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## PRIVACY AND THE RIGHT TO RECORD

MARGOT E. KAMINSKI\*

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*Many U.S. laws protect privacy by governing recording. Recently, however, courts have recognized a First Amendment “right to record.” This Article addresses how courts should handle privacy laws in light of the developing First Amendment right to record.*

*The privacy harms addressed by recording laws are situated harms. Recording changes the way people behave in physical spaces by altering the nature of those spaces. Thus, recording laws can be placed within a long line of First Amendment case law that recognizes a valid government interest in managing the qualities of rivalrous physical space, so as not to allow one person’s behavior to disrupt the behavior of others. That interest, importantly, will not always justify suppressing recording, but it can be distinguished from an impermissible government interest in suppressing speech. Moreover, the government’s interest in managing the qualities of a particular environment can itself be speech-protective—and has been recognized as such.*

*As technological development brings more recording devices into the physical world, courts will need to determine how to balance speech interests and privacy. First Amendment doctrine, often blunt in nature, is in fact, and perhaps surprisingly, equipped to address the nuances of this challenge. Regulating recording governs a moment of interaction in physical space, not a downstream editorial decision that may cause dignitary harms. Regulation, thus, does not break with the U.S. free speech tradition of protecting the publication and distribution of information.*

#### INTRODUCTION

Many laws in the United States protect privacy by governing recording. Wiretap and eavesdropping laws, video voyeurism laws, and a host of new privacy laws all target the moment at which a recording is made or information is gathered. Recent cases, however, have recognized a First Amendment “right to record.”<sup>1</sup> While commentators have argued for the existence of this First

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<sup>1</sup> See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) (“Our recognition that the First Amendment protects the filming of government officials in public spaces accords with the decisions of numerous circuit and district courts.”); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“[W]e agree with the Smiths that they had a First Amendment right, subject to reasonable time,

Amendment right, none have analyzed, at any length, its implications for privacy laws.<sup>2</sup>

Privacy governance has always been in tension with the First Amendment.<sup>3</sup> Usually, however, that tension has played out around the distribution of information, not recording or information gathering. Until recently, governing recording was, in fact, the simplest way to protect privacy in the United States without triggering First Amendment scrutiny.

Governing the distribution of information interferes with a publisher's editorial choices and often requires assessing a reader's reaction to speech.<sup>4</sup>

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manner and place restrictions, to photograph or videotape police conduct.”).

<sup>2</sup> See Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 105 (2014) (arguing that recording is First Amendment salient, but electing not to set the level of scrutiny that should apply to privacy laws, as “the answer will depend on context”); Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1079-80 (2015) (arguing that recording, as a type of speech production, should be protected, but only when it produces information about a matter of public concern); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 380-81, 384, 398 (2011) (arguing that recording is protected as an extension of memory, though the right might be considered waived in private spaces); Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 997-98 (2016) (arguing that the First Amendment protects recording even when it occurs in a privately owned space); see also Marc Jonathan Blitz, *The Right to Map (and Avoid Being Mapped): Reconceiving First Amendment Protection for Information-Gathering in the Age of Google Earth*, 14 COLUM. SCI. & TECH. L. REV. 115, 122 (2012) (discussing how the right to free expression should include a right to information gathering, and envisioning exceptions for privacy). See generally Marc Jonathan Blitz et al., *Regulating Drones Under the First and Fourth Amendments*, 57 WM. & MARY L. REV. 49 (2015) (discussing the right to record in the context of unmanned aerial vehicles). Joel Reidenberg has discussed the right to record from the perspective of privacy law, and is largely critical of the developing First Amendment framework, believing that any protection should be limited in scope to protecting matters of public concern. See Joel R. Reidenberg, *Privacy in Public*, 69 U. MIAMI L. REV. 141, 152 (2014).

<sup>3</sup> See, e.g., Neil M. Richards, *The Limits of Tort Privacy*, 9 J. ON TELECOMM. & HIGH TECH. L. 357, 361-65 (2011) [hereinafter Richards, *The Limits of Tort Privacy*] (discussing the tension between the disclosure tort and the First Amendment); Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1051 (2000). But see Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465, 466-67 (2015) (identifying studies that suggest that surveillance produces conformity, which has negative implications for First Amendment freedoms); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 393-407 (2008) (arguing that First Amendment values require intellectual privacy protection); Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1501 (2015) [hereinafter Richards, *Why Data Privacy Law Is (Mostly) Constitutional*].

<sup>4</sup> See *L.A. Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32, 40-41 (1999) (finding that California could not restrict access to and use of arrestees' addresses for

The Supreme Court suggested in *Bartnicki v. Vopper*<sup>5</sup> that privacy governance should be aimed at recording, not distribution.<sup>6</sup> Where telling a publisher or speaker to retract lawfully obtained, truthful information implicates the First Amendment, under *Bartnicki*, the government can make it unlawful to obtain information in the first instance, without necessarily invoking First Amendment scrutiny. The right to record threatens this governance model. The moment of recording is no longer a First Amendment-free zone.

Courts appear conscious of the deregulatory power of a recording right and have sought limiting principles. Courts have cabined the scope of the right to record based on both content and physical location.<sup>7</sup> Courts have also proposed treating the right to record as though it were expressive activity in a physical space, like a parade.<sup>8</sup> This treatment would allow courts to balance privacy against speech when evaluating recording, rather than strike down most recording laws under strict scrutiny.

Both current and proposed judicial treatment leads, however, to challenging questions. First, why is it that the scope of the right to record might differ in different physical spaces, as courts currently suggest? Second, if recording is expressive, how does one disentangle a legitimate government interest in protecting privacy from an impermissible government interest in restricting speech?

My central claim is that the contours of the protected right to record are defined by the privacy harms that the right potentially causes. Understanding the right to record is possible only by properly articulating the privacy interests

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commercial purposes, where addresses were available in police reports); *Fla. Star v. B.J.F.*, 491 U.S. 524, 532 (1989) (finding unconstitutional the suppression of publication of a rape victim's name when the name was accidentally disclosed in a police report); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975) (finding suppression of publication of a rape victim's name unconstitutional, where the name was publicly available).

<sup>5</sup> 532 U.S. 514 (2001).

<sup>6</sup> *Id.* at 526-35 (finding that the government could not prohibit downstream publication of an illegal recording, the content of which was a "matter of public concern," so long as a publisher's hands were clean, but suggesting that the point of recording could still be governed in the face of the First Amendment).

<sup>7</sup> See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 600 (7th Cir. 2012) ("[T]he eavesdropping statute restricts a medium of expression—the use of a common instrument of communication—and thus an integral step in the speech process. As applied here, it interferes with the gathering and dissemination of information about government officials performing their duties in *public*." (emphasis added)); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011) ("[T]he First Amendment protects the filming of government officials in *public* spaces . . ." (emphasis added)); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) ("The First Amendment protects the right to gather information about what public officials do on *public* property, and specifically, a right to record *matters of public interest*." (emphases added)).

<sup>8</sup> See *Blitz et al.*, *supra* note 2, at 110-38 (applying forum doctrine to airspace in framing discussion of regulation of drones under the First Amendment).

at stake. This claim stands even as the Supreme Court in recent cases has repeatedly disavowed balancing speech against other nonspeech harms.<sup>9</sup>

To understand the right to record, then, we must understand the privacy harm. Privacy can be many things.<sup>10</sup> Recording implicates a particular type of privacy interest that is entwined with physical space.<sup>11</sup> Laws that govern recording enable individuals to dynamically manage their social accessibility in physical space and over time.<sup>12</sup> In order to manage their social accessibility, people rely on a variety of tactics and circumstances, including: physical walls; clothing; others' forgetfulness over time; and physical distance. When the use of a technology disrupts any of these tactics and circumstances, the government may have an interest in intervening to prevent undesirable changes in behavior, including chilling effects on speech.

Understanding privacy as involving both physical and temporal features of an individual's environment helps answer the two most difficult questions about the right to record. First, the scope of the right to record is treated differently in different physical spaces because the strength of the privacy interest varies in different physical locations. Courts consequently set doctrinal defaults that favor privacy in private locations and speech in public locations (not that private and public are perfectly distinct, but that is the shorthand used in the doctrine here). Second, a government interest in protecting privacy *can* be unrelated to the suppression of speech, if it goes to enabling the successful management of social accessibility in a physical location, rather than disfavoring particular types of content or speakers.<sup>13</sup> This means that even in

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<sup>9</sup> See *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012).

<sup>10</sup> Daniel Solove has created a complex taxonomy outlining different kinds of privacy. See generally DANIEL J. SOLOVE, *UNDERSTANDING PRIVACY* (2008).

<sup>11</sup> See Margot E. Kaminski, *Regulating Real-World Surveillance*, 90 WASH. L. REV. 1113, 1132-35 (2015) (building on the work of social psychologist Irwin Altman in defining privacy in physical spaces). See generally IRWIN ALTMAN, *THE ENVIRONMENT AND SOCIAL BEHAVIOR* (1975) (discussing human privacy, crowding, territory, and personal space).

<sup>12</sup> See Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 423 (1980) ("Our interest in privacy . . . is related to our concern over our accessibility to others: the extent to which we are known to others, the extent to which others have physical access to us, and the extent to which we are the subject of others' attention.").

<sup>13</sup> In *United States v. O'Brien*, 391 U.S. 367 (1968), the Court set out a test which requires that government regulation (1) be "within the constitutional power of [g]overnment"; (2) "further[] an important or substantial governmental interest" that is unrelated to the suppression of speech; and (3) incidentally restrict speech no more than is necessary to further that interest. *Id.* at 377; see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984))).

public spaces, where the right to record will be more protected, the government can sometimes articulate an interest in privacy that can withstand analysis under the intermediate scrutiny usually applied to expressive acts entwined with physical presence.

The right to record exemplifies a larger concern about current First Amendment doctrine: As coverage expands, and the doctrine ossifies, First Amendment protection can serve as a deregulatory tool.<sup>14</sup> Alternatively, as coverage expands, courts might fundamentally alter First Amendment doctrine, reducing speech protection.<sup>15</sup> At first glance, the right to record looks like it may trigger this looming conflict. As this Article demonstrates, however, closer inspection of the right to record in fact illuminates existing nuance within current First Amendment doctrine. It shows that the crisis of First Amendment expansionism is not always as stark as it may initially appear.

This Article proceeds as follows: Part I discusses the implications of the right to record for the future of First Amendment law. Part II discusses whether recording is speech. Part III characterizes the privacy harm from recording to explain why recording is properly viewed as a regulable speech-act. Finally, Part IV explains the interface between privacy and the right to record, providing examples.

## I. THE EXPANDING FIRST AMENDMENT

First Amendment protection has recently been depicted as ever-expanding and increasingly blunt. Multiple scholars characterize recent First Amendment doctrine as extending speech protection into new subject-matter areas, with litigators taking advantage of the strength of First Amendment protections by rebranding ordinary economic activity as speech.<sup>16</sup> Scholars also worry that the Supreme Court has ossified First Amendment analysis so that courts use the doctrine as a hammer, failing to take context into account.<sup>17</sup> The result, according to a number of recent critics, is that the First Amendment has become a blunt tool of deregulation.<sup>18</sup> We should, according to these critics,

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<sup>14</sup> See *infra* Part I.

<sup>15</sup> Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1635 (2015) (discussing how expanding First Amendment coverage could potentially weaken “existing doctrinal tools”).

<sup>16</sup> See Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015); Frederick Schauer, *First Amendment Opportunism*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 174, 178 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002); Schauer, *supra* note 15, at 1635.

<sup>17</sup> See Toni M. Massaro, *Tread on Me!*, 17 U. PA. J. CONST. L. 365, 367 (2014) (“A better understanding of free speech practice requires thinking that is factored, not formulaic; contextual, not trans-contextual; dynamic, not static; tentative, not absolutist; plural, not singular.”).

<sup>18</sup> E.g., J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 384 (“Business interests and other conservative

worry about the consequences of expanding First Amendment coverage because, inevitably, commercial entities will use “speech” protection to escape a stronger government hand.

These concerns are not entirely misplaced. The Supreme Court in recent cases appears to have fixed the possible exceptions to First Amendment protection into a short, historical list.<sup>19</sup> The Court has several times now refused to weigh broader social interests with speech interests to create new exceptions to First Amendment protection once it has established that a particular activity is covered by the First Amendment.<sup>20</sup> When First Amendment coverage extends to a particular activity, the fear is that courts will apply strict scrutiny, which is famously “fatal in fact,” or some other form of heightened speech scrutiny under which the regulations are doomed to fail.<sup>21</sup> This overly blunt approach may derail all kinds of regulatory efforts, from protection of data privacy to bans on the off-label promotion of drugs.<sup>22</sup>

Some scholars fear this approach to the First Amendment will lead inevitably to deregulation. Others, however, see a related problem looming. They fear that First Amendment expansionism—courts finding speech in more and more places—will result not in deregulation but in a judicial backlash.<sup>23</sup> In other words, arguing that everything is speech and is thus protected by the First

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groups are finding that arguments for property rights and the social status quo can more and more easily be rephrased in the language of the first amendment . . . .”); Stuart Minor Benjamin, *Proactive Legislation and the First Amendment*, 99 MICH. L. REV. 281, 286 (2000) (warning that Lochnerism could be revived through First Amendment analysis); Amanda Shanor, *The New Lochner*, 2016 WIS. L. REV. 133, 134 (“Commercial interests are increasingly laying claim, often successfully, to First Amendment protections.”).

<sup>19</sup> See *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (listing the following as historically unprotected speech: incitement, obscenity, defamation, speech integral to criminal conduct, “fighting-words,” child pornography, fraud, true threats, and “speech presenting some grave and imminent threat the government has the power to prevent”); *United States v. Stevens*, 559 U.S. 460, 468-69 (2010) (listing obscenity, defamation, fraud, incitement, and speech integral to criminal conduct as historically unprotected speech).

<sup>20</sup> See *Alvarez*, 132 S. Ct. at 2546-47 (refusing to create an exception for lies); *Stevens*, 559 U.S. at 470 (refusing to create an exception for crush videos).

<sup>21</sup> See Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (discussing strict scrutiny in the context of the Equal Protection Clause); Steven H. Shiffirin, *The Dark Side of the First Amendment*, 61 UCLA L. REV. 1480, 1485 (2014) (noting that the “Court has retreated in some recent decisions to an indefensible form of absolutism”). *But see* Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, *supra* note 3, at 1505 (arguing that data privacy law generally does not raise First Amendment issues).

<sup>22</sup> See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 557 (2011); *United States v. Caronia*, 703 F.3d 149, 152 (2d Cir. 2012) (holding that a conviction for promoting an FDA-approved drug for off-label use violated the First Amendment under heightened scrutiny).

<sup>23</sup> See AMY GAJDA, *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS* 4 (2015) (predicting a backlash in First Amendment doctrine).

Amendment will not result in everything being protected; it will result in a lowering of protection for speech in general.<sup>24</sup> Courts will back away from categorical reasoning and employ balancing tests instead, erasing decades of doctrinal development that has proven extraordinarily protective for speakers in the United States.<sup>25</sup> In fact, several scholars call explicitly for this approach: harmonize U.S. free speech law with the law of the rest of the world, balancing speech against other societal values.<sup>26</sup> As a general move, this would represent an extraordinary change in First Amendment doctrine, erasing years of doctrinal calibration to protect dissident and unpopular speech.<sup>27</sup>

Current discussions of the right to record appear at first to fall squarely within this narrative. First Amendment scholars largely argue for expanding First Amendment protection to cover a right to record,<sup>28</sup> while privacy scholars fear that the right will become primarily a deregulatory tool.<sup>29</sup> These fears are not misplaced; companies have already used the right to record to argue for deregulation of automatic license plate readers (“ALPRs”) and drones.<sup>30</sup> Several scholars, thus, call for limiting First Amendment protection of the recording right in various ways.<sup>31</sup> Others fear, however, that limits on First

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<sup>24</sup> See Schauer, *supra* note 15, at 1635-36.

<sup>25</sup> See, e.g., *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791-93 (2011) (applying *United States v. Stevens* and firmly rejecting a balancing test, holding instead that the categorical approach is better).

<sup>26</sup> See, e.g., Shiffrin, *supra* note 21, at 1497-98 (claiming that except for protection of dissenting speech, the United States largely gets speech protection wrong while Europe gets it right); Alexander Tsesis, *Balancing Free Speech*, 96 B.U. L. REV. 1, 4 (2016) (proposing a balancing test for free speech cases that are “difficult . . . involving competing rights”).

<sup>27</sup> Margot E. Kaminski, *The First Amendment's Public Relations Problem: A Response to Alexander Tsesis's Free Speech Constitutionalism*, 2015 U. ILL. L. REV. SLIP OPINIONS 103, 106.

<sup>28</sup> See, e.g., Bambauer, *supra* note 2, at 105; Kreimer, *supra* note 2, at 380-81, 384, 398; Marceau & Chen, *supra* note 2, at 997-98.

<sup>29</sup> See, e.g., Reidenberg, *supra* note 2, at 153.

<sup>30</sup> *Dig. Recognition Network Inc. v. Hutchinson*, 803 F.3d 952, 954-55 (8th Cir. 2015) (addressing a lawsuit by manufacturers arguing that the law banning ALPRs violated their First Amendment rights); Brief of News Media *Amici* in Support of Respondent Raphael Pirker at 7-12, *Huerta v. Pirker*, NTSB Order No. EA-5730 (Nov. 18, 2014) (No. CP-217) (arguing that an absolute ban on unmanned aerial systems would violate the First Amendment by interfering with newsgatherers' rights).

<sup>31</sup> See, e.g., Bhagwat, *supra* note 2, at 1065; Reidenberg, *supra* note 2, at 155; see also Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 50 (2016) (advocating an antitargeting approach, which would protect phone cameras and like media, because “[c]ameras and other audiovisual recording devices are conventional means of communication—that is, they are conventionally used for communicative purposes” but would not protect other kinds of recording technologies).

Amendment coverage will enable the government to target information gathering as a way of preventing speech.<sup>32</sup>

There is a third way, which does not result in either privacy deregulation or undercoverage. While the dominant narrative paints the picture of a blunt, categorical First Amendment, dozens of doctrinal twists regularly allow for the balancing of speech against other interests.<sup>33</sup> Courts assess a wide variety of First Amendment issues under analyses more closely resembling balancing tests: time, place, and manner regulations; regulations of symbolic conduct; regulations of speech by government employees; and much more.<sup>34</sup> Even the distribution of private information may, under *Bartnicki*, trigger some kind of balancing test.<sup>35</sup> Appellate courts similarly appear prepared to approach the right to record under some sort of balancing test.

The key question is how to justify this intuition. Why is recording the kind of thing better approached under a balancing test? Those scholars proposing a balancing test in this context have not offered an answer, apart from pointing out that categorically protecting recording will result in privacy deregulation. We cannot create a categorical right to record, the argument goes, or privacy will be unprotectable. Other scholars argue that the recording right should be limited in scope to only matters of public concern, grounding the right in protection of democratic self-governance.<sup>36</sup> This second approach is a sort of categorical form of balancing: it locks in a particular balance of privacy and speech by restricting the scope of coverage. But this approach has been subjected to valid criticism for rejecting or ignoring other theories for why we protect freedom of speech.

Recording in fact critically resembles the kinds of expression, expressive acts, or penumbral rights ordinarily subjected to First Amendment balancing tests rather than categorical analysis. However, we can see that recording is more akin to expressive acts like parades than disembodied words on the printed page only if we understand the nature of the government interest. And the government can regulate to protect privacy only if we can distinguish that interest in privacy protection from impermissible interests in regulating the content of speech.<sup>37</sup>

In the language of First Amendment scholarship, we often treat First Amendment protection as involving two steps. First, we analyze whether a particular act is “covered” by the First Amendment—whether it is salient to the First Amendment because it is recognizable as expressive or entwined with

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<sup>32</sup> Bambauer, *supra* note 2, at 61; Campbell, *supra* note 31, at 50-51.

<sup>33</sup> See Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 819-20.

<sup>34</sup> *Id.* at 810-21.

<sup>35</sup> See *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001).

<sup>36</sup> *E.g.*, Bhagwat, *supra* note 2, at 1035.

<sup>37</sup> This Article offers the “careful examination of relevant . . . regulatory interests” called for by Bhagwat in an intermediate scrutiny context. Bhagwat, *supra* note 33, at 826.

expression.<sup>38</sup> Second, we ask what kind of scrutiny applies to determine whether the expressive act is protected and the regulation fails.<sup>39</sup>

The right to record suggests several things. First, it suggests that assessments of the type of harm at issue are implicit in both coverage and scrutiny analyses. In other words, despite the Supreme Court's recent disavowals of harm assessments and balancing, the scope of a speech right is at least partially defined by a court's conception of its related harms. Second, the right to record suggests that there are physical places where speech disappears: what is expressive in one location may not be expressive for First Amendment purposes in other locations.<sup>40</sup> Thus, taking the approach that recording is universally "covered" by the First Amendment, without seriously assessing scrutiny, ignores that the right functionally does not exist in some places. Understanding the right to record contributes to discussions of "invisible speech"—clearly expressive activities, like agreeing to a contract, or joining a conspiracy, or committing a securities violation, that are not visible to the First Amendment at all.<sup>41</sup>

Privacy may end up breaking, or at least bending, the First Amendment, requiring recalibration of the current ossified categorical approach in other areas. We may need to assess, for example, whether courts should generally in the privacy context break with traditions of content neutrality to take into account whether information is about a private matter or a matter of public concern, as suggested by the Court in *Bartnicki* and other cases. We may need to consider whether First Amendment doctrine, currently suspicious of regulation of distribution, should be altered to allow an exception for revenge pornography, or some form of a "right to be forgotten," or other forms of data privacy governance that target information sharing.<sup>42</sup>

But with respect to the recording right, the contribution of this Article is that the doctrine is already nuanced enough to accommodate a privacy-speech interface of a particular kind. Buried in existing First Amendment doctrine is a nuanced understanding of exactly the kind of privacy protected by laws governing private actors and their ability to record.

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<sup>38</sup> Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1766-68 (2004).

<sup>39</sup> *See id.* at 1769-71 (discussing the difference between First Amendment protection and coverage).

<sup>40</sup> *See id.* at 1768 (listing several categories of speech, including speech governed by the Securities Act of 1933 and the Uniform Commercial Code, where the line between First Amendment coverage and noncoverage is "invisible").

<sup>41</sup> Schauer, *supra* note 38, at 1768.

<sup>42</sup> Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 348-49 (2014); Mary Anne Franks, "Revenge Porn" Reform: A View from the Front Lines, FLA. L. REV. (forthcoming).

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## II. RECORDING AS SPEECH

Recording should be protected under the First Amendment. Doctrine, theory, and practical considerations all support protecting a right to record. None of these explain, however, exactly how or to what extent recording should be protected, or how it should be balanced against privacy interests.<sup>43</sup>

In this Part, I discuss how recording has been treated with respect to First Amendment salience. I then join a growing chorus of voices that advocates for a right to record. I compare different ways in which the recording right might be salient to the First Amendment: as speech, as an access or newsgathering right, or as speech entwined with action.

In practice, courts have largely chosen to protect the right to record as some combination of an access right and speech entwined with action. This leads to the question addressed in Part III: How can we arrive at a principled understanding of why recording is treated by the First Amendment as situated in physical space? The answer lies in understanding the privacy harms that recording can trigger.

### A. *Recording as Nonspeech*

Regulating recording was not treated as a First Amendment issue until relatively recently. Recording, in other words, has not always been salient as expression, and courts continue to divide on whether it receives First Amendment protection at all.

Some courts in right-to-record cases have asked whether recording is speech or conduct. The First Amendment test for distinguishing speech from conduct, articulated in *Spence v. Washington*,<sup>44</sup> asks whether somebody intends to communicate a particularized message that is likely to be understood.<sup>45</sup> According to several courts applying the *Spence* test to recording, if there is no demonstrable intent to communicate a particularized message to an audience, recording is not speech.<sup>46</sup> Some courts thus recognize First Amendment protection for recording only if a person can show an intent to distribute a recording; they otherwise characterize the moment of recording as governable action rather than speech.<sup>47</sup> A district court recently explained that the First

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<sup>43</sup> Bambauer, *supra* note 2, at 109 (arguing for recognition of the right to record, but not establishing the appropriate level of scrutiny, explaining that “the contours of First Amendment scrutiny are complex and deserve careful consideration”).

