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### Performative Privacy

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# Performative Privacy

Scott Skinner-Thompson\*

*Broadly speaking, privacy doctrine suggests that the right to privacy is non-existent once one enters the public realm. Although some scholars contend that privacy ought to exist in public, “public privacy” has been defended largely with reference to other, ancillary values privacy may serve. For instance, public privacy may be necessary to make the freedom of association meaningful in practice.*

*This Article identifies a new dimension of public privacy, supplementing extant justifications for the right, by arguing that many efforts to maintain privacy while in “public” are properly conceptualized as forms of performative, expressive resistance against an ever-pervasive surveillance society. For example, when a person wears a hoodie in public obscuring their identity, they may be engaged in active, expressive opposition to the surveillance regime — communicating a refusal to be surveilled. The same holds true when a person uses online obfuscation techniques to cloak their cyber activities.*

*This Article isolates “performative privacy” as a social practice, and explains how this identification of public, performative privacy may provide doctrinal and discursive solutions to some of our most pressing social controversies.*

*By demonstrating that functional demands for public privacy are often expressive, this Article helps establish that public privacy is grounded in*

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*the First Amendment and covered by its robust protections. Discursively, directly linking public privacy performances with the well-ensconced freedom of expression may help shift societal reaction to such privacy demands from suspicion to embrace. Moreover, to the extent that acts of performative privacy cut across conflicts targeting racial, religious, or sexual minorities (regulation of hoodies, head veils, and gender identity are some examples), performative privacy has the potential to provide a more universal and unifying normative response to these conflicts.*

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## INTRODUCTION

In popular discourse and in law, the right to privacy is often thought to cover only those activities that occur in the home, the bedroom, a doctor's office, or on a personal, internet disabled computer.<sup>1</sup> But less scrutinized and developed is the privacy we demand while in plain view — the privacy we perform in public. In fact, certain doctrines provide that the right to privacy while in public does not exist at all, that privacy is “dead” once you walk out your front door or expose your activities to anyone else.<sup>2</sup> Pursuant to this conception of the right to privacy, privacy is synonymous with secrecy.<sup>3</sup> But in a world of over seven billion people and almost constant surveillance by state and corporate actors,<sup>4</sup> keeping one's activities completely secret (and thus entitled to a right to privacy under the traditional, “secrecy paradigm”) is impossible.

In other words, “public privacy” ought not be a contradiction in terms. Other scholars have rightfully begun to critique the secrecy paradigm and advocate for a limited right to public privacy — a right which would not permit unfettered government or private-party surveillance of one's activities while in public.<sup>5</sup> But by and large, public-privacy proponents have attempted to normatively and

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<sup>1</sup> See, e.g., Stephanie M. Stern, *The Inviolable Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 913-18 (2010) (describing the home-centric focus of Fourth Amendment protections).

<sup>2</sup> See, e.g., *United States v. Houston*, 813 F.3d 282, 289-90 (6th Cir. 2016) (holding that there is no Fourth Amendment violation where police recorded an individual's activity outside his home for 10 weeks with a camera mounted on a utility pole by the utility company without a warrant); A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1536-37 (2000) (documenting that “privacy torts do not protect things in public view on the theory that such things are, by definition, not private”).

<sup>3</sup> Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 497 (2006) [hereinafter *Taxonomy*] (explaining that under the “secrecy paradigm,” a phrase Solove popularizes, “privacy is tantamount to complete secrecy, and a privacy violation occurs when concealed data is revealed to others”).

<sup>4</sup> The definition of “surveillance” employed throughout this Article does not refer narrowly to surveillance for the purpose of government criminal investigations but, rather, draws from surveillance studies scholars and refers to administrative, bureaucratic, private, or criminal systems “that afford control of people through the identification, tracking, monitoring, or analysis of individuals, data, or systems.” TORIN MONAHAN, *SURVEILLANCE IN THE TIME OF INSECURITY* 8 (2010); see also DAVID LYON, *SURVEILLANCE SOCIETY* 2 (2001) (defining surveillance as “any collection and processing of personal data, whether identifiable or not, for the purposes of influencing or managing those whose data have been garnered”).

<sup>5</sup> See, e.g., Joel R. Reidenberg, *Privacy in Public*, 69 U. MIAMI L. REV. 141, 142-43 (2014) (arguing there should be “spheres of privacy in public”).

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doctrinally justify a right to public privacy by highlighting the indirect support public privacy provides to other constitutional values. For instance, they insightfully observe that the right to leave your home and attend a civil rights organizing meeting without being tracked and surveilled is necessary for the freedom of association to have meaning in practice, and to prevent chilling of that right.<sup>6</sup>

This Article bolsters existing justifications for public privacy rights by identifying what is, perhaps, a more direct constitutional value served by a right to public privacy. The Article argues that attempts to preserve a degree of privacy or anonymity in public are often a form of performative and expressive opposition to an ever expanding surveillance society and, as such, may be protected as symbolic conduct. When an individual uses encryption technology to hide their online communications, they are functionally maintaining their privacy but also signaling disavowal of widespread internet monitoring. When a person wears a hoodie shielding their identity, they may be engaged in a form of active, expressive resistance to the surveillance regime — lodging an objection to being surveilled. When a transgender person demands the right to publicly express their true gender identity while simultaneously invoking the right to keep certain details about their birth-assigned sex or genital anatomy obscure, they are performing the right to privacy and resisting administrative surveillance. When a Muslim woman wears a head, face, or body covering, she can be practicing her religion, but may also be engaged in an act of performative privacy or modesty, registering her refusal to be the object of social gaze. Recognizing the expressive value of such privacy performances links these acts to the widely-cherished right to freedom of speech and helps us reimagine acts that are often viewed with distrust as part of a long history of democratic, political dissent — dissent that is safeguarded by the First Amendment.

