich v. New Eng. Life Ins. Co.*, 50 S.E. 68 (Ga. 1905).

<sup>17</sup> *See, e.g., Brents v. Morgan*, 299 S.W. 967 (Ky. 1927); *Melvin v. Reid*, 297 P. 91 (Cal. Dist. Ct. App. 1931).

<sup>18</sup> Neil M. Richards & Daniel J. Solove, *Prosser’s Privacy Law: A Mixed Legacy*, 98 CAL. L. REV. 1887, 1894 (2010).

<sup>19</sup> *Id.* at 1895. Twelve states recognized a common law right to privacy and the other two (Utah and New York) had enacted a statutory right to privacy.

<sup>20</sup> William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 388–89 (1960).

<sup>21</sup> Richards & Solove, *supra* note 18, at 1890, 1901.

<sup>22</sup> *Id.* at 1890, 1901. *See, e.g., Hamberger v. Eastman*, 206 A.2d 239 (N.H. 1964); *Lake v. Wal-Mart Stores, Inc.*, 582 N.W.2d 231, 235 (Minn. 1998).

*Ohio*<sup>23</sup> and *Katz v. United States*<sup>24</sup> expanded privacy protections for Americans. The *Katz* Court opined “what [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”<sup>25</sup> The currently used *Katz* standard—the reasonable-expectation-of-privacy test—asks (1) whether a person exhibits an “actual (subjective) expectation of privacy” and (2) whether “the expectation [is] one that society is prepared to recognize as ‘reasonable.’”<sup>26</sup>

Congress and the Supreme Court have continued to expand federal protection of privacy over the past 50 years, specifically in the realms of decisional privacy<sup>27</sup> and informational privacy,<sup>28</sup> which even a narrowing of the scope of privacy protection by the Supreme Court in the 1970s and 1980s could not entirely curb.<sup>29</sup> The Supreme Court has emphasized the importance of privacy in the face of new technologies in recent cases, such as in *Jones v. United States*, where the Court held that a tracking device attached to the defendant’s car violated his Fourth Amendment rights,<sup>30</sup> and in *Carpenter v. United States*, where the Court held that the government’s warrantless seizure of the defendant’s cell-site location information violated his Fourth Amendment rights.<sup>31</sup> These cases illustrate both the climate of sensitivity to individual privacy and the strong standalone legal protections for privacy that exist today at the state and federal level.<sup>32</sup>

When Americans have permitted their privacy to be infringed, there is usually an overriding public concern or some personal benefit in return.<sup>33</sup>

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<sup>23</sup> 367 U.S. 643 (1961).

<sup>24</sup> 389 U.S. 347 (1967).

<sup>25</sup> *Id.* at 351–52.

<sup>26</sup> *Id.* at 361 (Harlan, J., concurring).

<sup>27</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>28</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); Privacy Act of 1974, 5 U.S.C. § 552a (2014).

<sup>29</sup> See, e.g., *Smith v. Maryland*, 442 U.S. 735 (1979) (holding that numbers recorded by a pen register were not protected since there was no reasonable expectation of privacy); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (holding that state authorities can search the premises of third parties if there is probable cause).

<sup>30</sup> 565 U.S. 400 (2012).

<sup>31</sup> 138 S. Ct. 2206 (2018).

<sup>32</sup> See, e.g., LORI ANDREWS, *I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY* (2012).

<sup>33</sup> See generally Shiva Maniam, *Americans Feel the Tensions Between Privacy and Security Concerns*, FACT TANK (Feb. 19, 2016), <https://www.pewresearch.org/fact-tank/2016/02/19/americans-feel-the-tensions-between-privacy-and-security-concerns> [<https://perma.cc/4VX4-9H68>]; Alessandro Acquisti, Leslie K. John & George Loewenstein, *What Is Privacy Worth?*, 42 J. LEGAL STUD. 249 (2013); Chris Taylor

For example, police have search-and-seizure rights for the overriding purpose of protecting the population at large from crime, and even these rights are subject to privacy-preserving restrictions.<sup>34</sup> Online, consumers give up their data privacy for ease of access and curated advertisements.<sup>35</sup> Although these twenty-first century examples may suggest that Americans no longer care about privacy, research on this “privacy paradox” shows otherwise.<sup>36</sup> Many modern innovations have failed to provide a benefit in exchange for privacy, with software like mobile apps often gleaning private information from unknowing users.<sup>37</sup>

## II. ART AS A PRIVACY HACK

Art is one such area of modern innovation that actively engages with privacy yet does not provide any personal benefit in return. If the instant flash of the Kodak portable camera alarmed Americans in 1890,<sup>38</sup> those folks would be shocked to see the privacy-infringing capabilities of technology today. Even with a cellphone camera, photographers can take incredibly high-definition shots in a mere second.<sup>39</sup> With a full-size professional camera, the clarity of photographs, even at a great distance, is remarkable.<sup>40</sup> Modern privacy dangers from technology hardly end at the camera either;

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& Ron Webb, *A Penny for Your Privacy?*, HARV. BUS. R. (Oct. 11, 2012), <https://hbr.org/2012/10/a-penny-for-your-privacy> [<https://perma.cc/7QZF-HVP2>].

<sup>34</sup> See U.S. CONST. amend. IV.

<sup>35</sup> See, e.g., Kari Paul, *Americans Are Worried About Their Facebook Data — But College Students Would Give Up Their Privacy for Free Pizza*, MARKETWATCH (Mar. 23, 2018, 8:06 AM), <https://www.marketwatch.com/story/college-students-would-give-up-their-friends-privacy-for-free-pizza-2017-06-13> [<https://perma.cc/XYG5-YER7>].

<sup>36</sup> See generally Susan Athey, Christian Catalini & Catherine Tucker, *The Digital Privacy Paradox: Small Money, Small Costs, Small Talk* (Nat’l Bureau of Econ. Research, Working Paper No. 23488, 2017).

<sup>37</sup> See, e.g., Narseo Vallina-Rodriguez & Srikanth Sundaresan, *7 in 10 Smartphone Apps Share Your Data With Third-Party Services*, THE CONVERSATION (May 29, 2017, 9:48 PM), <https://theconversation.com/7-in-10-smartphone-apps-share-your-data-with-third-party-services-72404> [<https://perma.cc/3RVT-333R>].

<sup>38</sup> *Kodak Fiend*, *supra* note 13.

<sup>39</sup> See Fionna Agomuoh, *10 Smartphone Camera Features that Make You Feel Like a Professional Photographer*, BUSINESS INSIDER (Feb. 21, 2018, 8:45 AM), <https://www.businessinsider.com/smartphone-camera-features-that-make-you-feel-like-a-professional-photographer-2018-2> [<https://perma.cc/W43D-A77W>].

<sup>40</sup> James Abbott, *Smartphones vs Cameras: Do You Still Need a DSLR?*, TECHRADAR (Mar. 9, 2018), <https://www.techradar.com/news/smartphones-vs-cameras-do-you-still-need-a-dslr> [<https://perma.cc/3KM2-TAJP>].

the rise of the Internet<sup>41</sup> and improvements in biotechnology<sup>42</sup> have proved especially risky.

Some artists have embraced the hazards of twenty-first-century technology and used their art to highlight the dangers technology poses to privacy.<sup>43</sup> However, these artists, importantly, were conscious about not violating privacy while raising privacy concerns in their works. No benefit was received, but also no direct infringement of privacy took place. There was also no overriding public interest. Expressing art through privacy does not have to infringe one's privacy, as shown by the following works.

One example of this approach is bioartist Heather Dewey-Hagborg, who uses DNA to demonstrate the possibilities and limitations of scientific progress. One of her best-known pieces, *Stranger Visions*, involved Dewey-Hagborg collecting chewed gum and cigarette butts from across New York City, extracting and analyzing leftover DNA from them, and printing life-sized 3D portraits of the former owners.<sup>44</sup> While it may seem that analyzing DNA would produce a singular face, it actually produces a range of potential faces.<sup>45</sup> So while there is a chance that Dewey-Hagborg's next installation could feature your face, reproduced from a bit of discarded gum on the New York subway, this is unlikely. In fact, *Stranger Visions* intended to raise awareness of forensic DNA phenotyping and the limited potential for biological surveillance by law enforcement.<sup>46</sup> Other works by Dewey-Hagborg highlight ways in which we can spoof our DNA, further destabilizing the idea that DNA provides a full picture of someone.<sup>47</sup> While Dewey-Hagborg stressed the inaccuracy in genetic profiles, the materials she used in *Stranger Visions* were discarded scraps—and were therefore legally abandoned—so the previous owners no longer had attached property rights.<sup>48</sup>

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<sup>41</sup> See generally ANDREWS, *supra* note 32.

<sup>42</sup> See generally SIGNS OF LIFE: BIO ART AND BEYOND (Eduardo Kac ed., 2007).

<sup>43</sup> See Lori Andrews, *Controlling Our 'Nature': Gene Editing in Law and in the Arts*, in GENE EDITING, LAW, AND THE ENVIRONMENT: LIFE BEYOND THE HUMAN 113 (Irus Braverman ed., 2017).