<sup>44</sup> 418 U.S. 405 (1974).

<sup>45</sup> *Id.* at 410-11; *see also* Texas v. Johnson, 491 U.S. 397, 404 (1989).

<sup>46</sup> Bambauer, *supra* note 2, at 76 (citing cases that reason this way); Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1486 (2013) (suggesting that while an actual audience is not necessary, an anticipated audience is). *But see* Kreimer, *supra* note 2, at 377 (“It is simply not the case, moreover, that an external audience is or should be a necessary condition of First Amendment protection.”).

<sup>47</sup> *See* Baumbauer, *supra* note 2, at 76-77 (citing cases that require an intent to communicate for photography to be deemed speech); Benjamin, *supra* note 46, at 1479

Amendment would protect recording only if it was accompanied by a verbal announcement (or other expressive conduct) explicitly indicating disagreement with police activity.<sup>48</sup> As discussed below, against the backdrop of both First Amendment theory and protection for newsgathering and penumbral rights, this reasoning is significantly flawed.

Another way to approach recording is by looking at the type of law at issue rather than the nature of the governed act. The First Amendment does not protect newsgatherers from laws of general applicability.<sup>49</sup> A newspaper and its reporters may be subject to general tax laws, to antitrust laws, and even to requirements that reporters, like all citizens, respond to a grand jury subpoena.<sup>50</sup> A law can, however, move out of the category of a law of general applicability if it impermissibly targets a particular speaker or subject matter.<sup>51</sup>

Privacy laws governing recording have historically been characterized as laws of general applicability, not as laws targeted at speech or particular speakers. Most wiretap laws, eavesdropping laws, and other privacy laws tend to be subject-matter—or at least viewpoint—neutral, and thus were, until recently, invisible to the First Amendment. For example, the Court of Appeals for the Ninth Circuit in 1971 compared eavesdropping laws to trespass and theft laws, which are considered generally applicable forms of governance not

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(explaining that algorithmic speech should be protected under the First Amendment only when a human is “sending a substantive message in such a way that others can receive it”); see also *Fields v. City of Phila.*, 166 F. Supp. 3d 528, 535 (E.D. Pa. 2016).

<sup>48</sup> *Fields*, 166 F. Supp. 3d at 535. I led a recent amicus effort urging the Court of Appeals for the Third Circuit to overturn this decision. *Law Professors Amicus in Fields (Right to Record)* MARGOTKAMINSKI.COM (Nov. 1, 2016), <http://www.margotkaminski.com/?p=73> [<https://perma.cc/6WA9-GF94>].

<sup>49</sup> *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991) (“[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.”).

<sup>50</sup> *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972) (holding that subpoenaing the press does not violate the First Amendment); *Citizen Publ’g Co. v. United States*, 394 U.S. 131, 139-40 (1969) (applying First Amendment doctrine concerning newsgathering to antitrust laws); *Associated Press v. United States*, 326 U.S. 1, 6-7, 19-20 (1945) (same); *Associated Press v. NLRB*, 301 U.S. 103, 130-33 (1937) (holding an NLRB order under the National Labor Relations Act applicable to the Associated Press constitutional under the First Amendment).

<sup>51</sup> See *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 581 (1983) (finding a tax targeting a newspaper to be unconstitutional, but noting “[i]t is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems”); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 251 (1936) (same); see also *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011) (finding that content-based regulation will receive strict scrutiny when it is aimed at a particular speaker); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 391-92 (1992) (finding that the government cannot target a particular speaker or viewpoint within a category of speech that is otherwise unprotected).

subject to First Amendment scrutiny.<sup>52</sup> Other courts have similarly treated privacy laws as laws of general applicability.<sup>53</sup> The Supreme Court appeared to condone this approach in *Bartnicki*.<sup>54</sup> According to these courts, laws targeting the distribution of recordings target speech, but laws governing recording do not.

Even before current right-to-record case law, this approach of treating recording laws as laws of general applicability began to break down. In 1995, the Court of Appeals for the Seventh Circuit found that while journalists were not immune from liability for breaking generally applicable laws such as trespass, privacy laws were distinct from trespass law.<sup>55</sup> Similarly, the Ninth Circuit revisited the issue in 1997, when it assessed privacy laws with greater deference to newsgatherers, suggesting that the privacy laws were no longer inscrutable laws of general applicability.<sup>56</sup>

The fact that recording laws are now at least partially visible to First Amendment analysis suggests that they are moving out of the box of laws that includes trespass and into the box that includes laws that target speech.<sup>57</sup> Scholars advocating for a right to record push for precisely this shift: to treating privacy laws that constrain recording as speech-targeting laws, not laws of general applicability.<sup>58</sup>

#### B. *Protecting the Right to Record: First Amendment Theory*

*Bartnicki* appears to set up a workable framework for privacy regulation: target recording, not distribution. On closer scrutiny, however, its suggestion

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<sup>52</sup> *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (“The First Amendment is not a license to trespass, to steal, or to intrude by electronic means . . .”).

<sup>53</sup> *See, e.g., Miller v. Nat’l Broad. Co.*, 232 Cal. Rptr. 668, 678-81 (Cal. Ct. App. 1986) (analyzing privacy implications when a news team entered someone’s bedroom without authorization to film a rescue attempt by paramedics); *Noble v. Sears, Roebuck & Co.*, 109 Cal. Rptr. 269, 272-73 (Cal. Ct. App. 1973) (holding that plaintiff had a cause of action against a private investigator who obtained entrance into a hospital room by deception); *Dickerson v. Raphael*, 564 N.W.2d 85, 92 (Mich. Ct. App. 1997) (rejecting First Amendment newsgathering defense regarding the violation of eavesdropping statutes), *rev’d on other grounds*, 601 N.W.2d 108 (Mich. 1999).

<sup>54</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 526-31 (2001).

<sup>55</sup> *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1351-53 (7th Cir. 1995) (finding that “there is no journalists’ privilege to trespass,” but noting that the reporters “entered offices that were open to anyone expressing a desire for ophthalmic services and videotaped physicians engaged in professional, not personal, communications with strangers (the testers themselves)”).

<sup>56</sup> *Deteresa v. Am. Broad. Cos.*, 121 F.3d 460, 466 (9th Cir. 1997).

<sup>57</sup> *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 602 (7th Cir. 2012) (“The Illinois eavesdropping statute may or may not be a law of general applicability . . .”).

<sup>58</sup> *E.g., Bambauer, supra note 2*, at 111; *Campbell, supra note 31*, at 50-51; *Kreimer, supra note 2*, at 392.

that recording should be a First Amendment-free zone does not hold up.<sup>59</sup> I join a number of scholars in arguing that theory, intuition, and doctrine all suggest that the right to record should be afforded at least some form of First Amendment protection.<sup>60</sup>

First Amendment protection is justified under three dominant theories: (1) protection for the marketplace of ideas; (2) protection of speech necessary for democratic self-governance; and (3) protection of the individual autonomy interest in speech.<sup>61</sup> Under the theory of the marketplace of ideas, we protect speech so that a listener or reader can shop amongst competing ideas in a search for “truth.” Under the theory of democratic self-governance, we protect speech to better enable citizens to participate in the process of governance. Under the autonomy theory, we protect an individual’s autonomy, allowing the government to regulate her speech only when a significant, nonspeech-related harm can be shown.

Under any of these theories, some version of the right to record should be protected.<sup>62</sup> Audiovisual recordings often contribute to the marketplace of ideas and are now a regular part of the vast array of media consumed by most individuals in their searches for “truth.” Even other kinds of recording, such as gathering data to build maps of the physical environment,<sup>63</sup> or recording the

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<sup>59</sup> Here I agree with Jane Bambauer, who pushes back on the *Bartnicki* framework and calls for a First Amendment “right to create knowledge” as a necessary precursor to speech. Bambauer, *supra* note 2, at 61 (observing of *Bartnicki* that “[i]f the dissemination of mechanical recordings receives First Amendment protection (which it does), then the creation of those same recordings must have First Amendment significance, too” (footnotes omitted)).

<sup>60</sup> See, e.g., Bambauer, *supra* note 2, at 61; Marceau & Chen, *supra* note 2, at 999.

<sup>61</sup> Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478 (2011); see also ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 75 (1948) (noting the importance of the value of democratic self-governance by concluding that “we of the United States have decided to be a self-governing community”); JOHN STUART MILL, *ON LIBERTY* 141 (1859) (emphasizing the importance of autonomy interests by noting that the “acts of an individual may be hurtful to others . . . without going to the length of violating any of their constituted rights”); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982).

<sup>62</sup> See Bambauer, *supra* note 2, at 91-104; Blitz, *supra* note 2, at 174 (“[I]f and when the First Amendment protects such activity, it should do so with a right to receive information and ideas that protects the pursuit of these individual interests. Such an emphasis is not only necessary to advance central First Amendment purposes, but compatible both with limits on the scope of the right, and with the goal of leaving room for privacy rights that entail denying individuals some of the information they might seek.”); Kreimer, *supra* note 2, at 379 (“The government is barred from intermeddling in both speech and thought because both undergird the constitutional commitments to personal autonomy and popular sovereignty.”); Marceau & Chen, *supra* note 2, at 999 (“First Amendment theory strongly supports the notion that video recording is a form of expression or conduct preparatory to speech.”).

<sup>63</sup> Blitz, *supra* note 2, at 124-26.

heat emanations from apartments to determine whether they are occupied by more than the permitted number of tenants,<sup>64</sup> contribute more information to the marketplace of ideas.

Under the theory of democratic self-governance, we should at least protect the right of citizens to record government officials or acts of governance, in order to better enable individuals to participate in the political process.<sup>65</sup> This theory suggests, for example, that recording police activity should be squarely protected by the First Amendment, both because the recording serves a government oversight function and because it can inform future policy choices.<sup>66</sup> A broader view of democratic self-governance suggests protecting not just political audiovisual recordings, but anything that properly belongs in the public sphere, where it can contribute to an individual's understanding of herself as a citizen. Similarly, a broader view of democratic self-governance suggests that the First Amendment should protect anything that, when regulated, threatens an individual's view of the legitimacy of her government.<sup>67</sup> If government regulation of, say, cellular phone recording threatens an individual's sense of the legitimacy of her government, it should be protected.

Both the marketplace of ideas and democratic self-governance theories suggest a hierarchy of protected recordings, however. We might, for example, under self-governance theory, protect only recordings of public figures or matters of public concern<sup>68</sup> and afford less protection to other kinds of subject matter. Under the marketplace of ideas, we may be less concerned with frivolous recordings or seemingly personal recordings because their contribution to a search for "truth" may be characterized as less significant.

Under autonomy theory, however, these hierarchies disintegrate. One can argue under autonomy theory that all forms of recording should be protected unless the government can show a significant nonspeech-related harm.<sup>69</sup> Those

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<sup>64</sup> A. Michael Froomkin, *Regulating Mass Surveillance as Privacy Pollution: Learning from Environmental Impact Statements*, 2015 U. ILL. L. REV. 1713, 1724.

<sup>65</sup> See Bhagwat, *supra* note 2, at 1065 (noting that the Supreme Court has ruled in multiple cases that First Amendment protections are extended to speech "about a matter of public concern"); Marceau & Chen, *supra* note 2, at 999-1004 (explaining how the advent of modern video recording technology and distribution has better enabled individuals to participate in democracy); Reidenberg, *supra* note 2, at 154 (discussing the value of image capture for providing greater transparency in the job performance of public officials).

<sup>66</sup> See Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1560 (2016) [hereinafter Simonson, *Beyond Body Cameras*]; Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 413 [hereinafter Simonson, *Copwatching*] (2016).

<sup>67</sup> Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2369 (2000).

<sup>68</sup> Bhagwat, *supra* note 2, at 1065; Reidenberg, *supra* note 2, at 155-56.

<sup>69</sup> Bambauer, *supra* note 2, at 100; Blitz, *supra* note 2, at 174 (discussing the broad protection the First Amendment should provide to an individual's right to receive

who agree with the autonomy theory of the First Amendment will find it hardest to stomach a right to record that is limited solely to matters of public concern.

There is evidence in current doctrine that courts find the autonomy theory significant. Speech protections generally run broader than just protecting “high value” speech, and there are significant practical problems—resulting in both overinclusion and underinclusion—with asking courts to assess when speech is “high value,” or a matter of public concern.<sup>70</sup> Moreover, the current Supreme Court appears largely to embrace a broader First Amendment, affording protection to clearly lower-value speech—such as lies or violent video games—not just speech valuable to self-governance or a high-minded search for “truth.”<sup>71</sup>

Yet, it is possible to embrace the autonomy theory of the First Amendment while also recognizing significant autonomy interests in privacy protection.<sup>72</sup> The right-to-record puzzle is most interesting and difficult under this theory that encourages the broadest form of First Amendment protection. How should we protect individual autonomy with the right to record while also protecting individual autonomy from ubiquitous or mass surveillance?<sup>73</sup>

First Amendment theory, therefore, suggests that at least some recording should be protected by the First Amendment.<sup>74</sup> It does not, however, dictate (1) what kinds of recordings should be covered by the First Amendment; (2) what form of scrutiny laws governing recording should face; or (3) how to reconcile competing interests, such as privacy, with an expansive right to record.<sup>75</sup>

### C. *A Note on Automation*

One potential way to limit the scope of the right to record, which might at least cabin the number of recordings falling under First Amendment protection, would be to recognize a right to record only when there is a human author.<sup>76</sup> A

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information and ideas when pursuing their individual interests).

<sup>70</sup> See Bambauer, *supra* note 2, at 117 (finding that there is no clear guidance for courts to determine which types of speech are important enough to be protected); Blitz, *supra* note 2, at 169.

<sup>71</sup> See *United States v. Alvarez*, 132 S. Ct. 2537, 2545 (2012); *United States v. Stevens*, 559 U.S. 460, 470 (2010).

<sup>72</sup> Bambauer, *supra* note 2, at 101; Blitz, *supra* note 2, at 190 (acknowledging that there are legitimate concerns about protecting individual privacy when permitting the right to record and capture images in public and private places).

<sup>73</sup> Blitz, *supra* note 2, at 192.

<sup>74</sup> Bambauer, *supra* note 2, at 105.

<sup>75</sup> *Id.*; Blitz, *supra* note 2, at 192-93 (stating that government restrictions on information gathering must overcome the *O'Brien* intermediate scrutiny test, without analyzing how such a balancing test would apply).

<sup>76</sup> *Cf.* Blitz et al., *supra* note 2, at 100 (suggesting limiting the right to record from drone surveillance to journalist authors).

large number of recordings are made by cameras or other sensors placed in physical locations, with no human being present to turn the cameras on and off. And a large amount of future recordings will likely be made by automatic or autonomous systems such as drones or driverless cars, which will use such recordings for navigation and other more nefarious purposes, like assessing insurance risk.<sup>77</sup> One could limit the scope of the conflict between privacy and the right to record by eliminating these types of recordings from First Amendment coverage.<sup>78</sup>

First, this will be hard to do in practice. While determining the nature of algorithmic authorship is beyond the scope of this Article, it is worth noting that it can be incredibly challenging to draw the line between human and algorithmic authorship.<sup>79</sup> Second, it is not clear from current case law that such a distinction would be viable. Courts assessing recording have not distinguished between cameras held by humans and cameras left in place by an absent human author.<sup>80</sup>

The bigger issue with trying to line-draw around algorithmic authorship, however, is that the social meaning of a particular recording will likely be the same regardless of whether it is made by a human or an algorithm.<sup>81</sup> One person's security tape is another person's news story.<sup>82</sup> It does not matter, from a viewer's perspective, whether the tape is "authored" by a stationary, nonhuman security camera, or a lauded film director.<sup>83</sup>

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<sup>77</sup> See *The First 1000 Commercial UAS Exemptions*, ASS'N FOR UNMANNED AERIAL VEHICLE SYS. INT'L, [www.auvsi.org/1000report](http://www.auvsi.org/1000report) [<https://perma.cc/33TL-9F8Y>] (last visited Oct. 18, 2016).

<sup>78</sup> See Blitz et al., *supra* note 2, at 132-34 (distinguishing between human photography and automated image capture and suggesting that the former might receive greater First Amendment protection).

<sup>79</sup> See, e.g., Benjamin, *supra* note 46, at 1493 n.143; Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1504 (2013); see also Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1187 (2016). But see James Grimmelmann, *There's No Such Thing as a Computer-Authored Work—And It's a Good Thing, Too*, 39 COLUM. J.L. & ARTS 403, 408 (2016) (arguing that human and algorithmic authorship are the same).

<sup>80</sup> See, e.g., *S.H.A.R.K. v. Metro Parks Serving Summit Cty.*, 499 F.3d 553, 562 (6th Cir. 2007), mentioned in Marceau & Chen, *supra* note 2, at 1028-29.

<sup>81</sup> See, e.g., Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 720 (2000); Andrew Tutt, *Software Speech*, 65 STAN. L. REV. ONLINE 73, 77 (2012).

<sup>82</sup> See Kreimer, *supra* note 2, at 347 ("As image-capture capability has diffused, publicly salient images emerge not only from premeditated efforts to prepare for public dialogue, but from recordings by serendipitous amateur photographers."); see also Bambauer, *supra* note 2, at 85 ("Though the Supreme Court has not directly addressed the question whether mechanical recordings are protected speech, it has recognized that information gathering is a necessity for speech.")

<sup>83</sup> See Bambauer, *supra* note 2, at 59-60 ("A distinction can be made between statements

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This is because the First Amendment protects the rights of listeners in addition to the rights of speakers.<sup>84</sup> If we recognize that an algorithmically “authored” recording can nonetheless impact viewers and listeners as much as a human-authored recording, then all three First Amendment theories—the marketplace of ideas, democratic self-governance, and even autonomy—suggest extending some form of First Amendment protection to the recording.<sup>85</sup>

D. *Free Speech Intuitions and the Right to Record*

Cultural intuitions about free speech protection similarly suggest that recording should be protected by the First Amendment. Take the following examples.

The cases that have given rise to the recognition of the right to record largely involve the arrest of citizens who recorded police actions in public places.<sup>86</sup> If there is no First Amendment protection at all for recording, then a person who pulls out a smartphone to record police malfeasance could be arrested without judicial scrutiny of the impact on free expression. This would also leave legislatures unchecked when enacting laws banning recording. That seems wrong.

A second common fact pattern might trigger more complicated intuitions. A number of states have enacted “ag-gag” laws largely aimed at public interest groups intent on filming abusive behavior on factory farms.<sup>87</sup> On the one hand, the banned recording in the ag-gag context takes place on private land, without the permission of a private landowner. On the other, the laws target newsworthy information and often target particular viewpoints of individuals who want to speak out against factory farms. If recording is invisible to the First Amendment, then these laws would not undergo judicial scrutiny of their impact on free speech, leaving legislatures unchecked.

Discussion of drones may spark similarly mixed intuitions. On the one hand, states have enacted privacy laws governing the use of drones to record private

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of fact that are observed and written by a human and those that are collected mechanically, and it might be tempting to draw the First Amendment line between the two. But the distinction is untenable.”).

<sup>84</sup> See Massaro & Norton, *supra* note 79, at 1175-78 (emphasizing listener rights as the source of protection for artificial intelligence authorship or speech). *But cf.* Benjamin, *supra* note 46, at 1477 (stating that the rights of listeners and viewers are “articulated as [] addition[s] to the rights of speakers, as opposed to [] substitute[s] for them”).

<sup>85</sup> See Benjamin, *supra* note 46, at 1477-78.

<sup>86</sup> See, e.g., *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 600 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 83 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

<sup>87</sup> Marceau & Chen, *supra* note 2, at 994-96 (discussing the enactment of legislation in various states that “criminalizes the act of nonconsensual audio or video recording on the premises of slaughterhouses, factory farms, and other industrial meat operations”).

individuals in their own backyards, largely protecting an understandable privacy interest.<sup>88</sup> On the other, when the Federal Aviation Administration (“FAA”) proclaimed the area immediately above Ferguson, Missouri to be a no-fly zone in the wake of public protests, the ban clearly had First Amendment implications.<sup>89</sup> The restriction on flight above Ferguson prevented recording and media reporting of what was happening on the ground. That flight ban may have turned out to be justified for safety reasons, but if there is no protection for a right to record, then the FAA’s actions would receive no First Amendment analysis to determine if an impermissible motive existed for regulating speech.

E. *First Amendment Doctrine and the Right to Record*

A right to record fits not only within free speech intuitions and First Amendment theory but also within several lines of well-established doctrine. Recording might be protected as speech itself, or it might be protected because it is a necessary part of a recognized communications medium. The First Amendment also protects the corollary or penumbral rights that are necessary for speech; newsgathering is a particular kind of corollary right. Again, as with First Amendment theory, these doctrines lead to potentially different levels of both coverage and scrutiny. The doctrines vary in both the scope and strength of potential protection for a right to record.

Several scholars have suggested that recording video might be fully protected expression. They argue that just as writing words or editing a film is clearly expressive, recording that film must be expressive, too.<sup>90</sup> After all, the First Amendment protects movies as speech,<sup>91</sup> without asking whether a “particularized message” has been expressed.<sup>92</sup> The First Amendment protects

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<sup>88</sup> See, e.g., *infra* note 336 and accompanying text (discussing various states’ drone regulations).

<sup>89</sup> See Margot E. Kaminski, *Up in the Air: The Free-Speech Problems Raised by Regulating Drones*, SLATE (Nov. 25 2014, 11:56 AM), [http://www.slate.com/articles/technology/future\\_tense/2014/11/faa\\_s\\_attempts\\_to\\_regulate\\_drones\\_could\\_have\\_first\\_amendment\\_problems.html](http://www.slate.com/articles/technology/future_tense/2014/11/faa_s_attempts_to_regulate_drones_could_have_first_amendment_problems.html) [https://perma.cc/X8FZ-669A]; see also Press Release, Fed. Aviation Admin., *FAA Issues Temporary Flight Restriction over Ferguson, Missouri*, (Nov. 25, 2014), [https://www.faa.gov/news/press\\_releases/news\\_story.cfm?newsId=17854&cid=TW283](https://www.faa.gov/news/press_releases/news_story.cfm?newsId=17854&cid=TW283) [https://perma.cc/P6WL-E88W].

<sup>90</sup> See Kreimer, *supra* note 2, at 343; Marceau & Chen, *supra* note 2, at 1015 (“[A]ll speech is conduct—whether it involves writing words on a page, carrying a picket sign, [or] shouting a protest chant . . .”).

<sup>91</sup> See *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (finding that both “pictures [and] films . . . have First Amendment protection”); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 495 (1952) (protecting films regardless of commercial motive).

<sup>92</sup> Kreimer, *supra* note 2, at 373 (“[T]he Court has treated images as media of communication without inquiring into an illusively specific message.”).

not just the public exhibition of video but also private viewings.<sup>93</sup> If the First Amendment protects the distribution and viewing of video, it seems strange to say it affords no protection to video recording.<sup>94</sup> Additionally, audiovisual recording may be fully protected as speech in connection to freedom of thought; making a video for later recollection might be analogous to keeping a private diary for later personal consumption.<sup>95</sup>

Even if recording is not equivalent to pure speech, there is clear doctrinal protection for conduct essential to recognized communications media.<sup>96</sup> Audiovisual recording may be protected as conduct integral to expression, even if recording itself is not considered to be equivalent to oral speech or writing. Once society recognizes a particular communications medium, First Amendment protection extends beyond the finished communications product into the production process.<sup>97</sup> When the state targets an integral aspect of a recognized communications medium, such as by placing a tax on pen and paper, that action may be suspect under the First Amendment.<sup>98</sup> The Supreme Court recognized in 1952 that “motion pictures are a significant *medium* for the communication of ideas.”<sup>99</sup> Like buying pen and paper, video recording

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<sup>93</sup> See *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (“If the First Amendment means anything, it means that a State has no business telling a man . . . what books he may read or what films he may watch.”).

<sup>94</sup> *Bambauer*, *supra* note 2, at 61.

<sup>95</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (“The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”); *Blitz*, *supra* note 2, at 148 (“Taking a picture is in many respects analogous to drawing or painting what one sees. It represents and fixes a visual experience in a particular medium of expression, usually to remember it later or to share it with others.”); *Kreimer*, *supra* note 2, at 342 (commenting that “camera-phone users ubiquitously capture and archive images to record their experiences for future reference”); *id.* at 378 (recognizing that “[a] diary entry begins a process of communicating with an audience of one: my entries are subject to review by my future self”).

<sup>96</sup> *Marceau & Chen*, *supra* note 2, at 1018.

<sup>97</sup> See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012) (“This observation holds true when the expressive medium is mechanical rather than manual.”); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010) (“The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds.”); *Kreimer*, *supra* note 2, at 382 (“Almost all media of expression can be broken down into a series of social practices and preconditions that are not themselves expressive.”); *Post*, *supra* note 81, at 717 (“If the state were to prohibit the use of [film] projectors without a license, First Amendment coverage would undoubtedly be triggered. This is not because projectors constitute speech acts, but because they are integral to the forms of interaction that comprise the genre of the cinema.”).

<sup>98</sup> *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 592-93 (1983) (invalidating a tax on ink and paper used in producing newspapers).

<sup>99</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (emphasis added); see also *Blitz*, *supra* note 2, at 139 (“[T]elling stories with photographically captured light has

may be protected because it is conduct that is essentially preparatory to speech via a recognized communications medium.<sup>100</sup>

This analysis of recording as pure speech or as conduct integral to a communications medium leaves open several questions. First, there is the question of whether one must always have an audience in mind or an intent to distribute the final communications product.<sup>101</sup> In order for recording to constitute speech, must it be directed to another person? Some scholars have argued that it must.<sup>102</sup> Others disagree.<sup>103</sup> Cases suggest, however, that speech need not be published to be protected, pointing to the idea that a distribution requirement is not necessary.<sup>104</sup>

Second, while these analyses may work for audiovisual film, which the Supreme Court has recognized as protected expression and a protected medium,<sup>105</sup> it is unclear whether they might apply to other kinds of recording. This presents a line-drawing problem: Is there some way to distinguish between audiovisual recording and, say, observing and recording thermal imagery?<sup>106</sup> If such distinctions exist, are they principled? Are they workable in light of rapid technological change? It can be challenging to determine when a particular practice constitutes a recognizable communications medium. This

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become, as Kreimer and other scholars observe, a familiar mode of expressing oneself . . .”); Campbell, *supra* note 31, at 50 (“Cameras and other audiovisual recording devices are conventional means of communication—that is, they are conventionally used for communicative purposes.”); Kreimer, *supra* note 2, at 339 (“In today’s world, personal image capture is part of a medium of expression entitled to First Amendment cognizance.”).

<sup>100</sup> See Campbell, *supra* note 31, at 50-51 (“Targeted regulations of audiovisual recording thus single out conduct commonly associated with expression and impose an apparent disproportionate burden on speech.”); Marceau & Chen, *supra* note 2, at 1018.

<sup>101</sup> See, e.g., *Fields v. City of Phila.*, 166 F. Supp. 3d 528, 534 (E.D. Pa. 2016) (finding that expressive conduct protected by the First Amendment exists where there is an “intent to convey a particularized message”).

<sup>102</sup> See, e.g., Benjamin, *supra* note 46, at 1483; Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 257 (2004).

<sup>103</sup> See, e.g., Bambauer, *supra* note 2, at 59; Kreimer, *supra* note 2, at 377.

<sup>104</sup> See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (explaining that the First Amendment protects “a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect” (quoting *Estate of Hemingway v. Random House, Inc.*, 244 N.E.2d 250, 255 (1968))). *But see* Benjamin, *supra* note 46, at 1484 (arguing that meaning has to be communicated to be considered protected speech).

<sup>105</sup> *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (“[W]e conclude that expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments.”).

<sup>106</sup> Campbell, *supra* note 31, at 52 (suggesting we distinguish between audiovisual recording, which should be protected as part of a communications medium, and other kinds of recording, which should not be protected).

could result in too little protection, by failing to capture newer technologies, or it might not limit protection at all. For example, one could argue that Google Maps is now a widespread communications medium, and thus all gathering of geolocation data should be protected speech.

Third, and most significantly, the act of recording differs from opening one's mouth to speak, or even from burning a flag, because both expressive moments are created at the same time they are disseminated.<sup>107</sup> By contrast, books are printed before they are distributed; photographs are taken before they are displayed; and movies are filmed before they are screened.<sup>108</sup> When you can demarcate the act of producing communication from the act of actually communicating, this raises the questions of whether the act of production is truly part of the communicative moment and how far into conduct First Amendment protections extend.<sup>109</sup> As one scholar has noted, protecting the production of speech implicates issues from regulating tattoo parlors to regulating the production of pornography.<sup>110</sup>

Protecting recording as speech thus raises a broader line-drawing problem: many forms of conduct can be understood as significantly entwined with speech. What is to distinguish recording from other kinds of conduct? Traveling to a foreign country, for example, could be cast as necessary for informed speech about that country.<sup>111</sup> The Supreme Court has rejected First Amendment protection for such travel, noting that: "There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. . . . The right to speak and publish does not carry with it the unrestrained right to gather information."<sup>112</sup>

Characterizing the governance of audiovisual recording as equivalent to the governance of speech or governance of a communications medium fails to helpfully distinguish between acceptable and unacceptable regulatory interests. If aiming a regulation at audiovisual recording always constitutes improper targeting of speech, then there appears to be no room for acceptable nonspeech-related government motives.

The final doctrinal justification for protecting a right to record is, in my view, the most convincing. The First Amendment protects not just core rights

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<sup>107</sup> Bhagwat, *supra* note 2, at 1033 (explaining that oral speech and in-person conduct are created and disseminated simultaneously).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1033-34. Seth Kreimer has noted that this distinction is sometimes meaningless in today's communications environment because in practice images are often captured and immediately disseminated, such as with live video broadcasting. Kreimer, *supra* note 2, at 376.

<sup>110</sup> Bhagwat, *supra* note 2, at 1034.

<sup>111</sup> *Zemel v. Rusk*, 381 U.S. 1, 16 (1965) ("Appellant also asserts that the Secretary [of State's] refusal to validate his passport for travel to Cuba denies him rights guaranteed by the First Amendment.")

<sup>112</sup> *Id.* at 16-17.

but also the penumbral and corollary rights that are necessary for core protections.<sup>113</sup> The Supreme Court has explained that “[w]ithout those peripheral rights the specific rights would be less secure.”<sup>114</sup> The First Amendment protects not only speech, but also “the indispensable conditions of meaningful communication.”<sup>115</sup> The First Amendment thus provides corollary protections beyond the core protection of speech, including the right to distribute, the right to receive, the right to read, freedom of inquiry, freedom of thought, and freedom of expressive association.<sup>116</sup> The Court has extended penumbral or corollary First Amendment protections not just to the act of printing a newspaper, but to various links in the distribution chain, including the distribution of handbills,<sup>117</sup> acts of door-to-door solicitation,<sup>118</sup> the operation of sound amplification equipment,<sup>119</sup> and the placement of newspaper racks.<sup>120</sup>

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<sup>113</sup> The existence of such corollary rights is “necessary in making the express guarantees [of the First Amendment] fully meaningful.” *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965); *see also* *Luis v. United States*, 136 S. Ct. 1083, 1097-98 (2016) (Thomas, J., concurring) (“Constitutional rights thus implicitly protect those closely related acts necessary to their exercise . . . . [T]he First Amendment ‘right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.’” (quoting *McConnell v. FEC*, 540 U.S. 93, 252 (2003) (Scalia, J., concurring in part, dissenting in part, and concurring in the judgment in part))).

<sup>114</sup> *Griswold*, 381 U.S. at 482-83.

<sup>115</sup> *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring) (proposing a “structural role” for the First Amendment in providing access to court).

<sup>116</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *Griswold*, 381 U.S. at 482 (citing *Pierce v. Soc’y of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925)); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

<sup>117</sup> *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168-69 (2002) (invalidating an ordinance that prohibited door-to-door solicitation); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938) (stating that pamphlets and leaflets are protected because the liberty of the press “comprehends every sort of publication which affords a vehicle of information and opinion”).

<sup>118</sup> *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 753 (1988).

<sup>119</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989) (finding that a city ordinance that regulated the sound equipment used at a public bandshell was valid but required First Amendment analysis).

<sup>120</sup> *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 410 (1993). Several scholars have argued that the Press Clause supports these kinds of structural First Amendment protections. *See, e.g.*, Edward Lee, *Freedom of the Press 2.0*, 42 GA. L. REV. 309, 318 (2008); McDonald, *supra* note 102, at 343 (proposing an expanded interpretation of the Press Clause that would “protect information-gathering conduct necessary for preserving valuable information flows to the public”); Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 463 (2012).

The First Amendment protects such corollary rights so that the government cannot prevent speech by targeting conduct that falls just outside, but is still necessary for, expression. Information gathering, and similarly information recording, is often necessary for speech to occur.<sup>121</sup> As the Seventh Circuit observed:

The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected . . . .<sup>122</sup>

Newsgathering, which I discuss at greater length below, is one such protected corollary right. And the newsgathering case law—while not perfectly mapping on to the right to record—gives significant hints as to how to recognize and draw principled lines around the burgeoning right to record.

#### F. *Recording as Speech?*

Is recording protectable as speech? This is, in my view, the wrong way to frame the question. If we ask the question, “Is recording speech?” then we are faced with limited options for making room for other values—and we fail to accurately capture the relationship between the recording right and physical spaces. If recording is speech like the Internet is speech or like movies are speech, then regulation of recording will likely be subjected to strict scrutiny, unless the regulation addresses one of a limited list of historical exemptions to speech protection.<sup>123</sup> Privacy is not one of these historical exemptions, and thus—absent significant adjustment to strict scrutiny, or the creation of an explicit privacy exemption or balancing test—privacy laws regulating recording would almost always fail strict scrutiny and be held unconstitutional.

This result does not comport with the Supreme Court's suggested approach in *Bartnicki*, nor does it comport with the intuition that, in some cases, speech

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<sup>121</sup> See Bhagwat, *supra* note 2, at 1058 (“[T]he Court has long interpreted the Speech Clause to extend penumbral protection to conduct closely associated with speech, notably distribution of speech but also some speech-preceding conduct. Furthermore, there seems no reason not to read the Press Clause to also provide some penumbral protections.”); see also Bambauer, *supra* note 2, at 70 (“One might assume that the creation of data tends to receive protection as well, since the collection of data is a necessary precursor to having and sharing it.”); Blitz, *supra* note 2, at 154-55 (“It is hard to see how such peripheral rights could fail to include the right to have access to the media and tools that make speech possible.”).

<sup>122</sup> *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); see also Bambauer, *supra* note 2, at 73 (“Indirect burdens on speech provoke First Amendment scrutiny . . . when the intended target of the regulation is so closely linked to speech, so indispensable to First Amendment rights, that it is an impediment to speech itself.”).

<sup>123</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2539-40 (2012); *United States v. Stevens*, 559 U.S. 460, 468 (2010).

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and privacy should be balanced against each other and privacy might win. Strict scrutiny requires a categorical rather than a balancing approach to First Amendment protection and is particularly ill-suited to contextual analysis. The right to record is nothing if not contextual.

But when we look to corollary rights, also referred to as structural First Amendment rights, the picture becomes clearer. When scholars characterize the right to record as a “necessary precursor to speech,” they characterize the right as a structural right, rather than equivalent to oral speech.<sup>124</sup> Courts recognize that structural rights are more contextual and more entwined with other regulatory interests, such as an interest in raising revenue through general taxation, or in keeping a clear flow of traffic, or preserving quiet in a residential neighborhood.

Treating the right to record as a structural right still leaves significant doctrinal puzzles in place. For example, it still does not explain how to disentangle government interests in protecting privacy from impermissible interests in preventing recording. And while some instantiations of structural rights appear to be disembodied from their physical locations (e.g., a tax on newspapers), others are analyzed in their physical contexts (e.g., the placement of newsracks). Characterizing the right to record as a structural right still does not yield a clear answer about whether or how the right should be situated in physical space.

Analyzing recording requires analyzing context. That context often includes the nature of a physical space. Does an invitation to come into your home give the invitee a First Amendment right to record there and subject any privacy regulation governing recording in the home to strict scrutiny? What if you purchase a smart refrigerator, a toy, or a robot—does the company that sells the object now have a First Amendment right to record all activities in your home?<sup>125</sup> Governing recording cannot possibly always trigger strict scrutiny or always fail intermediate scrutiny. The next Section explains why.

#### G. *Recording as Access*

The act of recording takes place in a physical environment. It is thus ill-suited to being treated like an abstract category of media.<sup>126</sup> Recording, in other words, is not a communications medium like movies, broadcasting, video games, or the Internet, to be evaluated in the abstract. Thus, in my view, it is incorrect to treat recording as a traditional abstract First Amendment “coverage problem,” involving the extension of speech protection to a new type of media.<sup>127</sup> Answers to the more difficult questions about the right to record

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<sup>124</sup> See Marceau & Chen, *supra* note 2, at 1019, 1047.

<sup>125</sup> For discussion of this question, see Margot E. Kaminski, *Robots in the Home: What Will We Have Agreed To?*, 51 IDAHO L. REV. 661 (2015).

<sup>126</sup> See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 847 (2011) (Breyer, J., dissenting); Blitz et al., *supra* note 2, at 112.

<sup>127</sup> Marceau & Chen, *supra* note 2, at 998 (referring to the question of “is X speech?” as

come from the understanding that recording takes place in a particular context, grounded in physical space and time.

Courts have discussed the importance of grounding the recording right in a physical space, though they have not yet sorted out the implications of this analysis.<sup>128</sup> Courts have cabined their approaches to the right to record to recognizing protection for recordings on matters of public concern, performed in traditionally public spaces.<sup>129</sup> The currently limited nature of the recording right—limited to public locations and to matters of public concern—makes sense only if one understands the right as the progeny of corollary rights doctrine, specifically access and newsgathering doctrine. Access and newsgathering doctrine historically involves inquiry into both the type of material at issue and the nature of the space in which newsgathering occurs.

Access case law addresses whether newsgatherers have a right to enter a particular space for purposes of gathering information.<sup>130</sup> It is both more nuanced and less speech protective than the First Amendment's treatment of communications media in the abstract.<sup>131</sup> To establish whether an access right exists, courts perform a balancing test of sorts, discussed further below, which takes into consideration the nature of the location. Once an access right exists, courts apply something resembling a relaxed version of strict scrutiny; courts have upheld access restrictions more frequently than restrictions on pure speech.<sup>132</sup>

This nuance is understandable. On the one hand, information gathering involves physical conduct in a physical space; entering a location and interacting with others once one is in that location. On the other hand, information gathering appears integral to the speech-creating process. This presents a difficult puzzle for courts.<sup>133</sup> That puzzle becomes all the more

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the "so-called coverage problem").

<sup>128</sup> See, e.g., *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012) (not deciding on the time, place, and manner standard, but performing analysis under it nonetheless); *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011) (observing that the right to record "may be subject to reasonable time, place, and manner restrictions").

<sup>129</sup> *Glik*, 655 F.3d at 82.

<sup>130</sup> See generally *McDonald*, *supra* note 102, at 251-52.

<sup>131</sup> See *id.* at 273 ("[I]t is evident that a right to gather information lies at the periphery of traditional First Amendment protection for expressive activities . . .").

<sup>132</sup> *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 9-10 (1986) ("[T]he presumption may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values, and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.").

<sup>133</sup> See *McDonald*, *supra* note 102, at 256 ("On the one hand, information gathering frequently consists of non-expressive conduct that bears a more attenuated link to acts of expression than other forms of non-expressive conduct . . . On the other hand, the government could abridge flows of important information to the public by simply restricting or burdening antecedent conduct that generates those flows." (emphasis omitted)).

difficult because of the Supreme Court's (in my view, correct) reluctance to privilege institutional media over citizen speakers.<sup>134</sup> If one newsgatherer is allowed access, then all must be.<sup>135</sup> This makes courts reluctant to open a door, because if it is open to one, it will be open to all.<sup>136</sup>

Access case law largely addresses access to particular physical or sociophysical spaces. In 1974, the Supreme Court rejected a First Amendment right to access prison inmates for interviews.<sup>137</sup> In 1980 and again in 1982, however, the Court held that the First Amendment requires a public right of access to criminal trials.<sup>138</sup> Newsgatherers and the public may access particular government proceedings if (1) those proceedings have been historically open to the public, and (2) the public access ensures the functioning of a government process.<sup>139</sup> These elements are referred to as the "logic and experience" principles of access case law, derived from Justice Brennan's concurrence in *Richmond Newspapers, Inc. v. Virginia*.<sup>140</sup>

A different line of newsgathering cases—more directly related to the right to record—addresses whether a person has a right to use a particular technology once she has been granted legal access to a space.<sup>141</sup> In 1965, the Court in

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<sup>134</sup> See *Citizens United v. FEC*, 558 U.S. 310, 352 (2010) (citing *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)) (finding the Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers").

<sup>135</sup> *Id.* at 353.

<sup>136</sup> But see McDonald, *supra* note 102, at 257 (proposing that courts use the Press Clause to provide special protection not for institutional media, but for those fulfilling a newsgathering and edifying role); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1030 (2011) (arguing "[f]or the Press Clause to mean something independent of the Speech Clause, it necessarily cannot apply to everyone" and that by limiting the "press club" the courts can bestow certain investigative immunities upon newsgatherers through the Press Clause).

<sup>137</sup> *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (upholding a federal prison policy prohibiting face-to-face interviews with inmates at maximum security prisons); *Pell v. Procunier*, 417 U.S. 817, 833-34 (1974) (holding newsgatherers "have no constitutional right of access to prisons or their inmates beyond that afforded to the general public" and upholding a California prison regulation prohibiting face-to-face interviews with inmates).

<sup>138</sup> *Globe Newspaper Co. v. Superior Court for Norfolk*, 457 U.S. 596, 610 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 585 (1980) (plurality opinion). In subsequent cases, and using similar reasoning, the Supreme Court has recognized the right of access to cover juror voir dire proceedings and probable cause hearings. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 10, 12 (1986); *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984). Lower courts have applied the "experience and logic" principles to determine the existence of public access rights in other areas. McDonald, *supra* note 102, at 303-04.

<sup>139</sup> *Globe Newspaper*, 457 U.S. at 605-06.

<sup>140</sup> *Richmond Newspapers*, 448 U.S. at 606 (Brennan, J., concurring).

<sup>141</sup> McDonald, *supra* note 102, at 276 n.80.

*Estes v. Texas*<sup>142</sup> evaluated whether a television reporter had a First Amendment right not just to access but to televise a criminal trial.<sup>143</sup> The Court said no. It explained that it “is a misconception of the rights of the press” to assert that the First Amendment protects a right to televise on top of the right of access to the court.<sup>144</sup> The First Amendment requires only that the general public, the newspaper reporter, the radio reporter, and the television reporter all be “entitled to the same rights” of access.<sup>145</sup> Each type of reporter is then free to report what information she obtains to the public through the media of her choice.<sup>146</sup> The First Amendment does not, however, require that each type of reporter be entitled to bring into court the reporting technology most conducive to her type of reporting.<sup>147</sup>

Thus, even when a newsgatherer has a legal right to be somewhere, she does not necessarily have a right to film. In 1978, the Supreme Court in *Houchins v. KQED, Inc.*<sup>148</sup> considered whether reporters who had legal access to a jail through public tours had a First Amendment right to bring in a camera and take photographs.<sup>149</sup> Three Justices found no First Amendment right to record, even in a location where reporters already had legal access.<sup>150</sup> They reasoned that newsgatherers have a First Amendment right to gather news, but “that affords no basis for the claim that the First Amendment compels others—private persons or governments—to supply information.”<sup>151</sup> The government, in other words, could still ban cameras on its public prison tours. The fourth concurring Justice suggested that a television reporter might have a special interest in recording, but still joined the other three in rejecting the right in that case.<sup>152</sup>

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<sup>142</sup> 381 U.S. 532 (1965).

<sup>143</sup> *Id.* at 534-35; *see also* *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 610 (1978) (explaining that neither the First nor the Sixth Amendment requires broadcasting trials to the public); *United States v. Kerley*, 753 F.2d 617, 622 (7th Cir. 1985) (holding the exclusion of cameras from federal courtrooms does not violate the First Amendment).

<sup>144</sup> *Estes*, 381 U.S. at 539.

<sup>145</sup> *Id.* at 540.

<sup>146</sup> *Id.* at 541-42.

<sup>147</sup> *See id.* at 540 (“The news reporter is not permitted to bring his typewriter or printing press.”).

<sup>148</sup> 438 U.S. 1 (1978) (4-3 decision).

<sup>149</sup> *Id.* at 3.

<sup>150</sup> *Id.* at 9 (“The public importance of conditions in penal facilities and the media’s role of providing information afford no basis for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.”).

<sup>151</sup> *Id.* at 11.

<sup>152</sup> *Id.* at 18 (Stewart, J., concurring in judgment) (finding the District Court’s determination “that the media required cameras and recording equipment for effective presentation to the viewing public of the conditions at the jail” was “sanctioned by the

Since *Estes* and *Houchins*, the Supreme Court has held that not all broadcasts of trials are presumptively unfair,<sup>153</sup> while also prohibiting a broadcast where the trial court failed to follow procedures under federal law.<sup>154</sup>

While both *Estes* and *Houchins* are still good law, courts in recent right-to-record cases have largely ignored both cases. This could indicate that there are important distinctions between access case law and right-to-record case law, discussed more below. Or, it might mean that the balance of harms in those particular environments—a criminal trial and a prison—are different from the balance in a public forum. Finally, this blind spot could reflect both changing social norms around recording and changing levels of technological adoption.<sup>155</sup>

As courts have recognized a right to record, they have drawn on the principles underlying First Amendment protection for access and newsgathering.<sup>156</sup> Just as access case law ensures public access where it is necessary for effective government functions, right-to-record case law protects the right to record where it contributes to effective and accountable government behavior, such as policing. Just as access case law protects public access in places where historically access has been allowed, right-to-record case law protects recording at least in public fora. And just as protection for newsgathering requires a balancing of the strength of competing interests, right-to-record case law appears sensitive to the value of the speech created.

The right to record is not precisely equivalent to an access or newsgathering right, however. As the Seventh Circuit has noted, most right-to-record cases are not really access cases.<sup>157</sup> When a newsgatherer seeks access to a court room or a prison, the underlying question is whether she has a right to be there. When a recording is banned in a public forum, there is no underlying question

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Constitution”).

<sup>153</sup> *Chandler v. Florida*, 449 U.S. 560, 574-75 (1981) (“An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts . . . may impair the ability of jurors to decide the issue of guilt or innocence . . .”).

<sup>154</sup> *Hollingsworth v. Perry*, 558 U.S. 183, 184 (2010) (per curiam).

<sup>155</sup> *Chandler*, 449 U.S. at 573-74 (“[*Estes*] does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change.”); see also Kyu Ho Youm, *Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning from Abroad?*, 2012 BYU L. REV. 1989, 1993-2012.

<sup>156</sup> *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 597-98 (7th Cir. 2012) (citing *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972)) (finding the ACLU’s challenge to an eavesdropping statute “draws on the principle that the First Amendment provides at least some degree of protection for gathering news and information”).

<sup>157</sup> *Id.* at 598 n.7 (“This is not, strictly speaking, a claim about the qualified First Amendment right of access to governmental proceedings. Access is assumed . . . in traditional public fora . . .”).

of whether the public has a right to be there. A public forum is, by definition, a place where “time out of mind” the public has already had access.<sup>158</sup> The logic of applying a variation of the access framework to a location where physical entry is already permitted is strained.

Purely adopting the access framework thus makes little sense when we are addressing a right to record in public spaces. It should, however, influence how we address the right in private spaces.<sup>159</sup> Some variation on the access framework is appropriate when we are contemplating a right to record in private locations or other locations where the public is not legally able to enter without permission.<sup>160</sup> This result—that the scope of the right to record will differ depending on the recorder’s physical location—is consistent with both the current state of doctrine and with most scholars’ intuitions.<sup>161</sup> But it is not explicable from a First Amendment perspective alone. To understand why the scope of the right might differ in different physical locations, we have to understand why physical location matters.