<sup>44</sup> Heather Dewey-Hagborg, *Stranger Visions*, HEATHER DEWEY-HAGBORG, <http://deweyhagborg.com/projects/stranger-visions> [<https://perma.cc/JP8F-JYHV>].

<sup>45</sup> Heather Dewey-Hagborg, *Sci-Fi Crime Drama with a Strong Black Lead*, THE NEW INQUIRY, <https://thenewinquiry.com/sci-fi-crime-drama-with-a-strong-black-lead> [<https://perma.cc/9HUT-4Y86>].

<sup>46</sup> Dewey-Hagborg, *supra* note 44.

<sup>47</sup> See, e.g., Heather Dewey-Hagborg, *Invisible*, HEATHER DEWEY-HAGBORG, <http://deweyhagborg.com/projects/invisible> [<https://perma.cc/EH7C-B6EH>].

<sup>48</sup> See generally Lior Jacob Strahilevitz, *The Right to Abandon*, 158 PENN. L. REV. 355 (2010).

Critical Art Ensemble's *Flesh Machine* took a volunteer-based approach to scrutinizing privacy. *Flesh Machine* is a performative piece that solicited volunteers to donate their cell and DNA samples, which were then analyzed to see how valuable the volunteers would be in the genetic-donor market for babies.<sup>49</sup> If the volunteers "passed" the test, they received certificates of genetic merit.<sup>50</sup> Those who passed could then have their cell samples and pictures in the piece.<sup>51</sup> The piece criticized modern eugenics in sperm and egg donors, but it only used voluntary participants.

Artist Chrissy Conant eschewed using others' DNA in her piece *Chrissy Caviar*.<sup>52</sup> The piece features a glass jar with a label on top that is reminiscent of fine caviar. But instead of the image of a sturgeon fish in the center, there is Conant lounging in a ball gown. The small jars do not contain fish roe either. Instead, suspended in a small vial inside a viscous liquid is one of Conant's own eggs. It is an expensive commodity, priced for sale at \$250,000. Along with the jars of *Chrissy Caviar*, Conant included biographical and genetic information about herself.<sup>53</sup> The piece is a statement on the commodification of egg donors, but Conant used herself rather than soliciting volunteers like Critical Art Ensemble did for *Flesh Machine*.

Finally, artist Larry Miller decided not to reveal personal information about anyone in his work but to instead use it to protect all his buyers from outside invasions of privacy. Dismayed by the outcome of *Moore v. Regents of the University of California*,<sup>54</sup> which held that the plaintiff, John Moore, had no right to his own cell line, Miller decided to act.<sup>55</sup> He drafted a new work of art, the Genetic Code Copyright, a document stating that the holder has a copyright over his genetic code.<sup>56</sup> While the document is probably not legally binding,<sup>57</sup> it does raise awareness of the risks around genetic privacy without infringing on any individual's personal information.

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<sup>49</sup> *Flesh Machine*, 1997-98, CRITICAL ART ENSEMBLE, <http://critical-art.net/flesh-machine-1997-98> [<https://perma.cc/T2H9-B2S3>].

<sup>50</sup> Rebecca Schneider, *Nomadmedia: On Critical Art Ensemble*, 44 DRAMA REV. 120, 122 (2000).

<sup>51</sup> *Id.*

<sup>52</sup> Chrissy Caviar, *General Information*, CHRISSEY CAVIAR, <http://www.chrissycaviar.com/ccaviar/infoFrameset.htm> [<https://perma.cc/5J9C-ZWBV>].

<sup>53</sup> *Id.*

<sup>54</sup> 793 P.2d 479 (Cal. 1990).

<sup>55</sup> ANDREWS, *supra* note 32, at 122.

<sup>56</sup> Mark Frauenfelder, *Own Your DNA – And Get it in Writing*, WIRED (Mar. 26, 1997, 2:48 PM), <https://www.wired.com/1997/03/own-your-dna-and-get-it-in-writing> [<https://perma.cc/2UYU-3YFZ>].

<sup>57</sup> *Id.*



While these four artists raised privacy concerns with their works, they did not actively infringe anyone's right to privacy. Dewey-Hagborg used discarded property. Critical Art Ensemble used volunteers from the audience. Conant used herself. Miller used no one at all. But what if artists infringe on an unsuspecting person's privacy, where privacy is infringed and no benefit is conferred? Such was the issue in *Foster v. Svenson*.

### III. *FOSTER V. SVENSON*

*Foster v. Svenson* raises questions surrounding the priorities of art and privacy, but because of the constraints of New York privacy law, it is unable to satisfactorily address these questions. Indeed, the limitations of the New York privacy statute prevented the Fosters from achieving an equitable solution.

At the center of this case is the work of Arne Svenson. Svenson is a critically acclaimed photographer whose work has appeared in many galleries.<sup>58</sup> He did not even leave his apartment for the project at issue, *The Neighbors*.<sup>59</sup> Svenson set himself up at the corner of his apartment window, hidden from view, and took photographs of those living in the apartment building across from him.<sup>60</sup> The apartment building he targeted had large glass windows that allowed Svenson to see the goings-on of the tenants<sup>61</sup> and capture snapshots of their daily lives.<sup>62</sup> Svenson's neighbors were unaware of his project, and he secretly captured thousands of photographs of them for a whole year.<sup>63</sup>

In *The Neighbors*, Svenson intended to comment on the "anonymity" of urban life,<sup>64</sup> noting in an interview,

New Yorkers are masters of being both the observer and the observed. We live so densely packed together that contact is inevitable—even our homes are stacked facing each other. I have found this symbiotic relationship between the looker and the observed only here—we understand that privacy is fluid and that glass truly is transparent.<sup>65</sup>

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<sup>58</sup> *Bio*, ARNE SVENSON, <https://arnesvenson.com/bio.html>.

<sup>59</sup> *The Neighbors*, ARNE SVENSON, <https://arnesvenson.com/theneighbors.html>.

<sup>60</sup> *Foster v. Svenson*, 128 A.D.3d 150, 152 (N.Y. App. Div. 2015).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Bio*, *supra* note 58.

<sup>65</sup> David Rosenberg, *Watching the Neighbors*, *New York City-Style*, SLATE (May 21, 2013, 11:00 AM), <https://slate.com/culture/2013/05/arne-svenson-the-neighbors-is-a-voyeuristic-look-into-a-new-york-city-apartment-building-photos.html> [<https://perma.cc/V8L5-8HLP>].

Svenson tried to obscure his subjects' faces, and no adult faces are seen in the photographs. Svenson wanted to draw attention to the notion that people believe they are in complete privacy while leaving the curtains open, but, in actuality, their private stage is available for all to see.<sup>66</sup> The photos depict images including a man lounging on his couch, a couple sitting in their bathrobes, and a family's dog.<sup>67</sup>

Following Svenson's compilation of *The Neighbors*, galleries in New York and Los Angeles exhibited his work.<sup>68</sup> And despite Svenson obscuring all of the adult faces, Matthew and Martha Foster discovered that two of Svenson's photos pictured their infant children.<sup>69</sup> Photograph No. 6 featured both children, while No. 12 featured only their daughter.<sup>70</sup> The children were undressed in both photos, and, compared to Svenson's careful obfuscation of the faces of his other subjects, the children's faces were partially exposed, making them easily identifiable. The Fosters complained to Svenson, the New York City gallery displaying his work, and the art website Artsy, and the photographs were ultimately taken down.<sup>71</sup>

In May 2013, however, Photograph No. 12 appeared on a New York City television broadcast.<sup>72</sup> Subsequent New York City broadcasts and online media ensued, which included the publication of the name of the Foster's apartment building (The Zinc).<sup>73</sup> This vastly increased the information available to the public about the Foster family. Ultimately, publicity around the photograph of the Foster's daughter drove them to sue, setting up this battle between their right to privacy and Svenson's First Amendment rights.<sup>74</sup>

The Fosters were not the only ones who felt their privacy had been violated. Fellow resident of The Zinc, Mariel Kravetz, invited a *New York Post* reporter to her apartment to take photographs of Svenson's own apartment as a form of revenge.<sup>75</sup> On the Internet, dozens of articles and thousands of comments noted that while some might consider the photo-

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<sup>66</sup> *Bio*, *supra* note 58.

<sup>67</sup> *The Neighbors*, *supra* note 59.

<sup>68</sup> *Foster*, 128 A.D.3d at 153.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 154.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See, e.g., Jennifer Bain, *A Sneak Peek into Tribeca Peeping Photographer's Apartment*, N.Y. POST (May 23, 2013, 4:00 AM), <https://nypost.com/2013/05/23/a-sneak-peek-into-tribeca-peeping-photographers-apartment> [<https://perma.cc/W7FY-YAMD>].

graphs beautiful, the infringement of privacy was at least concerning, if not outrageous.<sup>76</sup>

Despite these concerns, the Supreme Court of New York found for Svenson because *The Neighbors* served an artistic purpose,<sup>77</sup> and the Appellate Division affirmed.<sup>78</sup> New York's narrow privacy statute constrained both rulings, leaving the courts little choice.