#### H. *Recording as Speech Entwined with Action*

Once the right to record has been acknowledged, what level of scrutiny should be applied to the regulation of recording?<sup>162</sup> This question is one of the most difficult puzzles in determining how a right to record would interface with privacy laws. Courts have thus far indicated that recording is in some way speech entwined with action; recording is speech that exists in and impacts physical space and should consequently be scrutinized as such.<sup>163</sup>

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<sup>158</sup> See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

<sup>159</sup> See, e.g., Marceau & Chen, *supra* note 2, at 1028-29. See generally Tom A. Collins, *The Press Clause Construed in Context: The Journalists’ Right of Access to Places*, 52 MO. L. REV. 751 (1987) (analyzing media access to private locations under the access framework).

<sup>160</sup> See *S.H.A.R.K. v. Metro Parks Serving Summit Cty.*, 499 F.3d 553, 560 n.2 (6th Cir. 2007) (analyzing whether there was an access right to enter and record in a park, and concluding that “[w]hile the Supreme Court has developed a framework for analyzing access cases dealing with the special issue of access to judicial proceedings . . . such a framework is missing in access cases outside of the judicial-proceeding context”).

<sup>161</sup> See, e.g., Blitz, *supra* note 2, at 149; Kreimer, *supra* note 2, at 398; Marceau & Chen, *supra* note 2, at 1027.

<sup>162</sup> See Bambauer, *supra* note 2, at 105 (indicating that the level of scrutiny depends on the context); Blitz, et al., *supra* note 2, at 111 (arguing the public forum doctrine provides the framework for determining what level of scrutiny to apply); Marceau & Chen, *supra* note 2, at 997 n.26 (“[T]he location or nature of the recording may have an impact on the relevant level of scrutiny applicable to speech restriction.”). I believe that, when in private locations the right is limited to matters of public concern, it is a matter of salience, not scrutiny.

<sup>163</sup> See, e.g., *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012) (performing analysis under the time, place, and manner standard without deciding on whether that standard is generally applicable); *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

Usually, First Amendment doctrine addresses speech entwined with action by applying either the test from *United States v. O'Brien*,<sup>164</sup> or the “time, place, and manner” test. The *O'Brien* test requires that government regulation (1) be within the constitutional power of government; (2) further an important or substantial government interest; (3) be unrelated to the deliberate suppression of speech; and (4) incidentally restrict speech no more than is necessary to further the governmental interest.<sup>165</sup> The *O'Brien* test allows courts to determine when a law impacting speech is not aimed at speech and is, therefore, constitutional. The time, place, and manner test similarly requires courts to ascertain whether the government is impermissibly targeting speech or aiming the regulation at other concerns.<sup>166</sup>

A law governing trespass or physical safety would usually easily pass both tests even if it incidentally impacted somebody’s right to record. For example, if a state passed a law prohibiting trespass by a drone into private airspace, the aim of that law—to protect private property—would be unrelated to the suppression of speech, and the law would likely be constitutional even if it prevented a drone videographer from accessing particular information.<sup>167</sup> If a state passed a law prohibiting photographers from standing in the middle of a public street, the aim of that law—to enable the flow of traffic and prevent accidents—would also be unrelated to the suppression of speech, and the law would likely be constitutional even if it prevented a photographer from taking a photograph from a particular perspective.

The great difficulty with respect to privacy regulations is as follows: both the *O'Brien* test and the time, place, and manner test require a government interest that is unrelated to speech suppression.<sup>168</sup> Recording comes within the scope of First Amendment coverage purportedly because it is in some way inextricably related to speech. Thus, an interest that requires banning recording seems to always be an interest related to the suppression of speech. In other words, governing recording initially appears to always target communicative rather than noncommunicative activity.<sup>169</sup>

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<sup>164</sup> 391 U.S. 367, 377 (1968).

<sup>165</sup> *Id.*

<sup>166</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>167</sup> *See, e.g.*, OR. REV. STAT. § 837.380 (2015).

<sup>168</sup> *O'Brien*, 391 U.S. at 377 (“[A] government regulation is sufficiently justified if . . . the governmental interest is unrelated to the suppression of free expression.”); *see also Ward*, 491 U.S. at 791.

<sup>169</sup> *See Bambauer, supra* note 2, at 63 (“[S]tate action will trigger the First Amendment any time it purposefully interferes with the creation of knowledge. . . . Privacy regulations are rarely incidental burdens to knowledge. Instead they are deliberately designed to disrupt knowledge creation.”); *Kreimer, supra* note 2, at 390-91 (“Laws that prohibit the capture of images by definition interfere with the individual practice of preserving experience for future review, reflection, and expression—a practice that is entitled to protection under the First Amendment.”); *Marceau & Chen, supra* note 2, at 1021 (“[S]tate action that directly

If we look at the other examples of how nonspeech harms have been separated from protected speech interests, the relative uniqueness of this difficulty becomes clearer. The government can regulate parades because, while they are expressive activity, parades have nonexpressive impacts on the physical environment, such as crowding streets, causing noise, or obstructing the usual traffic flow.<sup>170</sup> The government can set regulations governing the time of a parade, the place where it occurs, and the manner in which it occurs.<sup>171</sup> Similarly, the government can govern sound trucks, which clearly communicate a message, but may also create an unpleasant volume of noise.<sup>172</sup> The government cannot aim its regulation at the message being communicated, but it can aim its regulation at the level of noise that communication creates.<sup>173</sup> One of the requirements of such regulations is that there be other available channels of communication; the noise can be addressed, but the person must still be able to communicate her message.<sup>174</sup>

How would this work in the privacy and recording context? It cannot, unless there is some way to separate the privacy interest in preventing recording from the communicative aspect of recording. Recording, unlike a parade or a sound truck, does not communicate a message that is readily separable from the regulable aspects of the act. The act and the communicative elements are coextensive. If recording itself creates the privacy harm, you cannot solve the problem by recording something in a way that is less harmful to privacy.<sup>175</sup>

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restricts non-consensual investigative video recordings implicates First Amendment speech concerns.”) *But see* Bhagwat, *supra* note 2, at 1054 (asserting that it does not make sense to treat all information gathering as speech); Blitz, *supra* note 2, at 192 (“[P]rivacy interests in restricting information may, at times, outweigh First Amendment interests in information-gathering.”); Campbell, *supra* note 31, at 50-51 (“Targeted regulations of audiovisual recording . . . single out conduct commonly associated with expression and impose an apparent disproportionate burden on speech.”); McDonald, *supra* note 102, at 271 (arguing that eavesdropping laws do not target speech).

<sup>170</sup> *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (“[T]he Court has recognized that the government . . . may impose a permit requirement on those wishing to hold a . . . parade . . . [A]ny permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant government interest, and must leave open ample alternatives for communication.” (citations omitted)).

<sup>171</sup> *Id.*

<sup>172</sup> *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949).

<sup>173</sup> *See Ward*, 491 U.S. at 792; *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (“It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.”).

<sup>174</sup> *See, e.g., Forsyth Cty.*, 505 U.S. at 130.

<sup>175</sup> Recordings *can* be more or less harmful to privacy—they can be de-identified so that faces are obscured and voices are distorted, among other things. However, most government regulations of recording target recordings of identifiable individuals and do not contemplate de-identification as a mitigating factor.

Of course, the same argument could be made for sound trucks and parades. Some scholars have convincingly argued that a parade or protest is much less effective at communicating its message when it can be relegated to a different location.<sup>176</sup> Sound trucks are similarly less effective at communicating if they have to be quieter. But the problem is even more pronounced with respect to the recording right. While message and noise level can ostensibly be separated, recording and recording at first glance cannot.

### III. PRIVACY AS ACTION

Courts have tentatively treated the right to record as though it is speech that exists in a physical space.<sup>177</sup> Even scholars who adamantly support a right to record have contemplated differences in its scope based on physical location.<sup>178</sup> But why? Pressing a button to record something is a physical act, but this alone does not explain why courts should employ speech doctrine that addresses or at least acknowledges physical spaces. Turning a page is physical; clicking through a webpage is physical; pressing play on a DVD player is physical. Technically, all speech takes place in physical space. Yet some speech is treated as abstracted (e.g., the Internet), and other speech is inseparable from its physical embodiment (e.g., burning a flag).<sup>179</sup>

Harm often defines the contours of First Amendment coverage and protection.<sup>180</sup> Despite the Supreme Court's purported speech absolutism—its outright refusal in several recent cases to balance speech against other harms<sup>181</sup>—much of First Amendment doctrinal development has consisted not

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<sup>176</sup> See Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 581 (2006) (“Place can be a powerful weapon of social and political control.”).

<sup>177</sup> “[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’” *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

<sup>178</sup> See Blitz et al., *supra* note 2, at 90-91; Kreimer, *supra* note 2, at 393 (outlining three principles that set boundaries for prohibitions on image capture, including that where rules “seek to protect the privacy of intimate venues,” further analysis of the competing interests is required); Marceau & Chen, *supra* note 2, at 1027 (“[T]he protection of recording as speech activity, particularly on private property, is not self-evident as a doctrinal matter.”).

<sup>179</sup> See *supra* note 173 and accompanying text.

<sup>180</sup> This claim is related to the idea that First Amendment analysis consists of sniffing out impermissible government motives, but differs in that it looks to the category of harm created. See, e.g., Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 413-14 (1996) (suggesting that First Amendment analysis should focus on government motives).

<sup>181</sup> See *United States v. Alvarez*, 132 S. Ct. 2537, 2540-41 (2012); *United States v. Stevens*, 559 U.S. 460, 470 (2010).

of asking whether some act is protected as speech, but of implicitly balancing the protection of expression with harms.<sup>182</sup>

The right to parade is, thus, a right to parade subject to time, place, and manner restrictions.<sup>183</sup> The right to burn a flag is a right to burn a flag subject to government regulations of arson.<sup>184</sup> The right to make inflammatory speeches is a right to do so as long as the speech is not so entwined with lawless action (or violence) that the action is both imminent and likely to occur.<sup>185</sup>

Strict scrutiny itself is notoriously fatal in fact.<sup>186</sup> But strict scrutiny's scope is relatively limited: it applies to "pure" speech and to regulatory efforts that target particular topics or speakers.<sup>187</sup> Once a court determines that the contemplated harm is *not a speech harm*, its analytical framework usually changes from strict scrutiny to something else.<sup>188</sup> For all that the current Supreme Court has disavowed harm balancing, this shift from the analysis of pure speech to other frameworks occurs surprisingly often in First Amendment doctrine.<sup>189</sup>

Admittedly, the United States defines speech-related harms more broadly than other countries. Harms to reputation, from hate speech, from the portrayal of violent or sexually demeaning acts, and from the publication of ostensibly private information, have all been considered too closely entwined with speech to merit distinct treatment or more deferential balancing.<sup>190</sup> These kinds of

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<sup>182</sup> See Bhagwat, *supra* note 2, at 1035 ("[P]roducing speech can involve a wide range of conduct that can cause social harm entirely independent of the communicative impact of the eventual speech.").

<sup>183</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech . . ."); cf. *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 568 (1995) (stating that "parades are . . . a form of expression," and are, therefore, subject to First Amendment analysis).

<sup>184</sup> See *Texas v. Johnson*, 491 U.S. 397, 399 (1989); *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

<sup>185</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam).

<sup>186</sup> See Gunther, *supra* note 21, at 8. But see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 796 (2006) (arguing that empirical data suggests that strict scrutiny is "survivable in fact").

<sup>187</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565 (2011); *United States v. Stevens*, 559 U.S. 460, 468 (2010).

<sup>188</sup> See generally Bhagwat, *supra* note 33 (describing the shift from strict to intermediate scrutiny of First Amendment claims).

<sup>189</sup> See *id.* at 831.

<sup>190</sup> *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 791 (2011); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 380-81 (1992); *Fla. Star v. B.J.F.*, 491 U.S. 524, 526 (1989); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (noting that First Amendment principles require open "debate on public issues" even if that debate "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials").

speech harms trigger either strict scrutiny or the carefully calibrated application of one of the historical exemptions to speech protection.<sup>191</sup> But when the contemplated harm is entwined with government management of the features of physical space, the analytical framework changes. When the harm is situated in physical, rivalrous space, the government is given “somewhat wider leeway to regulate features of speech unrelated to its content.”<sup>192</sup>

Again, take parades as an example. First Amendment protection of parades leaves room for government regulations aimed at managing qualities of physical space so the protected speech is not too disruptive to the behavior of others in that space.<sup>193</sup> We all share physical space, and one person’s loud sound truck is another person’s inability to read her book.<sup>194</sup> The scope of First Amendment protections for speech that occur in physical space is calibrated against the government’s need to manage those environments so that other citizens can speak, think, live, and thrive in them. Likewise, First Amendment doctrine allows for government protection of the “captive audience,” who can be protected from speech when that speech inescapably interferes with her ability to go about her business in a particular physical environment.<sup>195</sup>

The kind of privacy implicated by recording triggers this kind of government interest. The government’s interest in governing recording is, I contend, an interest in managing the qualities of the physical environment so that one citizen’s behavior is not too disruptive to the behavior of another person in that space so that it creates unacceptable costs. Just as First Amendment treatment of parades, sound trucks, and flag-burning requires an understanding of the government’s interest in preventing a nonspeech harm, First Amendment treatment of a right to record requires an understanding of the privacy interest.

“Privacy” can mean very different things.<sup>196</sup> Crucially, privacy in the context of publication is different from privacy in the context of recording. The

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<sup>191</sup> Many of these exemptions developed as the First Amendment began to be applied to state laws protecting against dignitary harms. *See* Bhagwat, *supra* note 33, at 805.

<sup>192</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

<sup>193</sup> *See* *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989).

<sup>194</sup> *See* *McDonald*, *supra* note 102, at 266-67 (“Whenever one is granted a ‘right’ or ‘freedom’ to engage in certain conduct, other members of society incur a corresponding obligation to tolerate that conduct. In other words . . . one person’s freedoms are another person’s chains. . . . [B]y acting in a more physical manner, chances increase that such actions will impinge upon important freedoms of others.”).

<sup>195</sup> *See* J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2310-11 (1999); Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 946 (2009) (“[T]he question is not whether the audience can avoid the message by leaving a particular location . . . but whether they should have to.”); Deborah A. Ellis & Yolanda S. Wu, *Of Buffer Zones and Broken Bones: Balancing Access to Abortion and Anti-Abortion Protestors’ First Amendment Rights in Schenck v. Pro-Choice Network*, 62 BROOK. L. REV. 547, 578 (1996).

<sup>196</sup> *See generally* SOLOVE, *supra* note 10.

Supreme Court's decision in *Bartnicki* reflects this intuition.<sup>197</sup> "Privacy" in the context of publication is often an interest in preventing a dignitary, speech-related harm—harm that results from exactly what makes publication powerful: the amplification of a piece of information and the emotional reaction of the person receiving it.<sup>198</sup> First Amendment doctrine has been notoriously skeptical towards protecting against the amplification of private information, because such protection allows the government to interfere in both the editorial process and the persuasion of other people.<sup>199</sup>

"Privacy" in the context of recording, however, is a different thing. It is physically situated.<sup>200</sup> As described at greater length below, an individual uses known features of her physical environment to manage her social accessibility at a given moment in time and space.<sup>201</sup> These environmental features include physical barriers, distance, and even the dispersal of social interactions over time. Recording changes that physical environment through technology that closes observable distances and permeates physical barriers, collapses temporally dispersed interactions, and broadens the potential audience to an interaction beyond the people physically present.

Changes to a physical environment have real consequences for how an individual behaves—including behavior related to expression.<sup>202</sup> Changing a physical environment by permitting recording does not necessarily alter an individual's ideal calibration of social accessibility; it often causes that individual to change her behavior instead.<sup>203</sup> Sometimes, that behavioral change may be socially desirable, promoting better behavior by public servants. This is the primary argument behind equipping police with body cameras or allowing citizens to record the police.<sup>204</sup> Other times, this

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<sup>197</sup> See *Bartnicki v. Vopper*, 532 U.S. 526, 531 (2001).

<sup>198</sup> Richards, *The Limits of Tort Privacy*, *supra* note 3, at 360.

<sup>199</sup> See *Fla. Star v. B.J.F.*, 491 U.S. 524, 534-35 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 471 (1975); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 337 (1991) ("On a general level, freedom of speech is valued precisely because speech has the capacity to persuade."). *But see* *L.A. Police Dep't v. United Reporting Publ'g Co.*, 528 U.S. 32, 34 (1999).

<sup>200</sup> Kaminski, *supra* note 11, at 1113; *see also* ALTMAN, *supra* note 11, at vii.

<sup>201</sup> See discussion *infra* Section III.A.

<sup>202</sup> See Froomkin, *supra* note 64, at 1727, 1743 (observing the chilling effect of surveillance on speech, association, and individual liberty).

<sup>203</sup> *Cf.* ALTMAN, *supra* note 11, at 86-94 (discussing how intrusion into personal space changes behavior).

<sup>204</sup> See Simonson, *Beyond Body Cameras*, *supra* note 66, at 1560; Simonson, *Copwatching*, *supra* note 66, at 413; Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win for All*, AM. CIVIL LIBERTIES UNION (Mar. 2015), <https://www.aclu.org/police-body-mounted-cameras-right-policies-place-win-all> [<https://perma.cc/MF9F-XESD>] ("Although we at the ACLU generally take a dim view of the proliferation of surveillance cameras in American life, police on-body cameras are different because of their potential to serve as a check against the abuse of power by police

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behavioral change may be socially undesirable, for example causing jurors to grandstand for their neighbors and friends.<sup>205</sup> But just as the government has a legitimate interest in preventing sound trucks and parades from disrupting the behavior of other citizens in shared sociophysical spaces, it sometimes (not always) has a legitimate interest in governing recording to prevent undesirable changes to others' behavior, and consequent costs.

Understanding the privacy interest in this way explains the two biggest puzzles in the right-to-record doctrine: (1) why the right appears to differ in scope in different locations; and (2) how the privacy interest can be conceived of as distinct from an interest in suppressing speech. Both of these puzzles are explicable by understanding the privacy harm as situated in physical, temporal space.

This Part defines the kind of privacy implicated by recording and protected in recording laws. It explains how an interest in protecting this kind of privacy is distinct from an interest in suppressing speech. It closes by identifying that this kind of privacy—the management of social accessibility using features of the physical environment—has been acknowledged as a protectable interest by courts, including the Supreme Court. In fact, the Supreme Court has recognized that protecting this kind of privacy is itself often protective of free expression. First Amendment interests, in other words, arise on both sides.

#### A. *Privacy as Physically Situated*

Privacy in the context of recording is the ability of an individual to dynamically manage her social accessibility at a particular moment, given known features of the physical environment.<sup>206</sup> This kind of privacy is environmentally situated. For example, an individual in her living room may rely on the height of a fence, the distance between the street and her house, the walls of her home, and shades on her windows to prevent people on the street from seeing her. She consequently may feel freer to indulge in behaviors in the home that she would not necessarily want seen by the general public, from reading dissident literature to picking her nose.<sup>207</sup> Those home-based behaviors may be socially beneficial: they may allow for the exploration of new ideas and the development of new facets of an individual's identity; and they may

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officers.”).

<sup>205</sup> See *Estes v. Texas*, 381 U.S. 532, 535-36 (1965).

<sup>206</sup> Kaminski, *supra* note 11, at 1116; see also *ALTMAN*, *supra* note 11, at 11 (“My view is that privacy is profitably conceived of as an interplay of opposing forces—that is, difference balances of opening and closing the self to others.”); Gavison, *supra* note 12, at 423 (arguing that our interest in privacy “is related to our concern over our accessibility to others,” which “enables us to identify when losses of privacy occur”).

<sup>207</sup> Kaminski, *supra* note 11, at 1136 (citing as an example that a person might do a silly dance in her office every morning before answering emails, relying on barriers such as walls and fourth story building height).

serve as an outlet for energies that are repressed in public spaces.<sup>208</sup> If a recording or information-gathering device can access that space (effectively removing physical walls by, say, using thermal imaging),<sup>209</sup> then an individual's calibration of her social accessibility will either be woefully inaccurate, or she will change her behavior.

An interest in protecting privacy can be understood as an autonomy interest.<sup>210</sup> It is an interest in enabling individuals to use their environment to make calculations about the personally appropriate degree of social exposure, based on features of their physical space, regardless of whether they are in public or private.<sup>211</sup> That interest will not always trump free speech concerns, but sometimes it will. Sometimes, it will protect and enable some expression at the same time that it discourages other expression.

The government's interest in governing recording is twofold. The first interest is an interest in enabling individuals to *accurately* manage their social accessibility, given changes to the physical environment wrought by technological development.<sup>212</sup> States have enacted eavesdropping laws that

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<sup>208</sup> See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 1-16 (1973) (proposing that humans perform the self socially, in different contexts, wearing different "masks" for different people); ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (describing privacy as allowing for withdrawal from public performance).

<sup>209</sup> See *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (holding that use of a thermal-imaging device to scan a home for illegal marijuana growth constitutes a Fourth Amendment "search").

<sup>210</sup> It need not be understood *only* as an autonomy interest. It can also be understood as protective of democracy and community values, or as an understanding of the self as embedded in social relationships.

<sup>211</sup> One of the great fallacies of First Amendment analysis is that privacy interests either do not exist in public or minimally exist in public. This is incorrect. See *Shulman v. Grp. W Prods., Inc.*, 955 P.2d 469, 490 (Cal. 1988) ("[T]here is no liability for the examination of a public record concerning the plaintiff. . . . [Or] for observing him or even taking his photograph while he is walking on the public highway. . . ." (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (AM. LAW INST. 1977))); *Aisenson v. Am. Broad. Co.*, 269 Cal. Rptr. 379, 388 (Cal. Ct. App. 1990) (finding that any invasion of privacy due to filming in a public street was *de minimis*); *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 771 (N.Y. 1970) ("[I]t is manifest that the mere observation of the plaintiff in a public place does not amount to an invasion of his privacy."); *McNamara v. Freedom Newspapers, Inc.*, 802 S.W.2d 901, 904 (Tex. Ct. App. 1991) (finding no invasion of privacy and strong First Amendment interests "[w]hen an individual is photographed at a public place for a newsworthy article and that photograph is published"). *But see* Kaminski, *supra* note 11, at 1116-18; Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 101, 111-12 (2004); Reidenberg, *supra* note 2, at 148.

<sup>212</sup> See Kaminski, *supra* note 11, at 1135 ("First, the government may have an interest in preventing people from miscalculating their boundaries. Second, the government may have an interest in preserving a particular genre of boundary management—not out of nostalgia or fear of technological change, but because of the problems that might occur if one forces people to shift boundary management tactics."). Michael Fromkin describes such

prohibit surreptitious eavesdropping—that is, recording an overheard conversation.<sup>213</sup> If a person has notice of the recording, the recording is not illegal. This makes sense from a privacy perspective: if a person has notice of the recording, whether actual or constructive, she will be able to recalibrate her behavior accordingly, with the knowledge that it will be seen or heard by a wider audience. Many recording laws thus have notice requirements; they ban surreptitious recording but allow recording with notice.<sup>214</sup>

Alternatively, the government may recognize that, even with notice, some behavioral changes caused by recording are particularly undesirable. This is the second government interest. People often manage social accessibility based on longstanding assumptions about a particular type of physical space. They employ, in the words of the relevant literature, “genres” of behavioral management.<sup>215</sup> You may have one type of behavior that you employ on a crowded public street and another that you employ in an empty public park. Or, to delink the concept from particular physical locations, you may employ one type of behavior when interacting with a close friend and another when interacting with your boss. The government can have a legitimate, nonspeech-related interest in preserving the settings within which a particular type of behavior occurs—not to prevent speech about a particular relationship or locale, but to prevent the costs of undesirable behavioral shifts. In fact, the government can have a legitimate, speech-preserving interest in preventing speech from being chilled by changes to the trusted environment.

Some argue that this interest is still irrevocably linked to the distribution of information. The argument goes as follows: people change their behavior when they are being recorded or watched because, in large part, they fear downstream distribution to others. And, since First Amendment law clearly protects distribution, this interest in protecting privacy is clearly an interest in preventing speech.

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unforeseen surveillance as an externality. Froomkin, *supra* note 64, at 1729, 1732.

<sup>213</sup> See, e.g., ALA. CODE § 13A-11-31(a) (2016) (describing “[c]riminal eavesdropping” as when a person “intentionally uses a[] device to eavesdrop”); CAL. PENAL CODE § 632(a) (West 2010) (defining “[e]avesdropping” as when a person “intentionally and without . . . consent . . . eavesdrops upon or records . . . confidential communication”); COLO. REV. STAT. § 18-9-304(1)(a)-(c) (2016) (defining “[e]avesdropping” as when a person not present for a conversation “[k]nowingly overhears or records such conversation or discussion without [] consent . . . [or] for the purpose of committing, aiding, or abetting the commission of an unlawful act; or [k]nowingly . . . attempts to use or disclose . . . the contents of any such conversation or discussion”).

<sup>214</sup> See, e.g., GA. CODE ANN. § 16-11-62(1) (Supp. 2016) (defining “[e]avesdropping” as any attempt “in a clandestine manner intentionally to overhear, transmit, or record . . . the private conversation of another which shall originate in any private place”).

<sup>215</sup> Leysia Palen & Paul Dourish, *Unpacking “Privacy” for a Networked World*, PROCEEDINGS SIGCHI CONF. ON HUM. FACTORS COMPUTING SYS., no. 1, Apr. 2003, at 129, 133 (referring to “genres of disclosure”).

I disagree. Privacy literature—and, it should be noted, significant parts of privacy law—recognizes that privacy harms can occur at the moment of recording or observation, even absent distribution to others.<sup>216</sup> Arguing that a government interest in preventing recording is equivalent to a government interest in preventing distribution ignores this effect.<sup>217</sup> Take the following example, drawn from a scholar who ostensibly believes that privacy harms occur only at distribution: one of the reasons for recording police officers is to get them to change their behavior at the moment they are being recorded.<sup>218</sup> At the moment of recording, nothing has been distributed, and perhaps may never be distributed.<sup>219</sup> Yet, police change their behavior nonetheless. This argument for protecting police recording even absent distribution rests on the same premise for distinguishing harms at recording from harms at distribution. A law targeting recording is aimed at changes of behavior in real time, in real space; a law targeting distribution is more likely to be aimed at a communicative moment between distributor and audience. And, just to be clear: while the change in police behavior can technically be characterized as a privacy harm, under every theory of the First Amendment, it does not outweigh the speech interests. Usually such a change in behavior is actually desirable from a speech perspective; it improves government functions and, thus, strengthens the argument for speech protection, while being minimally undesirable from a privacy perspective.

Even when an individual changes her behavior because she thinks that a recording will be distributed, this does not make the government interest in preventing recording equivalent to a government interest in preventing distribution. Trying to prevent the costs of a behavioral change when somebody believes a recording will be distributed is not the same thing as trying to target a communicative moment between speaker and subject. One involves no thought as to downstream audience persuasion while the other does. One involves a focus on actions taking place in a physical environment while the other involves a focus on a disembodied communications medium.

Thus, there is a twofold, nonspeech-related government interest in governing recording: (1) enabling the accurate management of social

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<sup>216</sup> See SOLOVE, *supra* note 10, at 9; Froomkin, *supra* note 64, at 1743 (“Yet for many, the knowledge that one is being observed and recorded—or even that there is a substantial likelihood of being surveilled—is itself a harm that not only chills speech, but generally inhibits freedom and self-realization.”); Kevin S. Bankston & Amie Stepanovich, *When Robot Eyes Are Watching 3* (2014) (unpublished draft) (on file with author) (arguing that automated reading of emails increases privacy concerns, regardless of whether a human ever reads the email). *But see* Bruce E. Boyden, *Can a Computer Intercept Your Email?*, 34 CARDOZO L. REV. 669, 676 (2012).

<sup>217</sup> See Kreimer, *supra* note 2, at 404 (positing that privacy harms occur only at distribution).

<sup>218</sup> Kreimer, *supra* note 2, at 404.

<sup>219</sup> See, e.g., *Fields v. City of Phila.*, 166 F. Supp. 3d 528, 535-36 (E.D. Pa. 2016).

accessibility, and (2) preserving particular behavior in particular spaces to avoid societal costs of behavioral changes. These two interests are strikingly similar to the government interests in governing protests, parades, and sound trucks.<sup>220</sup> The first is an interest in allowing other users of a shared physical space to adapt their behavior by providing knowledge of recording or information gathering. This is the interest protected by allowing time and place restrictions on parades and by requiring parade permits. Requiring parade permits allows other individuals to have knowledge of a parade route and to route around the parade. This interest in preventing the disruption of others may not be an interest that should trump First Amendment concerns, but in practice, that is what the doctrine often allows.

The second interest is recognized in both the parade and sound truck contexts by allowing the government to consider the impact of noise levels on other peoples' lives. Even in the First Amendment context, the government has a recognized interest in protecting behavior in rivalrous spaces from undue disruption, where that disruption would cause shifts in behavior that in turn have significant social costs.<sup>221</sup>

#### B. *Situated Privacy in the Case Law*

Many cases have recognized this situated concept of privacy. This is not to say that this privacy interest has always triumphed over other values or that courts have explicitly identified it as a privacy interest. Courts have consistently recognized, however, that if we fail to protect certain sociophysical settings or certain features of those settings, behavioral shifts will occur. They have recognized the importance of the nature of physical space in relationship management, even in First Amendment case law. And they have explicitly recognized that First Amendment interests often arise on the side of privacy laws, not just against them, because privacy protections can enable disclosure within trusted relationships and in trusted sociophysical spaces.

##### 1. Privacy in the Home

The first set of examples of this privacy interest occur in an environment that most people concede is private: the home. The Supreme Court has, in the First Amendment context, repeatedly recognized a valid government interest in protecting the ability of individuals to enjoy undisrupted tranquility in the home—in other words, protecting individuals from having to change their behavior.<sup>222</sup> In these cases, individuals receive protection for their decisions to

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<sup>220</sup> See *Blitz et al.*, *supra* note 2, at 133 (identifying relevance of unwilling listener cases, though not linking them to the government interest in protecting this particular kind of privacy).

<sup>221</sup> See *supra* note 192 and accompanying text.

<sup>222</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989); *Frisby v. Schultz*, 487 U.S.

manage the tranquility of the home environment and are not required to alter their behavior to accommodate others' speech interests.

In *Frisby v. Schultz*,<sup>223</sup> the Court upheld an ordinance prohibiting picketing that targeted a particular residence.<sup>224</sup> The Court conceived of residential privacy as the ability of an "unwilling listener" to be free from speech that "inherently and offensively intrudes on residential privacy."<sup>225</sup> Similarly, in *Ward v. Rock Against Racism*,<sup>226</sup> the Court upheld regulations of sound volume at a public concert, reasoning that the concert would cause "unwelcome noise" disruptive of life in residential neighborhoods.<sup>227</sup> The Court in *Rowan v. United States Post Office Department*<sup>228</sup> upheld a law allowing homeowners to refuse the delivery of offensive materials by mail, again reasoning that to do otherwise could disrupt a homeowner's control over the home environment.<sup>229</sup>

In these cases, the Court recognized that privacy involves the connection between a physical environment and a person's behavior. The Court did not just respect the home as private because it is privately owned or because it is not open to many people. The Court recognized that the privacy interest in the home involves decisions to maintain an environment that is uninterrupted and tranquil.<sup>230</sup> The home is a space where a person has the ability to behave the way she likes, without interference in her behavior by outside actors.

The interest in maintaining tranquility and controlling access to the home is an autonomy interest. In *Rowan*, the Supreme Court characterized the purpose of the mail delivery statute as enabling a person to manage his accessibility in the home.<sup>231</sup> The Court characterized this law not just as protecting a particular space, but as protecting a home occupant's autonomy interest in controlling access to that space.<sup>232</sup>

Recording disrupts the nature of a physical space. If loud sounds, targeted picketing, and the delivery of mail are disruptive enough to a homeowner's

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474, 484-85 (1988); *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970); *see also* Blitz et al., *supra* note 2, at 133. I disagree, here, with Justin Marceau and Alan Chen, who claim that the unwilling listener cases protect individuals only from undesired and disturbing messages being communicated and understood as messages. Marceau & Chen, *supra* note 2, at 1043. I read the cases to be about disruption and the First Amendment, more broadly speaking. *But see* ACLU of Ill. v. Alvarez, 679 F.3d 583, 592 (7th Cir. 2012).

<sup>223</sup> 487 U.S. 474 (1988).

<sup>224</sup> *Id.* at 488 (White, J., concurring in judgment).

<sup>225</sup> *Id.* at 484, 486.

<sup>226</sup> 491 U.S. 781 (1989).

<sup>227</sup> *Id.* at 796.

<sup>228</sup> 397 U.S. 728 (1970).

<sup>229</sup> *Id.* at 738.

<sup>230</sup> *Frisby*, 487 U.S. at 484.

<sup>231</sup> *Rowan*, 397 U.S. at 738.

<sup>232</sup> *Id.* at 736 ("[A] sufficient measure of individual autonomy must survive to permit every householder to exercise control over unwanted mail.").

management of the home environment to trump First Amendment interests, recording in the home environment may be, too.<sup>233</sup>

## 2. Situated Privacy and Exposure to Different Audiences

The home is in many ways the easy case. Protection for privacy in the home is paramount in case law.<sup>234</sup> Even for those who understand privacy merely in contrast to publicity, the home is the place of least exposure to the outside world.<sup>235</sup> Courts have recognized, however, that privacy can exist outside of the home and that exposure to one audience does not obviate a privacy interest with respect to other audiences.

The Supreme Court has recognized what are essentially privacy interests in a variety of non-home settings. Recall that in *Estes v. Texas*, the Court concluded that televising a criminal trial violated the due process rights of the criminal defendant.<sup>236</sup> The Court reasoned that recording the trial would cause participants to change their behavior because they would be conscious of the expanded audience.<sup>237</sup> Those behavioral changes would be so socially undesirable in the context of a trial that the Court found that recording should not be allowed in these circumstances. Thus, the Court condoned a ban on recording a criminal trial, even where access case law required public access to

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<sup>233</sup> See *Cohen v. California*, 403 U.S. 15, 21 (1971) (“The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.”); *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (“Plaintiff’s den was a sphere from which he could reasonably expect to exclude eavesdropping . . . [H]e does not and should not be required to take the risk that what is heard and seen will be transmitted by photograph or recording . . .”); see also *Desnick v. Am. Broad. Cos.*, 44 F.3d 1345, 1352-53 (7th Cir. 1995) (distinguishing *Dietemann* as happening in the home).

<sup>234</sup> *Frisby*, 487 U.S. at 484 (“[P]reserving the sanctity of the home, the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits, is surely an important value.” (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980))).

<sup>235</sup> Helen Nissenbaum, *Privacy as Contextual Integrity*, 79 WASH. L. REV. 101, 111-12 (2004).

<sup>236</sup> *Estes v. Texas*, 381 U.S. 532, 534-35 (1965).

<sup>237</sup> *Id.* at 544-45. A televised juror might fear community hostility, “realizing that he must return to neighbors who saw the trial themselves,” and thus “may well be led ‘not to hold the balance nice, clear and true between the State and the accused . . .’” *Id.* at 545 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). Judges, too, might change their behavior. *Id.* at 548. Witnesses may “be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization.” *Id.* at 547. The Court even recognized the impact on the defendant’s attorney: introducing recording could have grave consequences for fair representation of the defendant, whose attorney may be tempted “to play to the public audience.” *Id.* at 549.

that trial.<sup>238</sup> This effectively recognizes a privacy interest, as defined here, in a courtroom, a location clearly outside of the home. It also recognizes a continued privacy interest with respect to the public, even though information had already been disclosed to those participating in the trial and even to the press.

The Supreme Court again recognized that exposure to one audience does not obviate a privacy interest with respect to another audience in *Houchins v. KQED, Inc.*<sup>239</sup> The Court recognized that prison inmates have a privacy interest in not being recorded and broadcast by a television station.<sup>240</sup> The Court recognized this interest despite the fact that prison is largely a nonprivate environment with respect to the government.<sup>241</sup>

The Court has similarly addressed “media ride-alongs” with police and found a Fourth Amendment violation where police brought news media into a person’s home, even though the police were legally present with a valid warrant.<sup>242</sup> Despite the fact that the police were legally allowed to be in the home to arrest an individual, the Court recognized a privacy interest with respect to the news media and its audience.<sup>243</sup> These cases and others show a more nuanced understanding of privacy on the part of the Supreme Court: privacy does not only pertain to isolation in the home, but also to the dynamic management of exposure to different audiences, even if one audience already has permission to be there.<sup>244</sup>

### 3. Situated Privacy and Buffer Zones

Without necessarily characterizing the government interest as an interest in privacy, the Court has, in a series of cases, recognized a strong government interest in preserving behavior in the context of specific physical spaces, all of which were outside of the home. The government interest in preventing the disruption of behavior in rivalrous physical spaces has, on multiple occasions, overcome a First Amendment interest.

In *Boos v. Barry*,<sup>245</sup> the Court found that the government interest in preventing the disruption of behavior in an embassy justified a ban on

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<sup>238</sup> *Id.* at 540.

<sup>239</sup> 438 U.S. 1 (1978).

<sup>240</sup> *Id.* at 5 n.2 (“It is true that inmates lose many rights when they are lawfully confined, but they do not lose all civil rights. Inmates in jails, prisons, or mental institutions retain certain fundamental rights of privacy; they are not like animals in a zoo to be filmed and photographed at will by the public or by media reporters, however ‘educational’ the process may be for others.” (citing *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974))).

<sup>241</sup> *Id.* at 8.

<sup>242</sup> *Wilson v. Layne*, 526 U.S. 603, 605 (1999).

<sup>243</sup> *Id.* at 611.

<sup>244</sup> *See, e.g., Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164 (2002).

<sup>245</sup> 485 U.S. 312 (1988).

congregating in a public forum 500 feet outside the embassy.<sup>246</sup> Despite the nature of the space—a public forum—and the highly protected nature of the speech at issue—on matters of public concern—the Court found in *Boos* that the congregation law was appropriately “crafted for a particular context and . . . it is apparent that the ‘prohibited quantum of disturbance’ is whether normal embassy activities have been or are about to be disrupted.”<sup>247</sup> Without calling this a privacy interest, the Court chose to preserve a particular category of behavior in rivalrous physical space against real First Amendment interests in protesting against embassy activity.

In a series of cases, the Court considered the government interest in protecting entrance and egress at healthcare facilities (that is, abortion facilities) from disruption by stationed protestors and petitioners. In *Hill v. Colorado*,<sup>248</sup> the Court upheld a Colorado law creating an eight-foot floating buffer zone around a person within 100 feet of every healthcare facility.<sup>249</sup> A protestor or petitioner could approach a person within that buffer zone only with permission. The Court in *Hill* recognized the government’s interest in protecting the unwilling listener as a “privacy interest” that “varies widely in different settings.”<sup>250</sup> That interest was not limited to the home, or to private enclosed spaces. It could exist even “in ‘the Sheep Meadow’ portion of Central Park.”<sup>251</sup> The strength of this privacy interest depends, the Court noted, on both social and physical context.<sup>252</sup>

The government interest in *Hill* was articulated not as an interest in protecting unwilling listeners from offensive speech, but as an interest in protecting them from the moment of “deliberate ‘verbal or visual assault’” in a rivalrous physical setting.<sup>253</sup> The Court recognized that such an “assault” would likely cause a change in behavior and that the government has a legitimate interest in protecting individuals in that context from undue

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<sup>246</sup> *Id.* at 331, 334. Elsewhere, I have argued that *Boos* impinges on the First Amendment right to peaceably assemble. Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 50-51 (2012). I discuss below some limitations of the analysis in *Boos*, including the Court’s lack of attentiveness to the right to peaceably assemble.

<sup>247</sup> *Boos*, 485 U.S. at 332 (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972)).

<sup>248</sup> 530 U.S. 703 (2000).

<sup>249</sup> *Id.* at 718.

<sup>250</sup> *Id.* at 716.

<sup>251</sup> *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989)).

<sup>252</sup> *Id.* at 717 (“The right to avoid unwelcome speech has special force in the privacy of the home . . . and its immediate surroundings, . . . but can also be protected in confrontational settings.” (citations omitted)).

<sup>253</sup> *Id.* at 716 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210-11 n.6 (1975)); see also Corbin, *supra* note 195, at 945-46.

disruptions to their behavior.<sup>254</sup> In *Hill*, the buffer-zone law was found to be content-neutral and survived application of the time, place, and manner test.<sup>255</sup>

Similarly, in *Burson v. Freeman*,<sup>256</sup> the Court upheld a 100-foot election-day buffer zone around voting locations.<sup>257</sup> The Court found the law in *Burson* to in fact be content based and, consequently, applied strict scrutiny.<sup>258</sup> The law nonetheless survived strict scrutiny because of the strength of the government's interest in protecting voters from undue influence and protecting the integrity of the election.<sup>259</sup>

While the Court again did not explicitly describe this interest as a privacy interest, it described the effect of the law in what should by now be familiar terms. Failure to limit the area around the voter on the day of an election could result in intimidation by employers and others.<sup>260</sup> This interference, resulting in changed behavior by the voter, would disrupt the integrity of the vote. Protecting the secrecy of the vote by protecting the area around the voter was an acceptable interest in preventing voter behavior change.<sup>261</sup> It effectively is an interest in protecting voter privacy.

The above case law should be read with important caveats. First, the cases give little thought to the First Amendment right to peaceably assemble, which should afford heightened protection for protestors.<sup>262</sup> Restricting the right of individuals to peaceably assemble has significant implications for democratic society under all theories of the First Amendment.<sup>263</sup> Second, many commentators have looked at these cases as poor examples of First Amendment reasoning.<sup>264</sup> They are, however, current doctrine, and inasmuch as this Article attempts to work within the existing doctrinal framework, they

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<sup>254</sup> *Hill*, 530 U.S. at 716 (“[W]e have recognized that ‘[t]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests.’” (quoting *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 772-73 (1994))).

<sup>255</sup> *Id.* at 724.

<sup>256</sup> 504 U.S. 191 (1992).

<sup>257</sup> *Id.* at 211.

<sup>258</sup> *Id.* at 198.

<sup>259</sup> *Id.* at 199.

<sup>260</sup> *Id.* at 204 (“One commentator remarked of the New York law of 1888: ‘We have secured secrecy; and intimidation by employers, party bosses, police officers, saloonkeepers and others has come to an end.’”).

<sup>261</sup> *Id.* at 207-08 (“The only way to preserve the secrecy of the ballot is to limit access to the area around the voter.”).

<sup>262</sup> Kaminski, *supra* note 246, at 36. I have not previously contemplated the scenario where a host of peaceable videographers stand in a particular area and simultaneously peaceably assemble and record what’s going on around them. For purposes of this Article, two different kinds of rights are at issue in that fact pattern. It may be that the government can more readily regulate the recording than the protest, or vice versa.

<sup>263</sup> *Id.* at 37.

<sup>264</sup> *See, e.g., Zick, supra* note 176, at 583-89.

are legitimate sources of law. Third, even within the doctrinal framework that these cases establish, it is not clear that the Court correctly evaluated the strength of the government interest. The government interest in, say, protecting the genre of behavior that occurs within an embassy is not necessarily a strong privacy interest. Embassies are sites of public governance that might expect to regularly encounter protests. The abortion-provider cases are more complicated; although the sites might expect to regularly encounter protests, patients' privacy interests are stronger than those of embassy employees. While these cases are subject to legitimate criticism in how they assess the strength of the protestors' rights and the strength of the government's interest, they set up the currently operable doctrinal framework for weighing First Amendment rights against disruptions to a physical environment.

The Court in *Snyder v. Phelps*<sup>265</sup> recently assessed a privacy interest outside of the home under a different doctrinal framework.<sup>266</sup> What is surprising, however, is that the Court nodded to the same privacy interests articulated throughout this Article. In *Snyder*, the Court considered whether protestors from the Westboro Baptist Church could be held liable for intentional infliction of emotional distress and intrusion upon seclusion for staging a protest near a military funeral.<sup>267</sup> The regulation at issue was not content neutral—it turned on the reaction of listeners to the speech—and thus failed to pass the Court's scrutiny.<sup>268</sup>

Even in *Snyder*, however, the Court acknowledged a legitimate government interest in preventing behavioral disturbances in shared public spaces.<sup>269</sup> The Court explained that church members were not disruptive of the funeral service; the picketing occurred 1000 feet from the church, out of sight, and “[t]he protest was not unruly; there was no shouting, profanity, or violence.”<sup>270</sup> The Court distinguished the unwilling listener cases of *Rowan* and *Frisby*, not because they involved the privacy of the home, but because “there is no indication that the picketing in any way *interfered* with the funeral service itself.”<sup>271</sup> The strong implication is that there may be a valid and substantial government interest in preventing interference with or disruption of behavior at funerals that, unlike the regulation at issue in *Snyder*, might survive First Amendment scrutiny.<sup>272</sup>

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<sup>265</sup> 562 U.S. 443 (2011).

<sup>266</sup> *Id.* at 451.

<sup>267</sup> *Id.* at 447.

<sup>268</sup> *Id.* at 457 (“The record confirms that any distress occasioned by Westboro’s picketing turned on the content and viewpoint of the message conveyed, rather than any interference with the funeral itself.”).

<sup>269</sup> *Id.* at 456.

<sup>270</sup> *Id.* at 457.

<sup>271</sup> *Id.* at 460 (emphasis added).

<sup>272</sup> The Court considered the possibility of buffer zones around funerals. *Id.* at 457 (“To the extent these laws are content neutral, they raise very different questions from the tort

The Court in *Snyder*, in fact, went a step further than in other cases, implying that behavioral disruption in shared spaces could even be taken into account in strict scrutiny analysis of a content-based law. In considering whether Westboro Baptist Church could invoke the First Amendment as a defense to state tort claims, the Court emphasized that the speech must be on a matter of public concern.<sup>273</sup> The Court then outlined a test for determining whether speech is on a “matter of public concern”: courts must look to the whole record and examine “content, form, and *context*” of that speech.<sup>274</sup> Context includes “all the circumstances of the speech, including what was said, *where* it was said, and *how* it was said.”<sup>275</sup>

Thus, even in a case involving content-based regulation, the Court in *Snyder* required that courts look to how disruptive the speech is in its sociophysical context. The Court appeared to incorporate what this Article has defined as privacy into its inquiry as to whether the First Amendment can serve as a defense to state tort law, even under heightened scrutiny.

#### 4. Situated Privacy and Persistence Over Time

Courts have been willing to recognize legitimate government interests in regulating even political speech in public fora when that speech extensively disrupts the ability of other people to enjoy a rivalrous physical space. I have argued that recording can, in certain contexts, create precisely such a disruption.

Thus far, however, I have limited the discussion to individually distinct disruptive moments, in particular spaces. But places are not just physical—they are socially constructed, and their nature is constructed along the axis of time.<sup>276</sup> A person calculating her social accessibility does not just rely on a physical wall to maintain distance from another person. She also relies on the way she spaces out interactions with that individual over time. You may call a close friend every day or every week. You may call a less close friend, family member, or professional colleague twice a year. This spacing out of the relationship over time is part of your ongoing management of your relationship with that person.

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verdict at issue in this case. . . . [W]e have no occasion to consider how it might apply to facts such as those before us, or whether it or similar regulations are constitutional.”).

<sup>273</sup> *Id.* at 452.

<sup>274</sup> *Id.* at 453 (emphasis added) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1985)).

<sup>275</sup> *Id.* at 454 (emphases added).

<sup>276</sup> See JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 10-11 (2012); Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 443 (2006) (arguing that place is not “simply given; place is, rather, constructed and given meaning as it becomes part of an expressive culture”).

Recording made over a longer period of time—that is, persistent surveillance of an individual—disrupts privacy this way. Persistent and targeted surveillance collapses individual moments of interaction, spread out over time and mitigated through human forgetfulness, into one long story of an individual’s life. The harms caused by persistent surveillance have been much discussed in the Fourth Amendment literature, as courts have considered GPS tracking by law enforcement.<sup>277</sup> Persistent surveillance of an individual, even in public, can lead to inferences about very private areas of that person’s life: her religion, her addictions, her sexual predilections, her health.<sup>278</sup> In the Fourth Amendment context, judges and justices have recognized the need for law to step in as technology lowers the costs of persistent surveillance.<sup>279</sup>

The interest in preventing persistent surveillance of an individual has been less well articulated in the context of surveillance by private actors. Nonetheless, some important points emerge. Just as persistent surveillance in public over a long enough period of time can require a warrant under the Fourth Amendment,<sup>280</sup> persistent surveillance over a long enough period of time can, in the private context, convert protectable newsgathering into regulable action.