New York's privacy statute originated following *Roberson v. Rochester Folding Box Co.*,<sup>79</sup> a case about, ironically, the dissemination of lithographs taken without the subject's permission. In *Roberson*, the New York Court of Appeals rejected a common law right to privacy.<sup>80</sup> In response, within the next year, the New York State Legislature enacted a statutory right to privacy.<sup>81</sup> This statute, practically unrevised since, prohibits the use of a person's "name, portrait, picture, or voice" without the person's written consent for "advertising purposes" or "for purposes of trade."<sup>82</sup> The statute's limited scope—covering only infringements of privacy for advertising or trade purposes—was purposeful, intending to balance privacy and First Amendment interests.<sup>83</sup> And this limited scope has shielded various types of First Amendment speech that infringe on privacy, including newspaper publications, literature, and television programs.<sup>84</sup>

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<sup>76</sup> See, e.g., *The Voyeur Next Door*, TRIBECA CITIZEN (Apr. 29, 2013), <http://tribecacitizen.com/2013/04/29/the-voyeur-next-door> [<https://perma.cc/D7AF-VU7J>]; John Bacon, *New Yorkers Furious Over Photos Taken Through Windows*, USA TODAY (May 17, 2013, 9:13 AM), <https://www.usatoday.com/story/news/nation/2013/05/17/nyers-furious-over-photos-taken-through-windows/2193353> [<https://perma.cc/56ET-MNSE>]; Trevor Dayley, *How Would You Feel Being Secretly Photographed in Your House for an Art Exhibit?*, FSTOPPERS (May 17, 2013), <https://fstoppers.com/news/how-would-you-feel-being-secretly-photographed-your-house-art-exhibit-3243> [<https://perma.cc/4JUY-MU7W>]; Selim Algar, *Tribeca Residents Furious Over Being Secretly Photographed for New Chelsea Art Exhibit*, N.Y. POST (May 16, 2013, 4:00 AM), <https://nypost.com/2013/05/16/tribeca-residents-furious-over-being-secretly-photographed-for-new-chelsea-art-exhibit> [<https://perma.cc/F7MY-PGUT>].

<sup>77</sup> *Foster*, 128 A.D.3d at 154.

<sup>78</sup> *Id.*

<sup>79</sup> 64 N.E. 442 (N.Y. 1902).

<sup>80</sup> *Id.*

<sup>81</sup> See N.Y. CIV. RIGHTS LAW §§ 50–51.

<sup>82</sup> *Id.* For advertising purposes, the statute prohibits only the use of a person's "name, portrait, or picture" without written consent. *Id.* § 50.

<sup>83</sup> *Foster*, 128 A.D.3d at 156.

<sup>84</sup> See *Howell v. N.Y. Post Co.*, 612 N.E.2d 699, 703 (N.Y. 1993); *Freihofer v. Hearst Corp.*, 480 N.E.2d 349, 353 (N.Y. 1985); *Stephano v. News Grp. Publ'ns, Inc.*, 474 N.E.2d 580, 585 (N.Y. 1984); *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 256 N.Y.S.2d 301, 305 (N.Y. App. Div. 1965).

Before *Foster*, several lower New York courts addressed whether art falls outside the privacy statute, consistently holding that it does.<sup>85</sup> But many of these earlier cases addressed paintings, collages, and other manufactured artistic renderings of people, while *Foster* addresses the use of photography, which more accurately depicts the world.<sup>86</sup> While drawings and paintings can be fanciful, photography inherently captures the still life of a real-world scene.

The New York Supreme Court solidified the notion of photography as protected speech just a few years before *Foster* in *Nussenzweig v. DiCorcia*,<sup>87</sup> holding that photography is protected First Amendment speech. The defendant in that case photographed people walking by Times Square and displayed the photos for sale in his gallery.<sup>88</sup> The plaintiff was an Orthodox Jew who had strong religious beliefs against the use of his image.<sup>89</sup> While the court did not reach the constitutional question because the statute of limitations had run,<sup>90</sup> the concurring judicial opinion addressed it.<sup>91</sup> The concurrence concluded that the First Amendment protected the defendant's photography and that even selling the pictures did not render the photography a commercial activity that would violate Nussenzweig's privacy.<sup>92</sup> In *Foster*, the Appellate Division similarly found that because Svenson's photos constituted artwork, they were not used "for advertising or trade purposes," and were thus not actionable as a statutory invasion of privacy.<sup>93</sup>

The *Foster* court went further than the *Nussenzweig* court by expanding the newsworthy exception to the privacy statute. The New York Court of Appeals had long since established that newsworthy events and matters of public concern are exceptions under the privacy statute because they are not primarily commercial,<sup>94</sup> granting broad protections to the press.<sup>95</sup> In *Foster*,

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<sup>85</sup> See, e.g., *Nussenzweig v. DiCorcia*, 38 A.D.3d 339, 339, 347 (N.Y. Sup. Ct. 2007); *Altbach v. Kulon*, 302 A.D.2d 655 (N.Y. Sup. Ct. 2003); *Hoepker v. Kruger*, 200 F. Supp. 2d 340 (S.D.N.Y. 2002).

<sup>86</sup> See, e.g., Clive Thompson, *The Invention of the "Snapshot" Changed the Way We Viewed the World*, SMITHSONIAN MAG. (Sept. 2014), <https://www.smithsonianmag.com/innovation/invention-snapshot-changed-way-we-viewed-world-180952435> [<https://perma.cc/PQC5-5A3R>].

<sup>87</sup> 38 A.D.3d 339 (N.Y. Sup. Ct. 2007)

<sup>88</sup> *Id.* at 343 (Tom, J.P., concurring).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 341 (majority opinion).

<sup>91</sup> *Id.* at 342 (Tom, J.P., concurring).

<sup>92</sup> *Id.* at 342, 347.

<sup>93</sup> *Foster v. Svenson*, 128 A.D.3d 150, 152 (N.Y. App. Div. 2015).

<sup>94</sup> *Arrington v. N.Y. Times Co.*, 434 N.E.2d 1319, 1322 (N.Y. 1982).

<sup>95</sup> *Foster*, 128 A.D.3d at 158.

the Appellate Division expanded this protection by granting protections to art equal to those of the press, noting the importance of disseminating images, aesthetic values, and symbols to the public.<sup>96</sup> By finding that *The Neighbors* comprised a series of photographs that were artistic expression and therefore in the public interest, the court took the holding of *Nussenzweig*—which only applied to the public sphere—and grafted it onto people's homes.

Svenson sold the photos of the Fosters and used pictures of his photography in promotional materials,<sup>97</sup> and the court held that the fact that his art was sold for a profit did not reduce its constitutional protections.<sup>98</sup> Because the Fosters conceded that the photos constituted art, the photographs did not fall under the purposes of advertising or trade.<sup>99</sup>

The Appellate Division did note a restriction to the protection of art over privacy, but the limitation is nearly impossible to reach.<sup>100</sup> Citing *Howell v. New York Post Co.*,<sup>101</sup> the *Foster* court maintained a high standard for photography constituting outrageous behavior.<sup>102</sup> In *Howell*, the photographer trespassed into a psychiatric facility to photograph the plaintiff.<sup>103</sup> The Court of Appeals held that source-gathering needed to be “atrocious, indecent and utterly despicable conduct” to constitute outrageous behavior, and, according to the Appellate Division, Svenson's photography of the Fosters did not “remotely approach” this threshold.<sup>104</sup>

That said, the court did not eagerly accept that its holding in *Foster* should be the law. Justice Renwick questioned whether New York's statutory privacy tort did not allow redress for the type of privacy infringement caused by Svenson's photography,<sup>105</sup> noting that Svenson's photography was disturbing and that many people would similarly be rightly offended by how the pictures were taken.<sup>106</sup> Yet, because relevant precedent states that art is subject to the privacy statute only when created solely for trade, Justice Renwick was bound by *stare decisis*. In the final lines of her opinion,

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<sup>96</sup> *Id.* at 159.

<sup>97</sup> *Id.* at 160.

<sup>98</sup> *Id.* at 160–61.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 159.

<sup>101</sup> 612 N.E.2d 699 (N.Y. 1993).

<sup>102</sup> *Foster*, 128 A.D.3d at 161–62.

<sup>103</sup> 612 N.E.2d at 700.

<sup>104</sup> *Foster*, 128 A.D.3d at 162.

<sup>105</sup> *Id.* at 152.

<sup>106</sup> *Id.* at 163.

Justice Renwick pleaded to the legislature to revisit this issue, noting the heightened threats to privacy caused by new technologies.<sup>107</sup>

Notably, privacy in other contexts does not provide a bright-line rule, and the conflict between art and privacy is no different. Even so, the New York privacy statute is grossly limited, leading to an inequitable outcome: the Fosters' privacy was compromised with nothing in return. The court in *Foster*, while constrained by New York law, worsened the situation by allowing First Amendment rights to trump privacy even when looking into someone else's home. The holding in *Foster* left murky the contours of the law: how far does this extension of First Amendment rights go? Does it change depending on the floor of the apartment or the distance of the photographer? This uncertainty exists because New York courts focus on whether First Amendment rights trumped privacy, rather than on how the most equitable solution for both sides might be crafted.