For example, a court ordered a paparazzo who persistently followed and photographed Jackie Onassis and her family to stay away from them.<sup>281</sup> Cases addressing stalking laws characterize such persistent behavior as a combination of speech and action, separating out the persistence and disruption as regulable

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<sup>277</sup> For one opinion in this discussion, see David Gray & Danielle Keats Citron, *A Shattered Looking Glass: The Pitfalls and Potential of the Mosaic Theory of Fourth Amendment Privacy*, 14 N.C. J.L. & TECH. 381 (2013) (exploring the prospects for and advantages of mosaic theory of the Fourth Amendment and arguing that its practical challenges can be overcome through effective regulations). For a contrary opinion, see Orin S. Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 MICH. L. REV. 311 (2012) (considering the implications of a mosaic theory and arguing that courts should reject the theory because implementing it is difficult in light of rapid technological change).

<sup>278</sup> See *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring) (arguing that GPS monitoring impinges on expectations of privacy because it “generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations”).

<sup>279</sup> See *id.* at 956; Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011).

<sup>280</sup> See *Jones*, 132 S. Ct. at 964 (Alito, J., concurring) (finding that twenty-eight days of GPS monitoring violates reasonable expectations of privacy); *United States v. Pineda-Moreno*, 617 F.3d 1120, 1125-26 (9th Cir. 2010) (Kozinski, C.J., dissenting) (finding that the use of a GPS to track an individual’s movement impairs a reasonable expectation of privacy and is subject to Fourth Amendment protection).

<sup>281</sup> *Galella v. Onassis*, 487 F.2d 986, 995 (2d Cir. 1973) (“When weighed against the *de minimis* public importance of the daily activities of the defendant, Galella’s constant surveillance, his obtrusive and intruding presence, was unwarranted and unreasonable.”).

harassment, rather than protectable speech.<sup>282</sup> And in the captive audience context, a listener is more likely to be treated as a captive audience if the speaker persistently follows the listener.<sup>283</sup>

Individual targeting matters, too. Courts have found that even pure speech, when aimed persistently at an individual rather than distributed to a mass audience, can become more action-like in nature and thus may permissibly be regulated. Persistent phone calls, which are clearly speech, can become regulable harassment through their persistence when targeted at a particular individual instead of made to the public at large.<sup>284</sup>

Thus, persistent surveillance of a specific individual over time may be deemed by courts to be regulable action rather than protectable speech. Cases suggest that both the persistent nature of the recording over time and the individual targeting of it could convert a moment of protectable newsgathering into speech entwined with unprotected action.

The great difficulty, of course, is line-drawing: When does following an individual for purposes of gathering news about them become, instead, regulable surveillance or harassment? Courts have identified the same line-drawing problem in the Fourth Amendment context: Following somebody in public over twenty-eight days establishes a protectable privacy expectation,<sup>285</sup> but who knows what the line is beyond that? What if the persistence is disrupted—an individual follows and records somebody for fourteen days at a time, followed by a three-day break, followed by fourteen days of recording? What if that individual follows them for twenty-seven days instead of twenty-eight? These are questions that will arise in future cases. The point is that, despite a longstanding reluctance by courts to restrict recording in public

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<sup>282</sup> See *Galella v. Onassis*, 533 F. Supp. 1076, 1106 (S.D.N.Y. 1982) (“It does not strain credulity or imagination to conceive of the systematic ‘public’ surveillance of another as being the implementation of a plan to intrude on the privacy of another.” (citation omitted)); *Nader v. Gen. Motors Corp.*, 255 N.E.2d 765, 771 (N.Y. 1970) (“[U]nder certain circumstances, surveillance may be so ‘overzealous’ as to render it actionable.”); see also Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and “Cyberstalking,”* 107 Nw. U. L. REV. 731, 749 (2013) (finding that the First Amendment does not apply “when someone approaches someone else too closely” or “repeatedly follows someone even at a longer distance” because “[t]he law plausibly treats all these sorts of speech as intruding onto a person physically, by using the person’s real or personal property or coming too close to that person”).

<sup>283</sup> Corbin, *supra* note 195, at 945; Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken to?*, 67 Nw. U. L. REV. 153, 194 (1972) (including in the definition of “captivity” circumstances in which the target is being pursued by the communicator); Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 114 (1991).

<sup>284</sup> See Volokh, *supra* note 282, at 740.

<sup>285</sup> See *Jones*, 132 S. Ct. at 964 (Alito, J., concurring) (“We need not identify with precision the point at which the tracking . . . became a search, for the line was surely crossed before the 4-week mark.”).

spaces,<sup>286</sup> targeted recording over time is different, even if it takes place in public.<sup>287</sup>

To reiterate the core theme of this Article: the scope of the protectable right changes because the nature of the harm changes. One photograph of a person in public may offend his dignity. Twenty-eight days of targeted tracking meaningfully disrupts his environment and his behavior.<sup>288</sup>

##### 5. Situated Privacy and Trusted Spaces for Communication

Social bonds are features of the communications environment as much as walls are or as time is. We rely on other people to keep our secrets. Trust matters.<sup>289</sup> We reveal more to people we trust than to people we do not.<sup>290</sup> In some contexts, social trust has not been protected by law.<sup>291</sup> There is a growing academic conversation about the importance of preserving trust in communications and the relationship of trust to privacy.<sup>292</sup>

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<sup>286</sup> See, e.g., *Nussenzweig v. DiCorcia*, No. 108446/05, 2006 WL 304832, at \*6 (N.Y. Sup. Ct. Feb. 8, 2006).

<sup>287</sup> But see Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1127-28 (1999) (positing that mere chasing and following for the purpose of information gathering without any physical harm or threat should not be made the subject of liability).

<sup>288</sup> But see *Pomykacz v. Borough of W. Wildwood*, 438 F. Supp. 2d 504, 506-07, 512-13, 513 n.14 (D.N.J. 2006) (holding that a woman who followed a town's mayor, and whose conduct may have satisfied the *actus reus* elements of criminal harassment, had a First Amendment interest in her photographs as part of her political activism).

<sup>289</sup> See, e.g., DEP'T OF COMMERCE INTERNET POLICY TASK FORCE, COMMERCIAL DATA PRIVACY AND INNOVATION IN THE INTERNET ECONOMY: A DYNAMIC POLICY FRAMEWORK 13 (2010),

[https://www.ntia.doc.gov/files/ntia/publications/iptf\\_privacy\\_greenpaper\\_12162010.pdf](https://www.ntia.doc.gov/files/ntia/publications/iptf_privacy_greenpaper_12162010.pdf) [<https://perma.cc/Z97T-RS7T>] ("Privacy protections are crucial to maintaining consumer trust, which is necessary to secure full use of the Internet as a political, educational, cultural, and social medium."); Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1207 (2016); Neil Richards & Woodrow Hartzog, *Taking Trust Seriously in Privacy Law*, 20 STAN. TECH. L. REV. (forthcoming 2017) (manuscript at 27), <https://ssrn.com/abstract=2655719> [<https://perma.cc/D76G-QQNY>].

<sup>290</sup> Valerian J. Derlega & Alan L. Chaikin, *Privacy and Self-Disclosure in Social Relationships*, 33 J. SOC. ISSUES 102, 102-15 (1977).

<sup>291</sup> For example, the Fourth Amendment does not protect people from disclosures by "false friends." See, e.g., *United States v. White*, 401 U.S. 745, 749 (1971). But see *Cohen v. Cowles Media Co.*, 501 U.S. 663, 672 (1991); Balkin, *supra* note 289, at 1199; Richards & Hartzog, *supra* note 289, at 23-24 ("There is also substantial legal scholarship on the role of the law in general in generating or discouraging trust.").

<sup>292</sup> See Balkin, *supra* note 289, at 1187 (recommending a shift in the focus of First Amendment privacy protection to the relationships of trust and confidence); Richards & Hartzog, *supra* note 289, at 2 (arguing that privacy rules can be used to enable trust in essential information relationships).

Courts have recognized that privacy can be not just in conflict with but necessary for the First Amendment.<sup>293</sup> Allowing individuals a legally protected, safe space for the development of close relationships encourages them to disclose more to trusted others in those safe spaces. If the boundaries erected around a trusted conversation cannot be relied on, then individuals will disclose less.

This raises a First Amendment concern, explicitly recognized by the Supreme Court.<sup>294</sup> If there are no privacy protections for certain modes of communication, such as phone calls, then the First Amendment itself will suffer, as people will say less on the phone. In other words, if technological and environmental barriers fail to protect the privacy of individual conversations, individuals will resort to behavioral changes, disclosing less. There is a real First Amendment interest in preventing this chilling effect.<sup>295</sup>

The government interest in regulating the recording of conversations contains, within itself, a First Amendment purpose. If eavesdropping or wiretapping laws are challenged under the First Amendment, courts should recognize that such laws also enable speech, not just prevent it. As the Seventh Circuit explained in *ACLU of Illinois v. Alvarez*, “[t]he protection of personal conversational privacy serves First Amendment interests because ‘fear of public disclosure of private conversations might well have a chilling effect on private speech.’”<sup>296</sup> The First Amendment interest in encouraging free expression often requires the protection of privacy.

#### IV. PRIVACY MEETS THE RIGHT TO RECORD

Privacy laws that govern recording have already been challenged under the First Amendment. The question is: How should courts address such challenges? This Article has thus far discussed the nature of the recording right and the nature of the privacy interest at stake. This Part explains how the two might meet.

First, I briefly discuss why regulations made in the name of safety or property ownership, that nonetheless impact privacy, are inadequate to protect privacy. Next, I answer the two difficult doctrinal questions posed in the Introduction and in Part I: Why would the recording right change based on location? And if the right to record is protected by the First Amendment, how do we disaggregate the government’s interest in protecting privacy from an

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<sup>293</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

<sup>294</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 532-33 (2001) (recognizing that the government has an important interest in “encouraging the uninhibited exchanged of ideas and information among private parties”).

<sup>295</sup> See *id.* at 533; *White*, 401 U.S. at 787 (Harlan, J., dissenting); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 613-14 (7th Cir. 2012) (Posner, J., dissenting) (arguing that because private talk in public places is common, nonconsensual recording will have an inhibiting effect on the number and candor of conversations).

<sup>296</sup> *ACLU of Ill.*, 679 F.3d at 605 (quoting *Bartnicki*, 532 U.S. at 533).

illegitimate interest in preventing speech? I close this Part with examples of laws and cases, discussing whether courts have gotten it right, and what they might do going forward.

A. *Why Nonprivacy Regulations Alone Are Inadequate*

We need privacy laws. By this, I mean that we need laws that prevent recording or information gathering in order to protect privacy. Relying solely on laws that obliquely regulate recording by aiming at other purposes—such as keeping the airways or streets safe, or governing the boundaries of private property—will fail to adequately capture privacy interests and can leave significant regulatory gaps.

For example, drones carry video cameras and other recording devices. The FAA governs aircraft safety,<sup>297</sup> and state law determines the extent of privately owned airspace.<sup>298</sup> Some scholars have suggested that we might rely on the combination of FAA regulations and trespass law to prevent most anticipated drone privacy problems and access to problematic airspace.<sup>299</sup>

It is possible, however, for a drone to fly in accordance with FAA regulations, outside of privately owned airspace, and still commit a privacy violation. I have referred to this as the “fifty-foot gap,” referencing California’s recent attempt to ban drone flight under 350 feet, while the FAA suggests that model aircraft hobbyists fly under 400 feet.<sup>300</sup> In the fifty feet between an FAA

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<sup>297</sup> *Mission*, FED. AVIATION ADMIN., <https://www.faa.gov/about/mission/> [<https://perma.cc/35CW-2TEE>] (last visited Nov. 20, 2016).

<sup>298</sup> See RESTATEMENT (SECOND) OF TORTS § 159(2) (AM. LAW INST. 1965) (“Flight by aircraft in the air space above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes substantially with the other’s use and enjoyment of his land.”); Colin Cahoon, Comment, *Low Altitude Airspace: A Property Rights No-Man’s Land*, 56 J. AIR L. & COM. 157, 191-93 (1990); Troy A. Rule, *Airspace in an Age of Drones*, 95 B.U. L. REV. 155, 158-59 (2015).

<sup>299</sup> See GREGORY MCNEAL, BROOKINGS INST., DRONES AND AERIAL SURVEILLANCE: CONSIDERATIONS FOR LEGISLATORS 4 (2014), <https://www.brookings.edu/research/drones-and-aerial-surveillance-considerations-for-legislatures/> [<https://perma.cc/6ZQK-4NEV>] (“Legislators should follow a property-rights approach to aerial surveillance. This approach provides landowners with the right to exclude aircraft, persons, and other objects from a column of airspace extending from the surface of their land up to 350 feet above ground level. Such an approach may solve most public and private harms associated with drones.”); Blitz et al., *supra* note 2, at 212.

<sup>300</sup> See Justin Peters, *California Governor Vetoes Bill to Stop Drones from Flying over Private Property*, SLATE: FUTURE TENSE (Sept. 10, 2015, 3:15 PM), [http://www.slate.com/blogs/future\\_tense/2015/09/10/california\\_gov\\_jerry\\_brown\\_vetoes\\_bill\\_to\\_stop\\_drones\\_from\\_flying\\_over\\_private.html](http://www.slate.com/blogs/future_tense/2015/09/10/california_gov_jerry_brown_vetoes_bill_to_stop_drones_from_flying_over_private.html) [<https://perma.cc/Y7YX-SMC2>] (explaining the failure of the California bill that would have banned drone flight over private property below 350 feet); *Where to Fly*, FED. AVIATION ADMIN., [https://www.faa.gov/uas/where\\_to\\_fly/](https://www.faa.gov/uas/where_to_fly/) [<https://perma.cc/5WEC-GS4E>] (last visited Oct. 14, 2016) (advising hobbyists to use drones within line of sight and under 400 feet); *see also*

violation and trespass, drones would have been able to fly legally, record individuals below, and evade enforcement under either legal regime. Some states have attempted to regulate trespass onto privately owned airspace, rather than regulating recording.<sup>301</sup> Given the existence of zoom lenses, and the fact that much information can be captured from an angle while not flying directly overhead, these laws will not effectively prevent privacy violations. Oregon recently amended its drone trespass law for precisely this reason.<sup>302</sup>

Finally, it is not clear that these laws will in fact avoid First Amendment scrutiny. The Supreme Court in *McCullen v. Coakley*<sup>303</sup> suggested that laws that restrict access to public fora will undergo First Amendment scrutiny, even if they do not explicitly mention speech.<sup>304</sup> While it is unclear whether airspace is a public forum (at least one scholar has argued that it is not),<sup>305</sup> the Court's reasoning in *McCullen* should serve to caution regulators that clever work-arounds will not necessarily avoid First Amendment scrutiny of laws designed to prevent recording.

#### B. *Why the Doctrine Changes Depending on Physical Location*

One of the biggest puzzles surrounding the right to record is why its scope might differ in different physical locations. Numerous scholars have intuited that this must be the case,<sup>306</sup> and the case law has reflected the intuition that location matters.<sup>307</sup> None, however, has explained why location should affect the scope of the recording right.

Currently, the scope of the right to record appears to vary depending on the setting. In public fora, recording is protected; in private spaces, it might not be.

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PublishPurdue, *Drone Videos: Surveillance or Speech?*, YOUTUBE (Oct. 11, 2015), <https://www.youtube.com/watch?v=TOPWiIwkCso>.

<sup>301</sup> *E.g.*, OR. REV. STAT. § 837.380 (2015).

<sup>302</sup> *Id.*

<sup>303</sup> 134 S. Ct. 2518 (2014).

<sup>304</sup> *Id.* at 2529 (“Thus, even though the Act says nothing about speech on its face, there is no doubt . . . that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny.”).

<sup>305</sup> *See, e.g.*, Blitz et al., *supra* note 2, at 123-24 (arguing that navigable airspace is a limited purpose public forum).

<sup>306</sup> Marc Blitz is one such scholar and proposed using forum doctrine. *See id.* at 110. Others seem to have same intuition that the test will vary across physical spaces but do not explain why. *See, e.g.*, Kreimer, *supra* note 2, at 403; Marceau & Chen, *supra* note 2, at 1034 (proposing a different test for recording on private property without consent than recording in public or on private property with consent).

<sup>307</sup> *See, e.g.*, *Houchins v. KQED, Inc.*, 438 U.S. 1, 5 n.2 (1978) (noting that inmates retain a fundamental right to privacy that is not overcome by the First Amendment rights to film and photograph of either the public or media); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (holding that the First Amendment protects the filming of government officials engaged in their duties in public spaces).

This variation, I believe, is appropriate. First Amendment salience—what counts as speech, or is visible to First Amendment analysis—can be understood as itself internalizing balancing between speech and other values.<sup>308</sup> The default balance will differ in a public versus a private space. Salience can reflect this changed default as much as scrutiny.

The scope of the right to record sets a default balance between speech and privacy based on assumptions about particular kinds of spaces. In public, all recordings may be First Amendment salient (with the exception, perhaps, of the persistent and individually targeted surveillance discussed above). But in private, only some recordings might merit First Amendment scrutiny. This difference in salience shows First Amendment doctrine internalizing the expected nature of harms that may occur in different kinds of locations.

Lest this idea that the scope of First Amendment protection varies based on location be shocking—after all, the Internet and books are protected everywhere<sup>309</sup>—let us return to earlier examples. A newsgatherer presumably, like all individuals, has a First Amendment right to access a public forum. But a newsgatherer has a much more limited First Amendment right to access courts<sup>310</sup> and has no First Amendment right to access prisons.<sup>311</sup> It is not that the newsgatherer has a First Amendment right in each of these three settings that is scrutinized differently against different government interests; it is that the access right itself differs in scope. Access is less salient to the First Amendment when it involves more private spaces.

Forum doctrine itself can be understood as supporting this idea: First Amendment protection often varies depending on the nature of the physical place in which the speech act occurs. First Amendment analysis differs greatly depending on whether the regulation is of a public forum, or a limited purpose public forum, such as a school, or a place of public employment.<sup>312</sup> On the high seas, for example, the First Amendment is not solicitous of Greenpeace protests; in a public forum, it clearly would be.<sup>313</sup>

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<sup>308</sup> Fred Schauer has extensively described the notion of salience. Schauer, *supra* note 38, at 1768 (defining constitutional salience as “the often mysterious political, social, cultural, historical, psychological, rhetorical, and economic forces that influence which policy questions surface as constitutional issues and which do not”).

<sup>309</sup> See Marceau & Chen, *supra* note 2, at 1013.

<sup>310</sup> See *Estes v. Texas*, 381 U.S. 532, 539 (1965).

<sup>311</sup> See *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974).

<sup>312</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 n.2 (2014) (“A different analysis would of course be required if the government property at issue were not a traditional public forum but instead ‘a forum that is limited to use by certain groups or dedicated solely to the discussion of certain subjects.’” (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009))).

<sup>313</sup> *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1291 (9th Cir. 2013) (“Greenpeace USA has no audience at sea. And although the injunction imposes a safety ‘bubble’ around Shell’s vessels, Greenpeace USA’s reliance on *Schenck* and its discussion

In a public forum, recording of all kinds (again, perhaps excepting persistent surveillance) should be First Amendment salient. Thus, courts are wrong to limit the scope of the right to record in public fora; speech rights in public fora are historically broad, and subject to greater protection—“time out of mind.”<sup>314</sup> That is not to say that privacy regulations targeting a public forum will be subject to strict scrutiny. But recordings made in a public forum will likely always be First Amendment salient, and regulation of them will be subject to some form of First Amendment analysis.

However, this is not true of nonpublic fora, or privately owned locations.<sup>315</sup> There, as with newsgathering, the scope of the right will be more limited or even nonexistent. For example, as long as *Estes* and *Houchins* are good law, there is no First Amendment right to record a trial or in a prison. If there is no First Amendment right to record in a prison, a government-run institution, that begs the question of whether there is ever such a right to record on private property.

One can envision courts creating a modified version of access law for private property, asking whether a recording right exists in a particular space based on balancing the recording’s public benefit against how disruptive the recording will be to ordinary functioning within that environment.<sup>316</sup> This is effectively the question posed by access law; it is also the question posed when evaluating whether a public employee may speak about the government his employer.<sup>317</sup> A public employee may speak about what happens in his place of employment only if his interest in commenting on matters of public concern outweighs his employer’s interest in “promoting the efficiency of the public services it performs.”<sup>318</sup> In other words, a public employee’s speech is salient to the First Amendment only when its significance outweighs an employer’s interest in maintaining an undisrupted work environment. Otherwise, even

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of bubble zones around abortion clinics is sorely misplaced. Speech is, of course, most protected in such quintessential public fora as the public sidewalks surrounding abortion clinics. . . . But the high seas are not a public forum, and the lessons of *Schenck* have little applicability there.” (citations omitted)).

<sup>314</sup> *Boos v. Barry*, 485 U.S. 312, 318 (1988) (recognizing greater protections for “traditional public fora that ‘time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions’” (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939))).

<sup>315</sup> Timothy Zick has suggested that the binary demarcation of public and private fora is inadequately representative of the “expressive topography” of physical space. Zick, *supra* note 276, at 439. I agree. However, as courts still use this binary distinction, and as Zick’s own policy recommendations suggest no change to the underlying binary, I continue to use the binary of public and private fora in this Article.

<sup>316</sup> Marceau & Chen, *supra* note 2, at 1007.

<sup>317</sup> See *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) (per curiam); Helen Norton, *Government Workers and Government Speech*, 7 FIRST AMEND. L. REV. 75, 80 (2008).

<sup>318</sup> *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

though it is technically speech, it is not speech for purposes of First Amendment analysis.<sup>319</sup>

Both access law and public employee speech law provide examples for how in certain nonpublic spaces, a more limited recording right may exist. It will be narrower in scope, and it will be determined by balancing values at the stage of determining whether the right exists at all. Not all recording will be First Amendment salient in private spaces; the burden will be on the recorder to argue that recording is protected as speech in that context.

This difference—that all recording may be protected in public spaces but only some may be protected in nonpublic spaces—is understandable only if one can articulate both the nature of the speech right and the nature of the anticipated harm. A person in a private location historically has had more tools at her disposal for managing social accessibility: walls, windows, window curtains, distance, rooms, and social norms for behavior in private spaces. A person in a public location may still desire to manage her social accessibility, and thus may still have a privacy interest, but her tools in that setting are fewer and less effective. Combined with traditional First Amendment respect for public fora, this suggests that the speech interest in public fora is stronger, while the privacy harm is usually lower.

This is not to say that the old privacy binary, where we protect privacy in private spaces but not in public spaces, is correct. Rather, the division of public fora and nonpublic spaces at the salience stage serves to set defaults, not drive foregone conclusions. Speech receives a stronger thumb on the scale in public settings, where recording “is speech” or is salient regardless of its subject matter. And the framework puts a heavy thumb on the privacy side when the setting is not a public forum and asks for balancing of privacy with the value of the speech at issue.

Privacy interests, as described in this Article, are built into First Amendment access analysis. The right to record doctrine will, and to a large extent should, reflect these default salience settings, even as recording becomes more culturally acceptable and pervasive, because those defaults reflect the nature of particular sociophysical spaces.

### C. *How Privacy Can Be Separated from Speech*

The second difficult doctrinal problem created by the right to record is how to separate the government interest in protecting privacy from an impermissible interest in regulating speech. When is an interest in regulating recording “unrelated to the suppression of free expression” under *O’Brien*, or “justified without reference to the content of the regulated speech” under the time, place, and manner test?<sup>320</sup>

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<sup>319</sup> See *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

<sup>320</sup> *United States v. O’Brien*, 391 U.S. 367, 377 (1968); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

To address this question, privacy must be understood as it has been articulated in this Article: as the ability to manage social accessibility within a physical and temporal environment. Once the nature of privacy regulation has been understood in this way—as closely analogous to regulations of sound trucks and loud rock bands—courts can justifiably assess privacy under an *O'Brien* analysis, or time, place, and manner analysis, as they appear wont to do.<sup>321</sup> As the Supreme Court has explained, while “regulation of communications due to the ideas expressed . . . ‘strikes at the core of First Amendment values[,] . . . regulations of form and context may strike a constitutionally appropriate balance between the advocate’s right to convey a message and the recipient’s interest in the *quality of his environment*.’”<sup>322</sup>

I here address four questions raised in practice by the interface between privacy protections and a right to record. First, I discuss the strength of the government interest: How strong of an interest in privacy is strong enough to withstand scrutiny? Second, when is a recording law content neutral, versus content based? A content-based law will undergo strict scrutiny; a content-neutral law can instead undergo an *O'Brien* analysis or time, place, and manner analysis. Third, when is a law adequately tailored? I have argued that the government interest in protecting privacy can, even in public, be an important government interest; but in a public forum, what constitutes narrow tailoring of a law to that interest? Can a complete ban on recording in a particular space ever be narrowly tailored? And fourth, how should courts address the often-employed notice and consent requirements in recording laws? Are these a form of prior restraint?<sup>323</sup> Or can they be constitutional?

### 1. The Government Interest

The government interest in governing recording is, as discussed above and at length in Part III, an interest in managing the qualities of physical space so as not to allow one person’s behavior to disrupt the behavior of others such that changed behavior results in significant social costs. That interest will not always be strong enough to justify suppression of recording, but it is distinct from an interest in suppressing speech. Regulating recording governs a moment of interaction in physical space, not a downstream editorial decision

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<sup>321</sup> See, e.g., *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 607 (7th Cir. 2012) (performing analysis under the time, place, and manner standard, but not deciding whether it applies); *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

<sup>322</sup> *Frisby v. Schultz*, 487 U.S. 474, 487 (1988) (emphasis added) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 83-84 (1983) (Stevens, J., concurring in judgment)).

<sup>323</sup> See *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 169 (2002) (holding that a requirement to register before public speaking is incompatible with the requirements of the First Amendment).

based on dignitary harms. It, thus, does not break with the long tradition in the United States of protecting the publication and distribution of information.<sup>324</sup>

There are two basic approaches to protecting privacy from recording in this context. One approach entails banning recording entirely in a particular space or context to prevent socially harmful behavioral disruptions. The other involves the less drastic requirement of notice or consent, so the individual being recorded does not unintentionally overexpose herself to others.

When might that government interest be strong enough to overcome speech interests? First Amendment case law recognizes a legitimate government interest in protecting particular places from meaningful disruptions, such as the home, sidewalks outside the home, the area outside an embassy, and public sidewalks outside polling places on election day.<sup>325</sup> Lower courts have also recognized an interest in protecting welfare offices, churches, and funerals.<sup>326</sup> This is not to say that privacy will overcome a right to record in precisely those same places, but to show both that in those places, the Court has been solicitous of privacy-related arguments, and that, in general, the Court has found strong enough privacy interests outside the home to overcome speech concerns.

First Amendment case law also recognizes a legitimate government interest in empowering an individual to make choices about exposing herself to disruptive influences. This interest has been recognized in particular settings and contexts, by imposing a consent requirement for certain kinds of behavior, such as receiving unwanted mail at home or restricting petitioners from approaching within eight feet of a person outside a healthcare facility.<sup>327</sup>

These cases establish that the government interest in preventing recording in some contexts, and requiring notice or consent in others, can be a legitimate interest. The extent to which a ban on an activity can be considered adequately tailored is discussed further below.

## 2. Content Neutrality

Establishing a legitimate government interest is far from the end of the question. A content-based law, even in a public forum, will undergo strict

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<sup>324</sup> See *Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975).

<sup>325</sup> See *supra* Section II.B.

<sup>326</sup> *E.g.*, *Make the Road by Walking, Inc. v. Turner*, 378 F.3d 133, 146-47 (2d Cir. 2004); *Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1216 (9th Cir. 1998); *Phelps-Roper v. Taft*, 523 F. Supp. 2d 612, 619 (N.D. Ohio 2007); see also Corbin, *supra* note 195, at 949-50.

<sup>327</sup> See *Hill v. Colorado*, 530 U.S. 703, 725 (2000) (holding that eight-foot buffer zone around healthcare facility was “a valid time, place, and manner regulation”); *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 737 (1970) (“[T]he mailer’s right to communicate is circumscribed only by an affirmative act of the addressee giving notice that he wishes no further mailings from that mailer.”).

scrutiny.<sup>328</sup> A content-neutral law, by contrast, undergoes the more permissive time, place, and manner test.<sup>329</sup> Regulating recording can raise two kinds of questions around content neutrality. First, if the government is regulating recording to prevent disruptions to the behavior of the person being recorded, does that make the regulation content based? Second, is regulating recording of a particular location content based or content neutral?

The Supreme Court has articulated a number of tests for content neutrality. In *Hill*, the Court described the content-based/content-neutral distinction as hinging on “whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”<sup>330</sup> That test, however, may conflate content-based regulation with the even more suspect viewpoint-based regulation. In *McCullen*, the Court found a law creating a fixed buffer zone around abortion clinics to be content neutral because its enactment could be “justified without reference to the content of the regulated speech.”<sup>331</sup> The law would not have been content neutral “if it were concerned with undesirable effects that arise from ‘the direct impact of speech on its audience’ or ‘[l]isteners’ reactions to speech.’”<sup>332</sup>

This test for content neutrality—whether the government is trying to protect listeners from speech because of their reactions to that speech—presents a potential hurdle for regulating recording. Regulating recording clearly protects the subject of recording from her reaction to that recording. In fact, as articulated at length in this Article, that is often the government interest: to allow the subject of a recording to avoid having to react to it. If one analogizes directly from the unwilling listener cases, then a government desire to protect the subject of “speech” from an adverse reaction to it seems to turn the regulation into a content-based regulation.

This analogy to the unwilling listener cases is incorrect. The listener of a recording and the subject of a recording are distinct.<sup>333</sup> Unlike the unwilling listener cases, where the person being protected from confrontation in a physical space is also the unwilling listener to the content of that speech, the target audience for most recordings is not the person being protected from confrontation in the physical space. It is, thus, possible to disaggregate a government interest in preventing undesirable behavioral shifts on the part of

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<sup>328</sup> *Hill*, 530 U.S. at 735 (Souter, J., concurring) (“[C]ontent-based discriminations are subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some messages . . .”).

<sup>329</sup> See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

<sup>330</sup> *Hill*, 530 U.S. at 719 (quoting *Ward*, 491 U.S. at 791).

<sup>331</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014) (quoting *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48 (1986)).

<sup>332</sup> *Id.* at 2531-32 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988) (alteration in original)).

<sup>333</sup> *But see* Simonson, *supra* note 66, at 1575-76 (claiming that filming police is in fact expressive to police officers in the moment the recording occurs).

the person being recorded at the instance of recording, from a government interest in the impact of the circulation of that recording on a later audience. The latter motive would be impermissibly content focused; the former would be as content neutral as regulations of sound trucks or loud bands.

The Court in *Snyder* articulated this same distinction.<sup>334</sup> In distinguishing content-based regulation from potentially content-neutral buffer-zone regulation, the Court contrasted regulation based on content and viewpoint with regulation targeting the disruptiveness of behavior at the moment of interaction in a physical environment.<sup>335</sup> The government interest in preventing the disruption of the funeral service in a physical space was a content-neutral interest; the government interest in preventing a reaction to “the message conveyed” was content based, or even viewpoint based.

Regulating recording because of its behavioral impact on the person being recorded at the moment of recording, therefore, does not necessarily make the regulation content based. What about regulating particular spaces? A number of recording laws protect specific physical locations.<sup>336</sup> If these laws are deemed content based, they will undergo strict scrutiny.<sup>337</sup> If they are deemed content neutral, they will undergo some form of intermediate scrutiny.<sup>338</sup>

The buffer-zone cases focus on the regulation of particular named spaces. In *Hill*, the Court deemed the scrutinized law, which regulated counseling outside of health care facilities, to be content neutral for three reasons.<sup>339</sup> First, the law did not regulate speech itself, but instead regulated “the places where some speech may occur.”<sup>340</sup> Second, the law “was not adopted because of disagreement with the message it conveys.”<sup>341</sup> And third, and importantly, the

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<sup>334</sup> *Snyder v. Phelps*, 562 U.S. 443, 458 (2011).

<sup>335</sup> *Id.* at 457.

<sup>336</sup> For example, California attempted to ban drone flights over schools, wildfires, prisons, and jails, but the governor eventually vetoed these bills. Patrick McGreevy, *With Strong Message Against Creating New Crimes, Gov. Brown Vetoes Drone Bills*, L.A. TIMES (Oct. 3, 2015, 3:24 PM), <http://www.latimes.com/politics/la-me-pc-gov-brown-vetoes-bills-restricting-hobbyist-drones-at-fires-schools-prisons-20151003-story.html> [<https://perma.cc/5QUU-NY7N>]. Idaho protects farms, ranches, and dairies from drone surveillance. IDAHO CODE § 21-213(2)(a)(ii) (2009 & Supp. 2016). Illinois Tennessee both protect hunters from drone surveillance, targeting the filming of particular classes of people doing particular activities, rather than particular spaces. 720 ILL. COMP. STAT. § 5/48-3(b)(10) (2012); TENN. CODE ANN. § 70-4-302(6) (2012 & Supp. 2015). This approach likely poses more serious content-based problems. Of course, one great difficulty is drawing the line between laws aimed at speech, and laws protecting a privacy interest triggered by the nature of a particular location.

<sup>337</sup> *See Burson v. Freeman*, 504 U.S. 191, 207 (1992).

<sup>338</sup> *See Hill v. Colorado*, 530 U.S. 703, 725 (2000).

<sup>339</sup> *Id.* at 719.

<sup>340</sup> *Id.*

<sup>341</sup> *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

State's interests in protecting patient access and privacy were unrelated to the content of the protestors' speech.<sup>342</sup>

The Court in *Hill* explicitly rejected the idea that focusing regulation on a specific location makes the regulation content based.<sup>343</sup> Similarly, the Court in *Boos* found that a regulation targeting congregating outside a foreign embassy was content neutral.<sup>344</sup> A state could thus protect particular locations from recording without always triggering strict scrutiny. In *McCullen*, the Court again took up the question of content neutrality.<sup>345</sup> The majority conceded that the law, which created a fixed buffer zone of thirty-five feet outside of a reproductive healthcare facility, would inevitably restrict abortion-related speech more than other kinds of speech.<sup>346</sup> The majority concluded, however, that "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics."<sup>347</sup>

On the other hand, targeting a particular speaker or particular subject matter will invoke strict scrutiny.<sup>348</sup> When a law "does not simply have an effect on speech, but is directed at certain content and is aimed at particular speakers," it is content based rather than content neutral.<sup>349</sup> Courts will need to disentangle, on the one hand, the idea that regulating a particular physical space does not automatically regulate particular content, from the idea that regulating a particular subject matter makes a law content based. This will likely involve looking to government motive; again, "'content-neutral' speech regulations" are "those that are justified without reference to the content of the regulated speech."<sup>350</sup>

Last, there is the question of how courts should address exceptions or carveouts. In *Sorrell v. IMS Health, Inc.*, a recent case addressing Vermont's regulation of prescription information and data mining, the Supreme Court found the law to be content based and not tailored to a legitimate government interest in part because of exceptions to the law's coverage.<sup>351</sup> And in the

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<sup>342</sup> *Id.* at 719-20.

<sup>343</sup> *Id.* at 724.

<sup>344</sup> See *Boos v. Barry*, 485 U.S. 312, 331 (1988) (noting that the Congregation Clause withstood First Amendment scrutiny because "[i]t [did] not reach a substantial amount of constitutionally protected conduct").

<sup>345</sup> See *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014).

<sup>346</sup> *Id.*

<sup>347</sup> *Id.*

<sup>348</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992).

<sup>349</sup> *Sorrell*, 564 U.S. at 567.

<sup>350</sup> *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986); see also *Sorrell*, 564 U.S. at 566.

<sup>351</sup> See VT. STAT. ANN. tit. 18, § 4631(d)-(e) (2015) (creating exemptions to general prohibition of use of regulated records containing prescriber-identifiable information for various uses); *Sorrell*, 564 U.S. at 572-73 ("Under Vermont's law, pharmacies may share

recent case *Reed v. Town of Gilbert*,<sup>352</sup> the Court found that an Arizona town code that named and regulated twenty-three different kinds of signs was impermissibly content based.<sup>353</sup>

The Court appears to look at the connection between a legitimate, neutral state interest and the State's decision to carve out exceptions. In *Carey v. Brown*,<sup>354</sup> the Court invalidated Illinois's ban on nonlabor picketing because the distinction between labor and nonlabor picketing could not be "justified by reference to the State's interest in maintaining domestic tranquility."<sup>355</sup> The Court in *Carey* found the regulation to be content based because of its carveouts for labor picketing.<sup>356</sup> In *McCullen*, on the other hand, exemptions for particular individuals, like clinic employees, did not make the law content based, in large part because the exemptions were tied to the functioning of the abortion clinic.<sup>357</sup> After the Court's recent decision in *Reed*, this is an area that will likely be open to further litigation.

### 3. Tailoring

Determining whether a law is content based or content neutral is still not the end of the analysis. Even when the more permissive time, place, and manner analysis or *O'Brien* analysis is applied, a law still must be tailored. To be narrowly tailored under time, place, and manner analysis, a law must not burden substantially more speech than is necessary to further the government's legitimate interests.<sup>358</sup> Unlike strict scrutiny, the means employed need not be the least restrictive or least intrusive means.<sup>359</sup> There must, however, be ample alternative means of communication available.<sup>360</sup> This calls into question whether a complete ban on recording could ever be constitutional.

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prescriber-identifying information with anyone for any reason save one: They must not allow the information to be used for marketing. Exceptions further allow pharmacies to sell prescriber-identifying information for certain purposes, including 'health care research.' And the measure permits insurers, researchers, journalists, the State itself, and others to use the information." (citation omitted)).

<sup>352</sup> 135 S. Ct. 2218 (2015).

<sup>353</sup> *Id.* at 2228 ("The restrictions in the Sign Code that apply to any given sign thus depend entirely on the communicative content of the sign . . . . On its face, the Sign Code is a content-based regulation of speech.").

<sup>354</sup> 447 U.S. 455 (1980).

<sup>355</sup> *Id.* at 465.

<sup>356</sup> *See id.* at 464-65.

<sup>357</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2533 (2014).

<sup>358</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

<sup>359</sup> *McCullen*, 134 S. Ct. at 2535 ("Such a regulation, unlike a content-based restriction of speech, 'need not be the least restrictive or least intrusive means of' serving the government's interests." (quoting *Ward*, 491 U.S. at 799)).

<sup>360</sup> *Ward*, 491 U.S. at 791.

In *McCullen*, the Court found that the fixed buffer zone around abortion clinics was not narrowly tailored under time, place, and manner analysis.<sup>361</sup> While the fixed buffer zone clearly served legitimate government interests in ensuing public safety, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services,<sup>362</sup> the law took the "extreme step of closing a substantial portion of a traditional public forum to all speakers."<sup>363</sup>

This holding suggests that while a recording law aimed at a particular space can be deemed content neutral, it could face a tailoring challenge if it bans all recording in that space. Recording laws targeted at protecting a particular genre of behavior that occurs in a particular space—say, outside a school or hospital—might be deemed to be too broad in scope.

Two factors mitigate this concern, however. First, *McCullen* addressed First Amendment protections for classic forms of expression: leafletting and one-to-one communications, "the essence of First Amendment expression."<sup>364</sup> While courts should not be biased towards protecting particular modes of communication over others, the Court in *McCullen* was clearly concerned with tailoring because the regulation foreclosed historically protected communications in a public forum. Recording is not a classic form of expression.

Second, the Court has in fact allowed foreclosure of an entire mode of communication in a particular location: picketing, in a public forum, in front of a house.<sup>365</sup> In *Frisby*, the Court explained that a "complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil."<sup>366</sup> "[T]he 'evil' of targeted residential picketing, 'the very presence of an unwelcome visitor at the home' . . . 'is created by the medium of expression itself.'"<sup>367</sup> Hence, the Court in *Frisby* found a complete ban on picketing targeted at the home to be narrowly tailored.<sup>368</sup> If recording as

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<sup>361</sup> *McCullen*, 134 S. Ct. at 2537.

<sup>362</sup> *Id.* at 2537-39.

<sup>363</sup> *Id.* at 2541. The Court explained that the fixed buffer zone upheld in *Burson v. Freeman* around polling places on election day was, by contrast, appropriately tailored to prevent voter intimidation because voter intimidation is more difficult to detect than abortion protesters. *Id.* at 2540.

<sup>364</sup> *Id.* at 2536 (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995)); see also *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997) ("Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment . . .").

<sup>365</sup> *Frisby v. Schultz*, 487 U.S. 474, 485-86 (1988).

<sup>366</sup> *Id.* at 485.

<sup>367</sup> *Id.* at 487 (first quoting *Carey v. Brown*, 447 U.S. 455, 478 (1980) (Rehnquist, J., dissenting); and then quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)).

<sup>368</sup> *Id.* at 488.

a medium is deemed to be sufficiently disruptive of a particular environment—as in *Estes* or *Burson*—then a content-neutral law banning all recording in a particular space may nonetheless survive a tailoring challenge.<sup>369</sup>

Tailoring is related to the strength of the government interest. Where the government interest is not well articulated or sufficiently strong, a tailoring challenge is more likely to be successful. Where, however, the government interest convincingly identifies a particular evil that cannot be mitigated except by a complete ban, courts may find even a complete ban to be narrowly tailored.<sup>370</sup>

#### 4. Consent of the Unwilling Subject

Many states include a consent requirement, a notice requirement, or both in their eavesdropping laws.<sup>371</sup> Those requirements enable a surveillance subject to adjust her behavior by putting her on notice, and thereby accurately manage her social accessibility. There is a significant question of whether or when such a requirement might be constitutional.

A long line of First Amendment cases shows skepticism toward regulatory burdens on speech. The Supreme Court has rejected registration requirements for pamphleteering and door-to-door advocacy, citing a First Amendment right to anonymous speech.<sup>372</sup> Registration requirements discourage impromptu speech, operating as a form of prior restraint.<sup>373</sup> Similarly, the Court recently deemed unconstitutional a consent requirement for distribution of prescriber information, reasoning that “[l]awmakers may no more silence unwanted speech by burdening its utterance than by censoring its content.”<sup>374</sup> In *Sorrell*, the Court explained in its rejection of consent requirements that the “distinction between laws burdening and laws banning speech is but a matter

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<sup>369</sup> *But see* *City of Ladue v. Gilleo*, 512 U.S. 43, 55 (1994) (noting that the Court has been particularly skeptical of “laws that foreclose an entire medium of expression”).

<sup>370</sup> *See* *Burson v. Freeman*, 504 U.S. 191, 206 (1992).

<sup>371</sup> *See supra* note 215 and accompanying text (discussing various state eavesdropping laws with explicit or implicit notice or consent requirements).

<sup>372</sup> *See* *Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 164 (2002) (holding that registration requirement for canvassing and pamphleteering was unconstitutional infringement of First Amendment because of the “breadth of speech affected . . . and the nature of the regulation”); *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (holding that requiring pamphleteers to identify themselves was unconstitutional, because “[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent”).

<sup>373</sup> *See* *Watchtower Bible*, 536 U.S. at 164.

<sup>374</sup> *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011).

of degree.”<sup>375</sup> However, the Court’s holding in *Sorrell* may be limited in its application, as it addressed only content-based regulation.<sup>376</sup>

By contrast, in the buffer-zone cases, the Supreme Court has three times rejected First Amendment challenges to a consent requirement and upheld consent requirements as constitutional.<sup>377</sup> The Court’s reasoning in *Hill* was twofold: First, concerns about prior restraints generally relate to “restrictions imposed by official censorship,” not restrictions imposed by private citizens.<sup>378</sup> Second, the consent requirement is merely an attempt to empower private citizens to do what they already do: retain “the power to decide for themselves what they wish to read, and within limits, what oral messages they want to consider.”<sup>379</sup>

The Court characterized the consent requirement as protecting an autonomy interest on the part of the unwilling listener.<sup>380</sup> It enables the listener to make his or her own decisions about disruptive or confrontational speech, rather than imposing an official view of whether such speech should be tolerated. In the recording context, the buffer-zone cases suggest that one-party consent requirements are likely to survive scrutiny.

#### D. *The Tests Applied: Examples*

The right to record will be different in different kinds of spaces. In a public forum, courts should acknowledge that the right to record exists, regardless of whether the subject of the recording is a matter of public concern. This departs from the suggestions in current case law, but it is consistent with how speech is usually treated in a public forum. In a public forum, the recording law will then undergo time, place, and manner analysis rather than strict scrutiny, unless the law is content based. If the law is content based it will undergo strict scrutiny.

In a nonpublic setting, I propose that the right to record should not exist unless the subject of the recording is a matter of public concern that trumps the interests of the recorded individual in managing her environment. This is consistent with how courts have treated governmentally owned nonpublic spaces, under both access case law and case law on the speech rights of government employees. Courts should consider extending some protection of

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<sup>375</sup> *Id.* at 565-66 (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 812 (2000)).

<sup>376</sup> *See id.* at 566 (citing *Playboy*, 529 U.S. at 812).

<sup>377</sup> *See McCullen v. Coakley*, 134 S. Ct. 2518, 2525 (2014) (noting similarity between consent requirement in the challenged law and the buffer-zone law held constitutional in *Hill*); *Hill v. Colorado*, 530 U.S. 703, 734-35 (2000) (holding that consent requirement for buffer-zone outside health-care facility was constitutional); *cf. Burson v. Freeman*, 504 U.S. 191, 211 (1992) (upholding the constitutionality of a campaign-free zone around polling places).

<sup>378</sup> *Hill*, 530 U.S. at 734.

<sup>379</sup> *Id.*

<sup>380</sup> *See id.*

recording into privately owned spaces, but these decisions will and should be highly context specific.

Below, I discuss several examples of these tests applied to existing laws. Importantly, I do not claim to have discovered the ideal parameters for crafting a privacy law that will survive First Amendment scrutiny. Regulatory experimentation with balancing privacy interests and speech interests is still desirable.<sup>381</sup> The below examples should, however, guide courts when they encounter these laws.

### 1. Recording in Public Locations

The government interest in protecting privacy will be consistently lower in public locations. That is not to say that it will be nonexistent. I assess three versions of laws governing recording in public fora to show when the government interest might be strong enough to survive scrutiny under the time, place, and manner or *O'Brien* test—and when it might not.

#### a. *The Illinois Eavesdropping Statute*

The Illinois eavesdropping statute at issue in *ACLU of Illinois v. Alvarez*<sup>382</sup> was unusually broad in scope.<sup>383</sup> Unlike most eavesdropping and wiretapping laws, the Illinois statute had no requirement that the parties to a protected conversation actually have an expectation of privacy.<sup>384</sup> It required two-party consent to allow recording, and while a party's consent could be inferred, express disapproval would defeat that inference.<sup>385</sup> The Illinois eavesdropping law could be applied to open recording of conversations conducted in public, where the parties to the conversation had no expectation of privacy at all.<sup>386</sup>

The Seventh Circuit, considering a pre-enforcement action for declaratory and injunctive relief, found that the Illinois eavesdropping statute was likely unconstitutional as applied to audio recording of police officers conducting their duties in public places.<sup>387</sup> Thus, the Court enjoined full enforcement of the statute. Although the Seventh Circuit did not determine the proper level of scrutiny, it applied intermediate scrutiny to the statute and found that it would likely fail because of the lack of a reasonably close fit between law's means and its ends.<sup>388</sup>

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<sup>381</sup> See Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 CALIF. L. REV. CIR. 57, 57-59 (2013).

<sup>382</sup> 679 F.3d 583, 587 (7th Cir. 2012).

<sup>383</sup> See *id.* at 595.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* at 587.

<sup>386</sup> See *id.*

<sup>387</sup> *Id.* at 608.

<sup>388</sup> *Id.* at 604-06.