#### IV. THE RED HERRING OF EXPRESSION VERSUS PRIVACY

In New York, courts have incorrectly allowed the question of equity to be subsumed by the battle between expression and privacy. From the beginning, these two rights have been at loggerheads: Warren and Brandeis championed privacy over the press;<sup>108</sup> Prosser predicted tension between privacy and the First Amendment.<sup>109</sup> The battle is old, and answers remain elusive. Unfortunately, the explicit constitutional right to expression has subsumed privacy, and with it, the pursuit of equitable outcomes in cases like *Foster*.

While the right to privacy had a long and tortured route to recognition, the First Amendment explicitly enshrined the freedom of speech and the press.<sup>110</sup> Despite only specifically mentioning speech and the press, the First Amendment has unquestionably come to also protect freedom of artistic expression.<sup>111</sup> That said, art has usually been analyzed through the lens of free speech rather than as art for art's sake.<sup>112</sup> Art is unique through its

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<sup>107</sup> *Id.*

<sup>108</sup> See Warren & Brandeis, *supra* note 9, at 196.

<sup>109</sup> See Richards & Solove, *supra* note 18, at 1901.

<sup>110</sup> U.S. CONST. amend. I.

<sup>111</sup> See, e.g., Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995); Edward J. Eberle, *Art as Speech*, 11 U. PENN. J.L. & SOC. CHANGE 1, 1 (2007).

<sup>112</sup> Eberle, *supra* note 111, at 4; Sheldon Nahmod, *Artistic Expression and Aesthetic Theory: The Beautiful, the Sublime and the First Amendment*, 1987 WISC. L. REV. 221, 235 (1987).

creative process, style of expression, and method of communication, opening up opportunities both to view the world from a different perspective and to demonstrate one's own creativity.<sup>113</sup>

Art deserves protection. For example, authoritarian regimes have censored art throughout history to prevent the communication of ideas that could threaten the existing power structure.<sup>114</sup> Indeed, the categories that the Supreme Court has found undeserving of First Amendment protection are limited and include fighting words,<sup>115</sup> child pornography,<sup>116</sup> and obscenities.<sup>117</sup> While some of these categories apply to art, for the most part, these are narrow restrictions.<sup>118</sup>

The *Foster* court could not examine whether freedom of expression in art should trump privacy rights; nor did it have to answer it. The expression-versus-privacy debate sparked vocal criticism against Svenson and *The Neighbors*,<sup>119</sup> but the focus should have been on crafting the most equitable solution. While Svenson's photographs were described as beautiful, the means by which he captured the photographs remain controversial.<sup>120</sup> Svenson—unlike Heather Dewey-Hagborg, the Critical Art Ensemble, Chrissy Conant, or Larry Miller—actively violated his subject's privacy without their permission. He looked into people's lives and captured images ranging from couples arguing to young children and tenants going about their morning routines. While Svenson may have tried his best to anonymize his subjects, those who knew the subjects could connect the dots. Less focus on the overarching issue of expression versus privacy and more emphasis on doing right by the individual litigants would have resulted in a more just outcome.

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<sup>113</sup> Eberle, *supra* note 111, at 6–14.

<sup>114</sup> See, e.g., ERNST ROSE, *A HISTORY OF GERMAN LITERATURE* 309 (1960) (noting Nazi Germany's restriction of artistic and literary works to those praising the Aryan race and upholding perceived "German" values); Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 87–88, 97–98 (1996) (explaining how Iran banned the works of Salman Rushdie).

<sup>115</sup> *Cohen v. California*, 403 U.S. 15, 20 (1971).

<sup>116</sup> *New York v. Ferber*, 458 U.S. 747, 756–65 (1982).

<sup>117</sup> *Miller v. California*, 413 U.S. 15, 26–27 (1973).

<sup>118</sup> See Eberle, *supra* note 111, at 27.

<sup>119</sup> See, e.g., Stephanie Wolf, *Art or Invasion of Privacy? Photographer Arne Svenson's MCA Exhibit Raises Eyebrows*, COLO. PUB. RADIO (May 27, 2016), <https://www.cpr.org/show-segment/art-or-invasion-of-privacy-photographer-arne-svensons-mca-exhibit-raises-eyebrows> [<https://perma.cc/3Q6F-WKMB>]; Hili Perlson, *Voyeuristic Photographer Arne Svenson Wins New York Appellate Court Case*, ARTNET NEWS (Apr. 10, 2015), <https://news.artnet.com/market/arne-svenson-neighbors-photographs-supreme-court-286916> [<https://perma.cc/H8MU-GHVA>].

<sup>120</sup> Wolf, *supra* note 119.

But while the *Foster* ruling fails because it does not propose an equitable solution, both legislative reform and the doctrine of unjust enrichment offer hope for avoiding similar injustice in the future. Such new approaches are necessary because the *Foster*'s situation is not unique. Just last year, major exhibitions on voyeurism and surveillance in photography appeared at the International Center of Photography and the San Francisco Museum of Modern Art.<sup>121</sup>

New York needs a better solution than its current statute offers. For example, California, Illinois, Massachusetts, and federal law all prescribe privacy regimes more equitable than New York's.<sup>122</sup> Having laid out the weaknesses of the New York statute, this Article analyzes the respective regimes of those other four jurisdictions, which collectively highlight both the need for statutory reform in New York and the possibility of an interim stopgap via the doctrine of unjust enrichment.

## V. HOW WOULD THE COURTS DECIDE?

### A. New York

The *Foster* court, albeit disappointingly, correctly decided the case under New York law because of New York's narrow statutory definition of privacy torts. Following the controversial New York Court of Appeals decision in *Roberson*,<sup>123</sup> the New York State Legislature enacted a statutory right to privacy in 1903.<sup>124</sup> Despite major changes in the field of privacy because of advancements in technology, the New York statutory right to privacy has not changed since, and unlike many other states, New York has not adopted a common law right to privacy. To succeed in a New York right-of-privacy tort claim, the plaintiff must prove the defendant (1) used the plaintiff's name, portrait, picture, or voice (2) "for advertising purposes or for the pur-

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<sup>121</sup> *Strangers: The First ICP Triennial of Photography and Video*, INT'L CTR. PHOTOGRAPHY, <https://www.icp.org/exhibitions/strangers-the-first-icp-triennial-of-photography-and-video> [https://perma.cc/2TC8-59JN]; *Exposed: Voyeurism, Surveillance, and the Camera Since 1870*, SFMOMA, <https://www.sfmoma.org/publication/exposed-voyeurism-surveillance-and-camera-1870> [https://perma.cc/PS5S-JFHG]; see also Nikki Williams, *Surveillance Art: Rebellion or Hypocrisy*, CTR. DIG. ETHICS & POL'Y (Mar. 4, 2016), <https://www.digitaletics.org/essays/surveillance-art-rebellion-or-hypocrisy> [https://perma.cc/LQV9-DC3W].

<sup>122</sup> See *infra* Part V.

<sup>123</sup> 64 N.E. 442 (N.Y. 1902).

<sup>124</sup> N.Y. CIV. RIGHTS LAW §§ 50–51.



poses of trade” (3) without the defendant’s consent (4) within the state of New York.<sup>125</sup>

The most difficult element in this definition is the second prong, “for advertising purposes or for the purposes of trade.” New York legislators specifically crafted this limitation to protect First Amendment expression<sup>126</sup> because restricting commercial speech is much easier under First Amendment jurisprudence than pure expression in the form of political discourse or art.<sup>127</sup> Since the terms “advertising purposes” and “for the purposes of trade” were left undefined by the legislature, it might seem they have a broad scope. But the New York Court of Appeals has held these terms to be very narrow.<sup>128</sup> The form of expression can be made for profit, such as journalism or art; it just cannot be a disguised advertisement or solely for commercial purposes.<sup>129</sup> If the work has any artistic contribution, it is immune from the privacy statute.<sup>130</sup>

The New York Court of Appeals made it even harder for privacy interests to triumph over artistic ones when it held that free speech rights trump privacy rights if the speech concerns “newsworthy events or matters of public interest,” which has been held as the central question for determining whether a work is for advertising or trade.<sup>131</sup> The New York courts have indeed equated art with freedom of speech.<sup>132</sup> While the primary focus of these exceptions is the press, exceptions have also been applied to forms of artistic expression.<sup>133</sup>

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<sup>125</sup> *Titan Sports, Inc. v. Comics World Corp.*, 870 F.2d 85, 87 (2d Cir. 1989); *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 348 (S.D.N.Y. 2002).

<sup>126</sup> *Hoepker*, 200 F. Supp. 2d at 348.

<sup>127</sup> *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980).

<sup>128</sup> *See, e.g.*, *Arrington v. N.Y. Times Co.*, 434 N.E.2d 1319, 1321–22 (N.Y. 1982).

<sup>129</sup> *See id.* at 1322.

<sup>130</sup> This bar is so low that it seems that any work that is copyrightable and is not an advertisement would be exempt from the New York privacy statute. Copyright only requires minimal original expression. *See, e.g.*, *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 455 (S.D.N.Y. 2005) (holding that since the “photograph does not result from slavishly copying another work and therefore is original in the rendition”).

<sup>131</sup> *Stephano v. News Grp. Publ’ns, Inc.*, 474 N.E.2d 580, 584–85 (N.Y. 1984).

<sup>132</sup> *See Simeonov v. Tiegs*, 602 N.Y.S.2d 1014, 1018 (N.Y. Civ. Ct. 1993).