I largely agree with the Seventh Circuit's approach. Even applying the more nuanced understanding of privacy detailed in this Article, the Illinois legislature failed to adequately state a government interest in governing conversations held in public by public officials conducting public duties, and the legislature failed to tailor the statute to legitimate privacy concerns. The government may have a legitimate interest in protecting conversational privacy, but by eliminating the requirement that conversations actually be private, instead protecting against all non-consensual recordings, the Illinois legislature "severed the link between the eavesdropping statute's means and its end."<sup>389</sup>

Moreover, the statute at the time applied even to open, non-surreptitious recording, further indicating the weakness of the stated government interest in protecting privacy.<sup>390</sup> The Illinois legislature, in other words, was not protecting an interest in providing notice to the subjects of recording so they could adjust their behavior—an interest that the Seventh Circuit recognized would have been "stronger."<sup>391</sup> Nor was the government protecting an interest in preventing undesirable shifts in behavior, because it could not articulate how a shift in public officials' behavior would be undesirable.<sup>392</sup>

Significantly, the Seventh Circuit found that the eavesdropping law was content neutral on its face.<sup>393</sup> Even though an interest in protecting privacy is grounded in the reactions of those whose privacy is violated, the court explained that the law did not target any particular message, speaker, or idea; a law does not become content based merely because law enforcement must look at content to determine whether the law applies.<sup>394</sup> It was only when addressing the law's exemption for media that the court considered a possible content-based discrimination.<sup>395</sup> This approach is consistent with the distinctions between content-based and content-neutral laws discussed above: a law is content neutral when it addresses privacy generally, but content based when it governs speech based on a listener's anticipated reaction or perhaps when it names a particular class of speech or speakers.

Thus, while the Illinois eavesdropping law raised significant First Amendment concerns and would likely fail intermediate scrutiny, a typical eavesdropping law—protecting private conversations from surreptitious recording, obviated with one-party consent—likely would not. If the government could point to a legitimate interest in protecting conversational privacy, coupled with a consent exception, or a focus on surreptitious rather

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<sup>389</sup> *Id.* at 606.

<sup>390</sup> *Id.* at 607.

<sup>391</sup> *Id.* at 607 n.13.

<sup>392</sup> *See id.* at 586.

<sup>393</sup> *Id.* at 603 (finding that the statute "does not target any particular message, idea, or subject matter").

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 604.

than open recordings, a typical eavesdropping law would likely not face the same problems as the Illinois law. Most eavesdropping and wiretapping laws in the United States include one or more of these elements.<sup>396</sup>

b. *The Wisconsin Drone Law*

In 2013, Wisconsin enacted a statute to protect its citizens from privacy violations committed by people operating drones. The statute makes it a misdemeanor to use a drone “to photograph, record, or otherwise observe another individual in a place or location where the individual has a reasonable expectation of privacy.”<sup>397</sup> The statute does not define a “reasonable expectation of privacy,” nor does it indicate that the “place or location” need be in seclusion or privately owned. Wisconsin courts have previously interpreted the phrase “a reasonable expectation of privacy” in Wisconsin’s video voyeurism statute to apply beyond locations where a person is actually in seclusion.<sup>398</sup> I, thus, analyze the Wisconsin law expecting that it may be applied in public locations.

In contrast with the Illinois eavesdropping law, which does not require any expectation of privacy, the Wisconsin drone law protects a relatively strong government interest, actively defined by courts.<sup>399</sup> The Wisconsin legislature’s use of the phrase “a reasonable expectation of privacy” delegates the extent of the state interest to courts.<sup>400</sup> Presumably, courts will be aware of the First Amendment implications and may throw out cases that implicate First Amendment interests on the grounds that there is no reasonable expectation of privacy.

This is not to say that using the phrase “a reasonable expectation of privacy” always insulates a recording law from First Amendment scrutiny. The phrase might be considered impermissibly vague, although a previous Wisconsin

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<sup>396</sup> See Michael Potere, Note, *Who Will Watch the Watchmen?: Citizens Recording Police Conduct*, 106 NW. U. L. REV. 273, 283-86 (2012); Travis S. Triano, Note, *Who Watches the Watchmen? Big Brother’s Use of Wiretap Statutes to Place Civilians in Timeout*, 34 CARDOZO L. REV. 389, 394-95 (2012) (identifying the Illinois and Massachusetts eavesdropping laws as “the strictest in the nation”).

<sup>397</sup> WIS. STAT. § 942.10 (2016).

<sup>398</sup> *State v. Jahnke*, 2009 WI App 4, ¶ 9, 316 Wis. 2d 324, 762 N.W.2d 696, 699.

<sup>399</sup> Compare WIS. STAT. § 942.10 (2016), with 720 ILL. COMP. STAT. 5/14-2 (2012).

<sup>400</sup> The Wisconsin legislature has done the same in the context of its video voyeurism law. See WIS. STAT. § 942.09 (2016) (documenting the Wisconsin video voyeurism law). Wisconsin courts have interpreted “reasonable expectation of privacy” in that context to (1) depart from Fourth Amendment standards, and (2) include expectations of privacy specifically against recording—even when a person has permission to be in a particular location. See *Jahnke*, 2009 WI App 4, ¶ 9, 762 N.W.2d at 699; *State v. Nelson*, 2006 WI App 124, ¶ 21, 294 Wis. 2d 578, 718 N.W.2d 168, 174-75 (finding that the phrase “reasonable expectation of privacy” departs from the Fourth Amendment interpretation).

court decision suggests that it is not.<sup>401</sup> The law might face a tailoring challenge: Courts might find that a reasonable expectation of privacy exists even in locations where the First Amendment should trump any interests in privacy. Or, perhaps, the lack of a consent-based exception shows inadequate tailoring. If Wisconsin is interested in enabling individuals to manage their social accessibility, they ought to be able to consent to recording where desired. And if, instead, Wisconsin is interested in preserving particular behavior by outright banning recording by drone, the statute could be more carefully tailored to protect privacy in particular locations or scenarios.

Of course, any kind of tailoring raises the problem of potentially making the law content-based. The Wisconsin law is content neutral on its face: it targets a technology that creates a heightened government interest in protecting privacy, not particular speakers. This is in stark contrast with a Texas drone law, which contains carveouts galore, including for a “Texas licensed real estate broker in connection with the marketing . . . of real property,” and for “the owner or operator of an oil, gas, water, or other pipeline for the purpose of inspecting . . . pipelines.”<sup>402</sup> Texas singles out particular speakers—not just drone operators, but speakers and specific content—for different treatments. The Texas law is likely content based under *Reed* and, thus, might be subjected to strict scrutiny.<sup>403</sup> The Wisconsin law is not.

c. *The Arkansas Automatic License Plate Reader Law*

ALPRs track an individual’s location over time by taking photographs of cars’ license plates, correlating the images with GPS data, and making them machine-readable so they can be easily analyzed by computer.<sup>404</sup> Arkansas and Utah have both enacted laws prohibiting private use of this technology.<sup>405</sup> ALPR companies sued Utah for violating their First Amendment rights.<sup>406</sup> In reaction, Utah heavily amended the law, crafting an exception that allows private entities to collect license plate information and sell it to third parties.<sup>407</sup> Arkansas was also sued for First Amendment violations after prohibiting the use of ALPRs.<sup>408</sup> The Court of Appeals for the Eighth Circuit confirmed

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<sup>401</sup> See *Nelson*, 2006 WI App, ¶ 54, 718 N.W.2d at 183.

<sup>402</sup> TEX. GOV’T CODE ANN. § 423.002(13), (17) (West 2016); see also *id.* § 423.003.

<sup>403</sup> *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015).

<sup>404</sup> Devlin Barrett, *U.S. Spies on Millions of Cars—DEA Uses License-Plate Readers to Build Database for Federal, Local Authorities*, WALL STREET J., Jan. 27, 2015, at A1.

<sup>405</sup> ARK. CODE ANN. §§ 12-12-1801 through -1808 (2013 & Supp. 2016); UTAH CODE ANN. §§ 41-6a-2001 through 2006 (LexisNexis 2016).

<sup>406</sup> See, e.g., Complaint at 12-14, *Dig. Recognition Network, Inc. v. Herbert*, (No. 2:14-cv-00099-CW) (D. Utah Feb. 13, 2014).

<sup>407</sup> Automatic License Plate Reader System Amendments, ch. 276, 2014 Utah Laws 1158-59 (limiting the prohibition on warrantless use of ALPRs to governmental entities).

<sup>408</sup> See *Dig. Recognition Network, Inc. v. Hutchison*, 803 F.3d 952, 954 (8th Cir. 2015).

dismissal of the case on standing grounds, nonetheless assuming an injury-in-fact “arguably affected with a constitutional interest.”<sup>409</sup>

Beginning in 2013, the Arkansas Automatic License Plate Reader Systems Act makes it “unlawful for an individual, partnership, corporation, association, or the State of Arkansas, its agencies, and political subdivisions to use an automatic license plate reader system.”<sup>410</sup> The Act defines an ALPR as “a system of one . . . or more mobile or fixed automated high-speed cameras used in combination with computer algorithms to convert images of license plates into computer-readable data.”<sup>411</sup> By itself, this language looks problematic. The Act bans the use of a camera, in combination with algorithms, to convert visual information into computer-readable information. Thus, it should trigger First Amendment scrutiny.

The government interest, however, is clearly in protecting citizen privacy from persistent location tracking over time. This, as discussed at length above, is a legitimate government interest, distinct from an interest in targeting speech.<sup>412</sup> It might even, as discussed above, convert the recording at issue from newsgathering into regulable action, like stalking. This interest in privacy is indicated within the Act. The Act defines “[c]aptured plate data” as “the global positioning device coordinates, date and time, photograph, license plate number, and any other data captured by or derived from any automatic license plate reader system.”<sup>413</sup> Read in conjunction with this definition, the Act’s ban on ALPRs is intended as a ban on persistent location tracking over time.

The law may face a tailoring challenge in the future, depending on what “other data” is captured by ALPR systems. The government interest in protecting the particular kind of privacy implicated by this particular technology is, however, strong.

The Act is also largely content neutral, in that it targets license-plate-related data, not because of the effect that location information may have on a downstream audience, but because collection of that information by ALPRs is intrinsically related to location tracking. The Act contains, however, several exemptions: one for law enforcement use; one for parking enforcement; and

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<sup>409</sup> *Id.* at 957-58 (citing *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)) (finding that while plaintiffs could be assumed to have alleged injury-in-fact, they had not shown it to be “fairly traceable” to either official sued because the Act is to be enforced by private litigants).

<sup>410</sup> ARK. CODE ANN. § 12-12-1803(a).

<sup>411</sup> *Id.* § 12-12-1802(2).

<sup>412</sup> The Massachusetts legislature, which considered but did not adopt an ALPR ban, was far more explicit in identifying the privacy interest: “WHEREAS, such monitoring infringes upon ‘the existence of a reasonable societal expectation of privacy in the sum of one’s public movements’ . . . .” S.B. 2141, 188th Gen. Court, Reg. Sess. (Mass. 2014) (quoting *United States v. Jones*, 132 S. Ct. 945, 956 (2012)).

<sup>413</sup> ARK. CODE ANN. § 12-12-1802(3)(A).

one for controlling access to secured areas.<sup>414</sup> The question is whether these exemptions make the law content based. The law enforcement exemption is not problematic, because the First Amendment is concerned with state discrimination between private actors, not distinctions between treatment of private actors and law enforcement.<sup>415</sup> The question with regards to the other two exemptions is, therefore, whether they are consistent with or adequately related to the government's legitimate interest in protecting citizen privacy.<sup>416</sup> Arguably, they are at least consistent with that interest: use of ALPRs to control access to a secure location protects rather than offends privacy, and use of ALPRs for parking enforcement is presumably done with the knowledge and consent of the parking tenants. Both also limit the use of ALPRs to one environment, so these exemptions pose a lesser privacy concern than persistent tracking over space and time.

## 2. Recording in Private Locations

The scope of the First Amendment right to record will and should be lesser in private settings. Courts might adapt access case law or public employee case law not to grant individuals a right to trespass, but to grant individuals who have permission to be on the property a right to record while there.<sup>417</sup> When determining whether there is a right to record on nonpublic property, courts should balance the extent to which the issue being recorded is a matter of public concern against the privacy interests of the recorded individual.<sup>418</sup>

I discuss three examples of regulations of recording in private places where such balancing might occur. Even in private spaces, however, when the government specifically targets particular speech or speakers, the regulation will be content based and subject to strict scrutiny. This is apparent in the Idaho "ag-gag" law addressed below.

### a. *The California Privacy Protection Act*

The California Privacy Protection Act of 1998 (the "Paparazzi Act") protects individuals in their residences from a "constructive invasion of privacy."<sup>419</sup> Originally, the Act banned trespass via technological means, including through the use of a "visual or auditory enhancing device."<sup>420</sup> Since 2014, it has also protected against invasions of privacy by drone.<sup>421</sup>

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<sup>414</sup> *Id.* § 12-12-1803(b)(1)-(3).

<sup>415</sup> *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 604 (7th Cir. 2012).

<sup>416</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2529-30 (2014).

<sup>417</sup> *See generally* McDonald, *supra* note 102.

<sup>418</sup> *See* Whole Foods Market, Inc., 363 N.L.R.B. No. 87 (2015).

<sup>419</sup> *See* CAL. CIV. CODE § 1708.8(b) (West 2009).

<sup>420</sup> *See id.*

<sup>421</sup> *See* Act of Sept. 30, 2014, ch. 858, 2014 Cal. Stat. 5620 (changing the language "visual or auditory device" to "any device"); DL Cade, *California Updates Invasion of Privacy Law to Ban the Use of Camera Drones*, PETAPIXEL (Oct. 14, 2014),

In 1999, Rodney Smolla and Erwin Chemerinsky debated the constitutionality of this Act.<sup>422</sup> Chemerinsky was instrumental in guiding its enactment.<sup>423</sup> Smolla argued that the Paparazzi Act was an example of content-based regulation targeting paparazzi.<sup>424</sup> Chemerinsky responded that the Act did not target particular speakers, but instead it was a content-neutral regulation of a particular type of behavior.<sup>425</sup> Smolla eventually conceded this point and deemed it “on the cusp between a content-based and content-neutral law.”<sup>426</sup> While Chemerinsky disavowed the existence of any real First Amendment protection for newsgathering or recording itself,<sup>427</sup> Smolla characterized the Paparazzi Act as governing “acts of communication and expression.”<sup>428</sup> This disagreement between the two scholars is a microcosm of current disagreements over the right to record.

What both appear to have agreed on is that at the core of the Paparazzi Act lies a substantial government interest. For Chemerinsky, this is an interest in “an extension of the concept of trespass,” enabling a person to successfully “shut out the rest of the world.”<sup>429</sup> And Smolla, while suggesting that courts might first require a person to actively engage in that act of shutting out by pulling down a window shade, conceded that “[i]f journalists were to use sophisticated technology to somehow penetrate the walls of the building and obtain audio recordings of everything that was done and said, this should clearly be deemed intrusion.”<sup>430</sup>

In my view, Chemerinsky was right with respect to this particular law. He called for an “explicit balancing” approach, weighing the speech right against the privacy interest.<sup>431</sup> While this is not appropriate for recording that occurs in

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<http://petapixel.com/2014/10/14/california-passes-law-banning-drones-protect-general-publics-privacy/> [<https://perma.cc/XW3Q-QGAW>].

<sup>422</sup> Compare Smolla, *supra* note 287, at 1106-16 (“To the extent that the intent and operation of these laws focus on the traditional paparazzi, they violate current First Amendment principles that prohibit singling out a certain class of speakers or a certain form of media for specially disfavorable treatment.”), with Erwin Chemerinsky, *Balancing the Rights of Privacy and the Press: A Reply to Professor Smolla*, 67 GEO. WASH. L. REV. 1152, 1153-58 (1999) (“Unlike Professor Smolla, I believe that this law is clearly constitutional because the interests in protecting privacy outweigh the First Amendment restrictions on the gathering of information.”).

<sup>423</sup> Chemerinsky, *supra* note 422, at 1153.

<sup>424</sup> Smolla, *supra* note 287, at 1113-14 (“The anti-paparazzi laws are manifestly content-based laws, because they contain as a predicate element the perpetrator’s intent to sell or transfer communicative material.”). *But see* Chemerinsky, *supra* note 422, at 1153.

<sup>425</sup> Chemerinsky, *supra* note 422, at 1153.

<sup>426</sup> Smolla, *supra* note 287, at 1107 n.38.

<sup>427</sup> Chemerinsky, *supra* note 422, at 1155-57.

<sup>428</sup> Smolla, *supra* note 287, at 1112-13.

<sup>429</sup> Chemerinsky, *supra* note 422, at 1153-54.

<sup>430</sup> Smolla, *supra* note 287, at 1131.

<sup>431</sup> Chemerinsky, *supra* note 422, at 1153, 1161.

a public forum, in a private residence, it is a generous test. The Act is content neutral; thus, the first question under my proposed approach is whether the recording is on a matter of public concern. Without specific facts, this is impossible to determine. Where there are specific facts, courts might look to *Snyder* for an understanding of what constitutes a “matter of public concern.”<sup>432</sup> The government interest in protecting individuals in the home is particularly high. Thus, the Paparazzi Act is likely constitutional, at least with respect to its approach to constructive privacy invasions.<sup>433</sup>

b. *The Idaho Ag-Gag Law*

Idaho enacted Idaho Code § 18-7042 in response to undercover video investigations of animal abuse at factory farms.<sup>434</sup> This “ag-gag” law prohibits, among other things, entering “an agricultural production facility that is not open to the public and, without the facility owner’s express consent . . . , mak[ing] audio or video recordings of the conduct of an agricultural production facility’s operations.”<sup>435</sup> Federal litigation challenging this law is ongoing; the district court held that it violates the First Amendment.<sup>436</sup> Under the balancing test that I propose for private spaces, this law would likely fail as unconstitutional. The content being recorded is a classic matter of public concern (i.e., food safety), and the government interest in protecting privacy, even as defined here, is small, because food production is a heavily regulated industry subject to inspection by outsiders.<sup>437</sup> The types of behavioral shifts that might occur at the factory due to undercover investigations are largely desirable, driving compliance with consumer expectations about the treatment of animals. They are not the type of behavioral shifts that justify banning recording.

The Idaho ag-gag law, however, should be subjected not to a balancing test but rather to strict scrutiny as a content-based law. It does not target a particular location; it targets particular speech about “the conduct of an agricultural production facility’s operations.”<sup>438</sup> The legislative history also

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<sup>432</sup> See *Snyder v. Phelps*, 562 U.S. 443, 453, 458 (2011) (explaining that “[s]peech deals with matters of public concern” when it can be considered either a “political, social, or other concern to the community,” or “when it ‘is a subject of legitimate news interest’” (citations omitted)).

<sup>433</sup> The Act is limited to photographs taken for commercial purposes. This could raise a content-neutrality question.

<sup>434</sup> *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1199 (D. Idaho 2015); *Animal Legal Def. Fund v. Otter*, 44 F. Supp. 3d 1009, 1015 (D. Idaho 2014).

<sup>435</sup> IDAHO CODE § 18-7042(1)(d) (2016).

<sup>436</sup> See *Otter*, 118 F. Supp. at 1211-12.

<sup>437</sup> *Id.* at 1201 (finding that the statute “seeks to limit and punish those who speak out on topics relating to the agricultural industry, striking at the heart of important First Amendment values”).

<sup>438</sup> *Id.* at 1206 (quoting IDAHO CODE § 18-7042(1)(d)).

shows that Idaho legislators specifically intended to target undercover investigators and feared the effect of investigators' videos on "the court of public opinion," and not an invasion of privacy.<sup>439</sup> The law was aimed precisely at the effect of the videos on the downstream listener and not at the person managing privacy in the moment the video was taken. This makes it classically content based.

c. *The School Case*

My final example involves not a particular law, but unevenly applied school policies. A district court judge in Maine recently analyzed whether a school district's refusal to let the parents of a nonverbal fourteen-year-old boy equip himself with audio recording equipment to "tell" them about his day violated the First Amendment right to record.<sup>440</sup>

The parents grew suspicious when their son came home crying one day, and the school failed to explain what had caused his extensive distress.<sup>441</sup> The parents later observed unexplained bruises on their son's forearms, consistent with grab marks, and continued their attempt to have their son wear an audio recording device.<sup>442</sup> They were told that placing a recording device on their son would violate state law, school rules, and the school district's collective bargaining agreement.<sup>443</sup> Other disabled students, however, were permitted to use audiorecording devices without measures to protect student privacy.<sup>444</sup> School district representatives told the parents that the reason they had been treated differently was because the parents "want to monitor the behavior of school officials and employees, while the other students use recording devices for school-sanctioned purposes."<sup>445</sup>

The district court divided the First Amendment analysis into three steps: first, it asked whether the First Amendment "even applies"; second, it looked at the possibly applicable First Amendment standards; and third, it analyzed the government's justifications for the prohibition.<sup>446</sup> The court found that the First Amendment clearly applied to this activity, even though the controlling case had taken place in a public forum while this case took place in a school.<sup>447</sup> The court did not identify an applicable level of scrutiny, but concluded that

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<sup>439</sup> *Id.* at 1200.

<sup>440</sup> *See* Pollack v. Reg'l Sch. Unit 75, 12 F. Supp. 3d 173, 203 (D. Me. 2014).

<sup>441</sup> *Id.* at 181.

<sup>442</sup> *Id.* at 183.

<sup>443</sup> *Id.* at 182.

<sup>444</sup> *Id.* at 183.

<sup>445</sup> *Id.*

<sup>446</sup> *See id.* at 198-201 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 797 (1985)).

<sup>447</sup> *See id.* at 198-99 (citing *Glik v. Cunniffe*, 655 F.3d 78, 82-84 (1st Cir. 2011)).

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even under the least protective level of scrutiny proposed by the defendants, plaintiffs had made out a plausible claim for relief.<sup>448</sup>

The district court explained that the speech here involved a matter of public concern, looking at “all the circumstances of the speech” under *Snyder*.<sup>449</sup> Acknowledging that while most of what would be recorded would not involve matters of public concern, the court concluded that any information confirming the parents’ suspicions of abuse would be “serious enough to implicate community concerns.”<sup>450</sup> Even though the audience of the recordings would likely be limited to the parents, the district court reasoned that the plaintiffs would speak for the son in the broader community, making the recordings essential for conversations about matters of public concern.<sup>451</sup>

Then the court asked whether the regulation was “viewpoint neutral and reasonable,” which is the test applied to regulations of speech in nonpublic forums and the test suggested by the defendants.<sup>452</sup> The court did not address the reasonableness of the regulation, concluding instead that the plaintiffs had plausibly alleged viewpoint discrimination.<sup>453</sup> Their request to audio-record their son’s day was denied because the school did not want its officials to be monitored, while other students were allowed to record.<sup>454</sup>

Using the framework proposed here (and assuming that schools would be treated like other non-public fora, although there is a distinct standard for school speech), the district court should have, at the initial stage, weighed the speech interest in the recording against the alleged government interest in protecting privacy. The court was correct that the desired recordings would have implicated a matter of public concern, namely student safety. The court was also correct that the government interest in protecting student privacy was noticeably weak, because the school allowed other students to audio record at school, with no attempts to protect student privacy. The case was, thus, contextually rightly decided.

#### CONCLUSION

The right to record presents significant challenges to First Amendment doctrine. It is, however, just one example of the speech-related questions that arise as the digital world increasingly entwines with the physical world. Analysis of speech rights will, by necessity, become more and more contextual. This will be a challenge for courts, which currently face a blunt

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<sup>448</sup> *See id.* at 200-01.

<sup>449</sup> *Id.* at 200 (citing *Snyder v. Phelps*, 562 U.S. 443, 454 (2011)).

<sup>450</sup> *Id.* at 201.

<sup>451</sup> *Id.*

<sup>452</sup> *Id.* (citing *Del Gallo v. Parent*, 557 F.3d 58, 72 (1st Cir. 2009)).

<sup>453</sup> *Id.*

<sup>454</sup> *Id.*

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version of the First Amendment, and for scholars, who are tempted to address each new question as a simplified problem of First Amendment coverage.

Recording technologies are not new communications media; they are expressive activity occurring in physical space. This discussion of the right to record shows that if we carefully identify the nature of the harms a speech right causes, First Amendment doctrine need not be completely disrupted. There is more room within the doctrine than recent Supreme Court pronouncements might indicate. First Amendment case law is replete with more nuanced understandings of privacy than commonly understood. The understanding of privacy harms unpacked in this Article, involving the disruption of sociophysical spaces in which individuals manage their social accessibility, is applicable to other legal contexts. From policy discussions of police-worn body cameras, to Fourth Amendment discussions concerning public surveillance systems, to discussions of whether to allow cameras at the Supreme Court, existing First Amendment doctrine in fact—and to many, surprisingly—helps explain the strength of the relevant privacy interests.