<sup>133</sup> *See, e.g.*, *Univ. of Notre Dame Du Lac v. Twentieth Century-Fox Film Corp.*, 256 N.Y.S.2d 301, 305 (N.Y. App. Div. 1965) (finding motion pictures are protected); *Stephano*, 474 N.E.2d at 585 (finding photograph of a fashion model newsworthy).

A possible alternative would have been an intrusion-upon-seclusion claim. An intrusion-upon-seclusion claim typically involves four elements: (1) intentional invasion of the private affairs of the plaintiff; (2) the invasion must be offensive to a reasonable person; (3) the matter upon which the defendant intruded must be a personal matter; and (4) the intrusion must have caused mental anguish or suffering.<sup>134</sup> Theoretically, an intrusion-upon-seclusion claim could have offered a viable way to sidestep New York's narrow privacy statute. But New York does not recognize intrusion-upon-seclusion claims.<sup>135</sup> There is a strong argument that pictures of the Fosters' children inside their own home was a private matter and that the press coverage around the pictures caused the Fosters mental anguish. Without the availability of such a claim, however, New York plaintiffs such as the Fosters are limited to claims under the privacy statute.

Both because of New York's broad protections for freedom of artistic expression and because New York does not recognize the intrusion-upon-seclusion doctrine, there was little room for the Appellate Division to maneuver in *Foster*. The photographs were displayed in galleries and featured in museums. There was little doubt that they were produced as—and considered to be—art. If the advertising and trade exceptions were wider, the photographs might have been privacy-rights violations. But since the photographs also had an artistic purpose, they fell under the exception for newsworthy events or matters of public interest. New York's privacy statute left the court without the flexibility to instead focus on an equitable solution.

### B. *California*

Like the New York statute, the California physical invasion of privacy statute restricts advertising and trade use, but unlike the New York statute, it also requires an element of intent.<sup>136</sup> Additionally, the California Supreme Court has held that only sufficiently “transformative” art trumps the privacy right to publicity.<sup>137</sup>

Recently, Californian courts have separated its invasion of privacy analysis into two components: (1) analyzing perceived harm and (2) First

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<sup>134</sup> RESTATEMENT (SECOND) OF TORTS § 652 (AM. LAW INST. 1977).

<sup>135</sup> *Howell v. N.Y. Post Co.*, 612 N.E.2d 699, 703 (N.Y. 1993).

<sup>136</sup> CAL. CIV. CODE § 1708.8(a) (West 2016).

<sup>137</sup> *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001).

Amendment protection.<sup>138</sup> And while this separate, more careful analysis might benefit privacy,<sup>139</sup> the main focus of the California cases has been on press freedoms versus clear violations of the law. In *Raef v. Appellate Division of Superior Court*, the court ruled against the paparazzi when they dangerously sped in a motorized vehicle to capture footage.<sup>140</sup> Similarly, in *Shulman v. Group W Productions, Inc.*, the plaintiffs suffered injuries from a serious car accident and were filmed and recorded while in the medical helicopter by a cameraman and nurse, a clear violation of the law.<sup>141</sup> But while the *Shulman* court, like the *Raef* court, found against the photographers, it also found a violation of privacy and emphasized that “[t]he tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.”<sup>142</sup>

The California courts have not yet faced a case that pits the protection of art under the First Amendment protection of expression against individual privacy rights. For this reason, it is unclear how California courts would rule on facts similar to those in *Foster*.<sup>143</sup> The elements for invasion of privacy in California are more straightforward than those of New York. There must be (1) an intentional intrusion into a private place, conversation, or matter (2) in a manner highly offensive to a reasonable person.<sup>144</sup> An application of the *Shulman* analysis to the facts in *Foster* could go either way, but the filming of an injured person in a medical helicopter probably represents a more obvious violation of the expectation of privacy than Svenson photographing across-the-street tenants from his apartment window.

Under the California Civil Code, California courts have interpreted motive to be an essential element in determining whether an intrusion is highly offensive.<sup>145</sup> Indeed, in analyzing the offensiveness of an intrusion, a court must consider “the degree of the intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder’s motives and

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<sup>138</sup> See, e.g., *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 477–79 (Cal. 1998); *Raef v. App. Div. Super. Ct. of L.A. Cty.*, 193 Cal. Rpt. 3d 159, 168–69 (Cal. Ct. App. 2015).

<sup>139</sup> See Madeline Kessler, Note, *In the Privacy of One’s Own Home: Does New York State Law Prevent Invasions of Privacy in the Home?*, 36 CARDOZO ARTS & ENT. L.J. 481, 493–97 (2018).

<sup>140</sup> 193 Cal. Rpt. 3d at 162–63.

<sup>141</sup> 955 P.2d at 474–75.

<sup>142</sup> *Id.* at 490.

<sup>143</sup> Cf. Kessler, *supra* note 139, at 493–97.

<sup>144</sup> *Hilderman v. Enea TekSci, Inc.*, 551 F. Supp. 2d 1183, 1203 (S.D. Cal. 2008).

<sup>145</sup> CAL. CIV. CODE § 1708.8(a) (West 2016); *Streisand v. Adelman*, Case No. SC 077 257, at \*35 (Cal. Super. Ct. Dec. 31, 2003).

objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.”<sup>146</sup> If filming a person in disregard to their privacy is offensive, then selling photos of a person, like in *Foster*, seems similarly offensive.

While *Shulman*’s holding, taken to the furthest extent, might allow the *Fosters* to win, if *Foster* were before a California court, the outcome would probably turn on a finding of motive. Svenson was motivated not by malice, but a desire to create art, which likely fails to meet the threshold of highly offensive. That said, the *Raef* and *Shulman* courts did focus on harm to the plaintiff.<sup>147</sup> So while highly offensive intent may be a difficult element to satisfy under the facts of *Foster*, California courts have unmoored these cases from a rigid First Amendment expression-versus-privacy framework to provide an equitable solution to the harm.

### C. Illinois

Much like California’s privacy protections, Illinois’ statute is not limited to advertising and trade use, and it likewise also looks at intent. Like California, Illinois recognizes a common law right to the four categories of privacy enumerated by Prosser,<sup>148</sup> although the Illinois legislature also codified the right of publicity in 1999 in the Right of Publicity Act.<sup>149</sup> For an Illinois claim under the right of publicity, a plaintiff must prove that (1) the defendant gave publicity (2) to a matter of the plaintiff’s private, not public, life (3) that was highly offensive to a reasonable person and (4) was not of legitimate public concern.<sup>150</sup>

Under these four elements, the *Fosters* might have won. It is undisputed that Svenson made aspects of their lives public, but it is less clear if looking through their glass window was public or private and whether the matter was highly offensive or a legitimate public concern. Especially problematic is that Illinois, like California, considers the intent of the defendant. In *Jacobson v. CBS Broadcasting, Inc.*, a journalist sued a rival news station when it broadcasted her swimming in the broadcast subject’s pool.<sup>151</sup> In

<sup>146</sup> *Deteresa v. Am. Broad. Cos., Inc.*, 121 F.3d 460, 464 (9th Cir. 1997) (quoting *Hill v. Nat’l Collegiate Athletic Ass’n*, 865 P.3d 633, 648 (Cal. 1994)).

<sup>147</sup> See, e.g., *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 477–79 (Cal. 1998); *Raef v. App. Div. Super. Ct. of L.A. Cty.*, 193 Cal. Rpt. 3d 159, 168–69 (Cal. Ct. App. 2015).

<sup>148</sup> See also Prosser, *supra* note 20, at 388–89.

<sup>149</sup> 765 ILL. COMP. STAT. § 1075.1 (1999).

<sup>150</sup> *Green v. Chi. Tribune Co.*, 675 N.E.2d 249, 252 (Ill. App. Ct. 1996); see also *Douglass v. Hustler Mag., Inc.*, 769 F.2d 1128, 1138 (7th Cir. 1985).

<sup>151</sup> *Jacobson v. CBS Broad., Inc.*, 19 N.E.3d 1165, 1169 (Ill. App. Ct. 2014).

upholding the case's summary dismissal, the Illinois Court of Appeals focused on intent, finding that CBS did not act with actual malice.<sup>152</sup> Even if the average person might view Svenson's actions unfavorably, his intent was not malicious. Indeed, he even took precautions to try to maintain his subjects' privacy.

But unlike the California courts, Illinois courts have not emphasized harm to the plaintiff. So, while Illinois' privacy statute is less restrictive than New York's, it is not as equity-focused as California's. While the outcome for the Fosters under both California and Illinois law might be similar—both would probably turn on intent—California's equity-focused approach better balances the First Amendment and privacy interests.

#### D. *Massachusetts*

Massachusetts' privacy statutes fuse aspects of the New York, California, and Illinois statutes. Massachusetts has two privacy statutes, one focusing on advertising and trade use, like New York's,<sup>153</sup> and one that is more open-ended, like California's and Illinois'. Massachusetts' statute states, "A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages."<sup>154</sup> However, Massachusetts courts have interpreted "unreasonable, substantial or serious interference" as a high bar; indeed, one appeals court surmised that the revelation of things such as "certain manuscripts, private letters, family photographs, or private conduct which is no business of the public [would count as an invasion of privacy] . . . [whereas t]he appearance of a person in a public place necessarily involves doffing the cloak of privacy which the law protects."<sup>155</sup> Limited circulation inside an industry, such as only in one article for food distributors, is also not considered a violation of the general privacy statute.<sup>156</sup>

Despite this high bar, Massachusetts' privacy statute provides a helpful comparison to New York's because it supplements its advertising-and-trade-focused privacy statute with a general privacy statute. But as of now, the boundaries of this law are still amorphous. It is likely that the Fosters might

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<sup>152</sup> *Id.* at 1179–80.

<sup>153</sup> MASS. GEN. LAWS ANN. ch. 214 § 3A (West 1973).

<sup>154</sup> MASS. GEN. LAWS ANN. ch. 214, § 1B (West 1973).

<sup>155</sup> *Cefalu v. Globe Newspaper Co.*, 391 N.E.2d 935, 939 (Mass. App. Ct. 1979).

<sup>156</sup> *See Fratarolli v. Bill Comm'ns, Inc.*, No. 934025, 1994 WL 878935, at \*3 (Mass. Super. Ct. Nov. 14, 1994).

fail on a claim in a Massachusetts court too, with the question likely turning on whether an unblocked glass window constitutes a public space. This is a nebulous question that, overshadowed by the concept of the sanctity of the home, might turn on various factors, such as lighting of the apartment, the size of the window, and the distance of the photographer. However, by maintaining a general privacy statute, the Massachusetts legislature allows the courts more freedom in addressing modern privacy concerns such as those in *Foster*.

### E. Federal Courts

The federal structure for privacy is the most conducive for courts to issue equitable rulings. The Supreme Court uses a broader definition of privacy, while upholding the preeminence of the First Amendment.<sup>157</sup> For example, in *Stanley v. Georgia*, the Court determined that “[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.”<sup>158</sup> Yet, in *Bartnicki v. Vopper*, the Supreme Court permitted the broadcast of a newsworthy private phone conversation, analagous to the New York courts’ decisions in *Nussenzweig* and *Foster*.<sup>159</sup> The most valuable Supreme Court decision for elucidating a boundary between expression and privacy, however, is *Zacchini v. Scripps-Howard*, where the Court hinted at recovery for violations of one’s right to publicity.<sup>160</sup>

The First Amendment broadly states, “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>161</sup> Artistic expression has been incorporated under this gambit of First Amendment protections.<sup>162</sup> However, the First Amendment is not absolute. Federal courts have recognized several exceptions that infringe on others’ rights, including defamation, fighting words, and obscenity.<sup>163</sup> To determine if speech is protected and not obscene, the Supreme Court considers whether the speech has “seri-

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<sup>157</sup> The constitutional “right to privacy” has been defined as in the pneumbras of other constitutional rights. See *Lawrence v. Texas*, 539 U.S. 558, 594–95 (2003) (citing *Griswold v. Connecticut*, 381 U.S. 478, 481–82 (1965)).

<sup>158</sup> 394 U.S. 557, 565 (1969).

<sup>159</sup> 532 U.S. 514, 525 (2001).

<sup>160</sup> 433 U.S. 562, 578 (1977).

<sup>161</sup> U.S. CONST. amend. I.

<sup>162</sup> See, e.g., *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995); Eberle, *supra* note 111, at 1.

<sup>163</sup> See KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT (2014).

ous literary, artistic, political, or scientific value.”<sup>164</sup> This question could have been valuable in *Foster*, but it was not raised.<sup>165</sup> Even so, raising this question might not have changed the outcome because it hinges on judges’ opinions of what constitutes art.

In addition, privacy in and of itself has rarely been demarcated as one of the limited federal exceptions to freedom of expression. In part, this is because of the compelling state interest in both circulating public news and information<sup>166</sup> and sharing events that are newsworthy and of public concern.<sup>167</sup>

Despite these restrictions, the Supreme Court focused on equity in *Zacchini v. Scripps-Howard*, where it held that protecting individuals’ privacy was a compelling state interest in the face of First Amendment rights.<sup>168</sup> This exception was limited to the use of a person’s name or likeness for commercial gain, also known as the right of publicity.<sup>169</sup> However, the court focused on both harm to the plaintiff (from having his performance broadcast without his permission) and possible damages recovery.<sup>170</sup> *Zacchini* implies an important right of recovery, which might be achieved through another type of equitable suit, such as unjust enrichment.

## VI. MOVING PAST *FOSTER*

These comparisons with other jurisdictions raise three potential issues from the outcome of *Foster*. First, are works such as Svenson’s art? Second, is New York’s statute on privacy too constraining and thus ill-suited for the twenty-first century? Finally, is there merit in using unjust enrichment as an alternative to a strict privacy remedy to achieve an equitable solution? While questioning whether *The Neighbors* is art appears to be a perilous route, revising the New York privacy statute and pursuing unjust enrichment claims would provide for an equitable solution that transcends the fight between privacy and freedom of expression.

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<sup>164</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>165</sup> *Foster v. Svenson*, 128 A.D.3d 150, 158 (N.Y. App. Div. 2015).

<sup>166</sup> *See Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 470 (1975) (holding that, since the information was already public, the publication of it did not violate a reasonable expectation of privacy).

<sup>167</sup> *See, e.g., Hoepker v. Kruger*, 200 F. Supp. 2d 340, 349 (S.D.N.Y. 2002).

<sup>168</sup> 433 U.S. 562, 578 (1977).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

A. *Is it Art?*

The *Foster* court itself suggested that the Fosters might have argued that Svenson's photos were not art.<sup>171</sup> Since this question was not raised, the *Foster* court could not address it. The court's suggestion is unworkable, however, since the question of "what is art?" is inherently elusive and highly subjective.

It is indeed true that if the Fosters could have shown that Svenson's photos were not art, then the photos would not have qualified for the First Amendment protection they received. However, winning on this claim would have been extremely difficult. Indeed, Svenson is a widely acclaimed professional photographer.<sup>172</sup> *The Neighbors* was also presented in galleries and museums across the country, and copies were sold both at exhibitions and online.<sup>173</sup> One could argue that, since photography is nothing more than taking pictures of existing things, it does not qualify as artwork, but the Supreme Court soundly rejected this argument in the copyright context over a century ago.<sup>174</sup>

If the term "art" were better defined in New York, winning under such a claim might be easier. For example, California applies the higher standard of needing to be sufficiently "transformative" art to win over another right.<sup>175</sup> Similarly, the Supreme Court has required that a work "must have serious literary, artistic, political, or scientific value."<sup>176</sup> But even with these higher bars, art is still a vague term and the Fosters and those like them would be far from guaranteed to win in court.

Another concern with considering arguments on whether a work constitutes art is that decisions—and thus future precedent—would hinge on the personal opinion of the judge hearing the case. By nature, the judgment of art does not have any accepted standards; opinions on art are an expression of our own individual fancies.<sup>177</sup> The Supreme Court has given no delineating lines on what qualifies as having artistic value.<sup>178</sup> The courts could apply a philosophical notion of what qualifies as art,<sup>179</sup> but that would also be

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<sup>171</sup> *Foster v. Svenson*, 128 A.D.3d 150, 160 (N.Y. App. Div. 2015).

<sup>172</sup> *Bio*, *supra* note 58.

<sup>173</sup> *Foster*, 128 A.D.3d at 160.

<sup>174</sup> *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

<sup>175</sup> *See Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 21 P.3d 797, 808 (Cal. 2001).

<sup>176</sup> *Miller v. California*, 413 U.S. 15, 26 (1973) (in the context of obscene works).

<sup>177</sup> Eberle, *supra* note 111, at 15.

<sup>178</sup> Nahmod, *supra* note 112, at 243.

<sup>179</sup> *Id.* at 260–261.



murky at best and, without a clear ruling by the highest courts at the state and federal level, would likely be applied inconsistently.

Even artists themselves cannot decide what is art. The first performance of Igor Stravinsky's now seminal work, *The Rite of Spring*, was a disaster. The audience broke into a fight and fellow composers described it as "the work of a madman."<sup>180</sup> Composer Camille Saint-Saëns was so derisive that he exclaimed, "If that's a bassoon, then I'm a baboon!"<sup>181</sup> Today, *The Rite of Spring* is considered one of the most important pieces of twentieth-century music.<sup>182</sup> Pablo Picasso's now famous *Les demoiselles d'Avignon* was also a disaster on its public debut. Painter Matisse thought it was a hoax, not art, and the crowd was nearly universally repulsed.<sup>183</sup> Today, the piece is one of the prized works in the Museum of Modern Art in New York.<sup>184</sup> Needless to say, tastes change, and one man's trash is another's treasure. When asked about whether a rubber foot in a loaf of bread was art, Stefan Edlis, a renowned art collector, merely said, "Well, it's not food."<sup>185</sup>

On the other hand, one could consider the amount of effort put into creating the work. When the Supreme Court decided to accept photography under copyright law, they noted the effort that the photographer had put into the work: he could not have just snapped the picture, but needed to have taken time to determine the best lighting, to dress and position his subject, and to arrange the background.<sup>186</sup> But, at least in the copyright space, the Supreme Court rejected the idea that hard work alone made a work copyrightable, discarding the "sweat of the brow" doctrine.<sup>187</sup>

Especially with contemporary art, art often does not even look like what many think of as art—but for its display in a museum or gallery with a label. For example, the University of Michigan Museum of Art has on display *Untitled (March 5th) #2*.<sup>188</sup> The piece consists of two hanging 40-watt

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<sup>180</sup> Kim Willsher, *Rite that Caused Riots: Celebrating 100 Years of The Rite of Spring*, GUARDIAN (May 27, 2013, 10:01 AM), <https://www.theguardian.com/culture/2013/may/27/rite-of-spring-100-years-stravinsky> [https://perma.cc/LCW8-9JBS].

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Picasso's "Les Demoiselles D'Avignon" Ignites Furore, HISTORY, <https://www.historychannel.com.au/this-day-in-history/picassos-les-demoiselles-davignon-ignites-furore> [https://perma.cc/W9XN-M25N].

<sup>184</sup> *Id.*

<sup>185</sup> THE PRICE OF EVERYTHING 57:12 (HBO 2018).

<sup>186</sup> Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 55 (1884).

<sup>187</sup> Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359–60 (1991).

<sup>188</sup> *Exchange: Untitled (March 5th) #2*, UMMA EXCHANGE, <https://exchange.umma.umich.edu/resources/18801/view> [https://perma.cc/62PT-A74V].

light bulbs attached to extension cords.<sup>189</sup> The piece's artist, Felix Gonzalez-Torres, explained that the two light bulbs represented himself and his lover at the height of the AIDS crisis, with one and then the other eventually burning out.<sup>190</sup> Works such as these make the question of what is art in the twenty-first century even murkier.

If Svenson had taken a photograph of the building across the street without planning or focus, would it have less artistic meaning? Can you do anything and claim protection by merely calling it art? In the end, whether something is art is in the eyes of the beholder. These might be important questions to address, but they should not be the primary concern of judges. A more valuable question to consider is how to both protect artistic expression—whether of the next Renoir or a photograph of Fifth Avenue—and provide for equitable recovery when art breaches privacy.

### B. *Revise the Statute*

The most straightforward way to better provide for equitable solutions in cases like *Foster* is to revise New York's privacy statute. The century-old New York privacy statute cannot properly protect individuals from the privacy risks of modern technology. While not an immediate solution, revising the New York privacy statute is the best way, in the long-term, to both clarify the boundaries between privacy and art and prioritize equity above this battle of rights.

New York's privacy statute has remained largely unchanged since it was first drafted in 1903, yet life in the twenty-first century would be unrecognizable to a New Yorker from 1903. Technology has raised various new issues on privacy as well as the dissemination of information and pictures without permission.<sup>191</sup> Surveillance has become so pervasive in 2020 that some question whether there can even be a reasonable expectation of privacy at all.<sup>192</sup> The rise of the Internet has further desensitized us to inva-

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<sup>189</sup> *Id.* I saw similarly situated bare light bulbs in the basement of my undergraduate college and never thought of them as art.

<sup>190</sup> *Id.* A similar work by Gonzalez-Torres consists of a pile of 175 pounds of candy, the weight at which his partner, Ross Laycock, died from AIDS. Guests are encouraged to take a piece of candy, mirroring the slow agonizing death of Laycock. Stephanie Eckhardt, *The New Met Brewer Wants You to Take Candies, Not Photos*, W MAGAZINE (Mar. 13, 2016, 11:00 AM), <https://www.wmagazine.com/story/felix-gonzalez-torres-candy-the-met-breuer>.

<sup>191</sup> See Barbara Pollack, *When Does Surveillance Art Cross the Line?*, ARTNEWS (Sept. 9, 2014, 9:30 AM), <http://www.artnews.com/2014/09/09/privacy-and-surveillance-art> [https://perma.cc/M6DC-ZJFE].

<sup>192</sup> *Id.*

sions of our privacy.<sup>193</sup> There are myriad new risks to privacy that the 1903 statute simply could neither have imagined nor prevented. Popular outrage against Svenson's photography suggests a need for reform.<sup>194</sup>

While the 1903 legislature cared about protecting First Amendment interests, "the rights guaranteed by the First Amendment do not require total abrogation of the right to privacy."<sup>195</sup> As discussed earlier, the privacy statutes of California<sup>196</sup> and Illinois<sup>197</sup> are not solely restricted to commercial-infringement exceptions. Meanwhile, Massachusetts—like New York—has commercial exceptions to its privacy statute, but—unlike New York—Massachusetts also maintains a complementary general privacy exception akin to the stand-alone privacy statutes of California and Illinois.<sup>198</sup> And other elements, such as intent, have been used to continue to protect First Amendment rights in states such as California and Illinois.<sup>199</sup> Further, the Second Restatement of Torts uses a reasonable person standard to limit privacy violations.<sup>200</sup> These all represent alternatives that New York could consider adding to its statute if it is concerned about either protecting First Amendment rights or enabling more equitable solutions to expression-versus-privacy issues.

Notably, New York Senator David Carlucci introduced a revision to New York's privacy statute in January 2017.<sup>201</sup> Senate Bill S1648 would have changed the statute to "[p]rohibit[ ] the recording of visual images of a person having a reasonable expectation of privacy while within a dwelling, when such images are recorded by another person outside the dwelling."<sup>202</sup> However, the bill has not advanced beyond the committee stage.<sup>203</sup> One advantage of this proposal—compared to the California and Illinois statutes—is its reduced mens rea requirement. Indeed, rather than requiring intent to violate another person's privacy (as in California and Illinois), mere

<sup>193</sup> See *id.*

<sup>194</sup> See Jordan M. Blanke, *Privacy and Outrage*, 9 CASE W.J.L. TECH. & INTERNET 1, 12–13 (2018).

<sup>195</sup> *Briscoe v. Reader's Digest Ass'n, Inc.*, 483 P.2d 34, 42 (Cal. 1971).

<sup>196</sup> CAL. CIV. CODE § 1708.8(a) (West 2016).

<sup>197</sup> 765 ILL. COMP. STAT. § 1075.1 (1999).

<sup>198</sup> MASS. GEN. LAWS ANN. ch. 214 § 1B and § 3A (West 1973).

<sup>199</sup> CAL. CIV. CODE § 1708.8(a) (West 2016); *Hilderman v. Enea TekSci, Inc.*, 551 F. Supp. 2d 1183, 1203 (S.D. Cal. 2008); *Streisand v. Adelman*, Case No. SC 077 257, at \*35 (Cal. Super. Ct. Dec. 31, 2003); *Jacobson v. CBS Broad., Inc.*, 19 N.E.3d 1165, 1179–80 (Ill. App. Ct. 2014).

<sup>200</sup> RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

<sup>201</sup> S. 1648, 2017–2018 Leg., Reg. Sess. (N.Y. 2017).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

knowledge of taking the photo would have sufficed under Senator Carlucci's New York proposal. Because proving intent is difficult in art cases like *Foster*, using a standard of knowledge instead of intent represents a sound policy choice.

The potential risk of statutory revision is that it could restrict the First Amendment right of expression, which would be unconstitutional. And even if it were not unconstitutional, any revision could limit what is considered art. But as the statute currently stands, almost no privacy infringement is actually prohibited. Only images and names used for advertising and trade purposes are covered. As shown by the art of Dewey-Hagborg, the Critical Art Ensemble, and others, it is possible to create meaningful art without harming others or infringing on their privacy. A revised statute could provide guidelines, clarifying for artists when their actions could lead to legal liability. Such clear statutory guidelines would allow artists to work right up to this line, but not cross it, since after that point the art would pose the highest risk of legal liability. Finally, in the case of a privacy violation in the name of art, a revised statute could lay out an equitable system of balancing rights and achieving recovery.

Even if New York revised its privacy statute, one potential remedy—an injunction—would not be very useful today. A photograph posted online can quickly leave the possession of only the photographer and spread rapidly across the globe. It would be impossible for an injunction against only the artist to stop all circulation of the photo. Indeed, once available online, photographs can be shared and posted on websites by scores of users within seconds.

Section 51 already provides for damages as a remedy along with injunctions, but until the New York legislature expands the law to include a broader definition of privacy, this route is blocked to those such as the Fosters. Damages are not the ideal remedy for plaintiffs like the Fosters, but damages still represent an equitable solution, since defendants like Svenson should not reap unencumbered profits resulting from invasions of privacy. Indeed, damages—rather than laying out a winner between expression and privacy—instead offer a balanced, equitable solution.

### C. *Unjust Enrichment*

Another equity-based possibility—which benefits from being a more immediate possibility since it does not require ratification by the New York legislature—is unjust enrichment. The unjust enrichment doctrine allows courts flexibility when an existing doctrine does not cover an issue. Unjust enrichment claims can fill holes in statutory law fields like contracts, tort,

and property law.<sup>204</sup> This flexibility has led to the use of unjust enrichment claims in cases of public concern across the country<sup>205</sup> to obtain restitution from parties who misled groups of individuals or the public for private gain.<sup>206</sup>

While the fields in which unjust enrichment claims apply have continued to expand, these newly encompassed areas typically relate to commercialization of a loss. For example, unjust enrichment claims against both the tobacco<sup>207</sup> and gun industries<sup>208</sup> have been articulated in terms of economic gain. In *City of Boston v. Smith & Wesson Corp.*, the court recognized that an unjust enrichment claim was an appropriate legal basis for addressing the defendant's reckless firearm distribution system that increased crime in Boston.<sup>209</sup> In that case, the City of Boston successfully pled an unjust enrichment claim on the premise that Smith & Wesson profited on its firearm sales in the illegal secondary firearms market and that the violence following the sales led to several deaths in Boston, harming the population at large.<sup>210</sup> Some have argued that unjust enrichment could be a viable route for pursuing data aggregators, too.<sup>211</sup>

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<sup>204</sup> David N. Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations*, 76 N.Y. L. SCH. L. REV. 626, 629 (2001) (citing JACK BEATSON, *THE USE AND ABUSE OF UNJUST ENRICHMENT: ESSAYS ON THE LAW OF RESTITUTION* 209 (1991)).

<sup>205</sup> Candace Saari Kovacic-Fleischer, *Restitution in Public Concern Cases*, 36 LOY. L.A. L. REV. 901 (2003) (citing *Newby v. Enron Corp.*, 18 F. Supp. 2d 684 (S.D. Tex. 2002)); *see also* SEC v. Yun, 148 F. Supp. 2d 1287 (M.D. Fla. 2001); *City of Boston v. Smith & Wesson Corp.*, 12 Mass. L. Rptr. 225 (Mass. Super. Ct. 2000); *City of St. Louis v. Am. Tobacco Co.*, 70 F. Supp. 2d 1008 (E.D. Mo. 1999); *State v. Lead Indus. Ass'n*, No. 99-5226, 2001 WL 345830, at \*15-16 (R.I. Super. Ct. Apr. 2, 2001); *Branch v. Mobil Oil Corp.*, 778 F. Supp. 35 (W.D. Okla. 1991)).

<sup>206</sup> *See, e.g.*, *Greenberg v. Miami Child. Hosp. Res. Inst., Inc.*, 264 F. Supp. 2d 1064, 1072-73 (S.D. Fla. 2003) (denying the defendant's motion to dismiss the plaintiffs' unjust enrichment claim); *Lead Indus. Ass'n*, 2001 WL 345830, at \*15-16 (ruling that the plaintiffs' unjust enrichment claim was sufficient); *City of New York v. Lead Indus. Ass'n*, 644 N.Y.S.2d 919 (N.Y. App. Div. 1996) (reversing the lower court's dismissal of the plaintiffs' unjust enrichment claim); *Smith & Wesson Corp.*, 12 Mass. L. Rptr. at \*1 (ruling that the plaintiff had adequately asserted its unjust enrichment claim).

<sup>207</sup> *Corning v. R.J. Reynolds Tobacco Co.*, 868 So.2d 331 (Miss. 2004).

<sup>208</sup> *Smith & Wesson Corp.*, 12 Mass. L. Rptr. at \*18.

<sup>209</sup> *Id.* at \*18.

<sup>210</sup> *Id.* at \*2.

<sup>211</sup> Andrews, *supra* note 3, at 457-60; Class Action Complaint and Demand for Jury Trial, *Zak v. Bose Corp.*, No. 17-cv-2928, 2017 WL 1395259 (N.D. Ill. Apr. 18, 2017).

A prime example is genetics. The field of genetics was brought into the commercial realm when scientists and pharmaceutical companies realized its potential lucrativeness.<sup>212</sup> In *Greenberg v. Miami Children's Hospital Research Institute, Inc.*, plaintiff Daniel Greenberg approached defendant Dr. Reuben Matalon to request his help with isolating the gene related to Canavan, a fatal disorder most often affecting Ashkenazi Jews.<sup>213</sup> Greenberg and others affected by Canavan provided Matalon with tissue samples.<sup>214</sup> In 1993, Matalon's team realized a major breakthrough by successfully isolating the gene that caused Canavan.<sup>215</sup> Greenberg and the other families continued to provide tissue while, unbeknownst to them, Matalon filed for and was granted a patent.<sup>216</sup> Matalon's hospital then started both limiting Canavan disease testing and charging royalties for access to the gene patent, leading to a lawsuit for recovery.<sup>217</sup>

One of Greenberg's legal theories was unjust enrichment, which survived a motion to dismiss. Although the case later settled out of court, legal scholar Debra Greenfield argued that the court's decision to not dismiss the unjust enrichment claim in *Greenberg* could be extrapolated further.<sup>218</sup> As Greenfield's argument went, if a patient's tissue or DNA was taken in a normal medical procedure—but was then used to make a profit by the physician or researchers—then the patient might have grounds to file an unjust enrichment claim.<sup>219</sup> In such a case, a benefit would have been taken from the plaintiff, the defendant would have profited from that benefit, and the defendant's retention of such a benefit would have been unjust. A possible harm or a non-financial loss would be enough to satisfy this portion of the claim.<sup>220</sup>

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<sup>212</sup> For example, in 2017 a patent court decided a heated battle over patents for the revolutionary gene-editing technology CRISPR-Cas9, with a potential profit in the millions awaiting the winner. Sharon Begley, *Broad Institute Prevails in Heated Dispute Over CRISPR Patents*, STAT (Feb. 15, 2017), <https://www.statnews.com/2017/02/15/crispr-patent-ruling> [<https://perma.cc/G97R-CT8X>]; *Broad Inst. v. Regents of the Univ. of Cal.*, 2017 WL 657415 (Patent Tr. & App. Bd. 2017).

<sup>213</sup> 264 F.Supp.2d 1064, 1066 (S.D. Fla. 2003).

<sup>214</sup> *Id.* at 1067.

<sup>215</sup> *Id.* at 1067.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> Debra Greenfield, *Greenberg v. Miami Children's Hospital: Unjust Enrichment and the Patenting of Human Genetic Material*, 15 ANNALS HEALTH L. 213, 246 (2006).

<sup>219</sup> *Id.*

<sup>220</sup> *E.g.*, *Edwards v. Lee's Adm'r*, 96 S.W.2d 1028 (Ky. Ct. App. 1936) (where profits received by the defendant who used part of the plaintiff's cave were the basis for recovery rather than any actual losses to the plaintiff).

Creating art at the expense of privacy could fit into unjust enrichment as well. Under New York law, to make an unjust enrichment claim, the plaintiff must allege that “(1) the other party was enriched, (2) at that party’s expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered.”<sup>221</sup> With an expanded view of commerce, which has been less rigidly constrained than the advertising and trade purposes of §§ 50-51, Svenson’s actions would readily fit these elements.

First, Svenson was enriched—from *The Neighbors*, Svenson gained press, prestige, and profits. Second, the photographs were published at the expense of the Fosters’ privacy, and the Fosters received nothing in return. Without this injury to their privacy, Svenson would not have been able to capture these photographs or enjoy the profits from them. By publishing the photographs, Svenson injured the Fosters’ right to privacy, their right to enjoy their home free from prying eyes, and their reputation. Third—and finally—the public’s outrage and disapproval around Svenson’s photographs demonstrated that Svenson’s actions were against equity and good conscience.<sup>222</sup> At the very least, since Svenson profited at the expense of the Fosters, he should disgorge the profits.

Admittedly, unjust enrichment will not, by itself, provide specific protection for privacy. But the possibility of damages stemming from an unjust-enrichment claim would deter artists from engaging in behavior similar to Svenson’s. The ruling in *Foster* only encourages artists to engage in risky artistic creations that endanger others’ right to privacy. These artists profit by exploiting others whose privacy is risked—even when the artist takes precautions like Svenson. The unjust enrichment doctrine also offers an equitable solution for both parties, rising above the battle between expression and privacy. Statutory change is the ideal route for the future, but, in the interim, unjust enrichment could provide a remedy for victims such as the Fosters.

## CONCLUSION

The worries of Warren, Brandeis, and the specter of the Kodak fiend remain as present now as they were at the end of the nineteenth century. While the art of Heather Dewey-Hagborg and the Critical Art Ensemble, and even Arne Svenson, have brought public attention to issues of privacy, the holding of *Foster v. Svenson* puts the art world and the right to privacy in

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<sup>221</sup> *Georgia Malone & Co., Inc. v. Rieder*, 973 N.E.2d 743 (N.Y. 2012).

<sup>222</sup> *See Blanke, supra* note 194, at 12–13.

each other's crosshairs rather than offering equitable solutions. Though New York's, rigid and century-old privacy laws significantly constrained the ultimate decision in *Foster*, the court nonetheless managed to leave a trail of breadcrumbs to guide reform. Indeed, this breadcrumb trail—considered alongside an analysis of other state and federal courts—provides two viable paths forward: statutory reform and unjust enrichment. While the *Foster* court did suggest that we could question what qualifies as art, that would be a slippery and uncertain path that could never have objective rules. Instead, the pragmatic suggestion is for the New York legislature to modernize its privacy laws in line with other states'. Until New York legislators rewrite the statute, however, the best weapon may lay in the yet-untested application of unjust-enrichment doctrine. In the eyes of the beholder, *The Neighbors* may be art, but it is also a cautious lesson on how New York law categorically values expression over privacy and equity.