This Article is among the first to comprehensively identify performative privacy as a social phenomenon and to explore its legal dimensions. It does so in three Parts.

Part I foregrounds how the solutions to many of our most pressing public privacy problems will not be found in traditional privacy doctrine, such as the Fourth Amendment.<sup>7</sup> This Part examines and

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<sup>6</sup> E.g., Elizabeth Paton-Simpson, *Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Spaces*, 50 U. TORONTO L.J. 305, 342 (2000) (analyzing cases highlighting the connection between the right to public privacy and the freedom of association).

<sup>7</sup> See *infra* Part I.

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then deconstructs both the secrecy paradigm and public privacy theories that rely on ancillary constitutional values to justify a right to public privacy. While apt, there is reason to believe that such indirect constitutional benefits are less likely to be recognized and vindicated by courts because the purported harm is not palpable or immediate.

Part II then reveals and explores examples of performative privacy, identifying and labeling a variety of social practices that are simultaneously functional efforts to maintain privacy and expressive forms of resistance against the scrutiny of the state and private, corporate actors.<sup>8</sup> Here, I point to multiple forms of evidence for performative privacy. First, drawing in part on post-structural social theory, I explain how functional acts designed to maintain public privacy gain expressive texture and meaning in response to the structures of surveillance which pervade society.<sup>9</sup> In other words, privacy efforts take on greater expressive meaning within the social context of surveillance. Second, I highlight evidence indicating that the state views functional efforts to maintain privacy as communicative forms of resistance, highlighting privacy's performative, expressive role. In fact, in some instances the state relies on the very expressive nature of an effort to maintain privacy to justify regulation of that effort. Lastly, I point to examples where individuals actually identify their privacy-enhancing acts as expressive.

Finally, Part III articulates the doctrinal and discursive payoffs, or implications, of performative privacy.<sup>10</sup> Doctrinally, by demonstrating that demands for public privacy are often (but not always) imbued with expression, this Article's concept of performative privacy helps establish that public privacy is grounded in the First Amendment's speech protections and that existing jurisprudence provides doctrinal support for a right to performative privacy in public. Discursively, understanding functional efforts to maintain privacy as a form of outward-facing expression helps us appreciate that privacy is not just important as a pre-political incubator for political thought, as it is often characterized, but is, itself, directly political. Conceptualizing privacy in such a manner accentuates privacy's role in maintaining the democratic balance between citizen and state, provides meaning to the currently brittle public-private distinction, and dispels misplaced

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

<sup>9</sup> As used here, "post-structural" simply refers to the idea that the meaning of certain individual acts is partially defined by and in relation to the social structures surrounding them, and that deviations from the norm can begin to destabilize those same structures. For a much fuller discussion, see *infra* Part II.

<sup>10</sup> See *infra* Part III.

suspicion often associated with those who demand their privacy. By helping society better understand the expressive dimension of attempts to obtain privacy in public by, for example, wearing a hoodie, the framework of performative privacy can help remove the initial, negative reaction to such a practice and instead associate it as an exercise of the freedom of speech — one of America’s most valued ideals. Moreover, the rubric of performative privacy has the potential to reinvigorate what we deem to be a “reasonable expectation” of privacy by underscoring the degree to which we do take subtle, but significant, efforts to guard our privacy. In these ways, performative privacy can shift the rhetorical landscape currently surrounding many attempts to obtain privacy in public.

In addition, while certainly no substitute for identity-based claims against widespread structural racism, Islamophobia, and homo/transphobia, to the extent that acts of performative privacy cut across laws disproportionately targeting racial, religious, or gender minorities (regulation of hoodies, bans on head veils, and laws that out transgender individuals are some examples), performative privacy promises to deliver a more collective and coalescing normative response to these conflicts. Put differently, performative privacy helps highlight the disparate burden of surveillance on marginalized communities and identifies a collective form of political resistance.

#### I. DECONSTRUCTING PUBLIC PRIVACY LEGAL THEORY

Defended by a handful of scholars, privacy doctrine largely provides that there is no right to privacy while in public. Other scholars argue that to the extent a right to public privacy against unfettered surveillance does exist, public privacy is justified because it indirectly serves as an adjuvant to other constitutional values, such as the freedom of association or movement, or as an incubator for the development of ideas and then speech. This Part analyzes these two positions, arguing that the privacy-only-in-private notion is descriptively inaccurate and based on faulty assumptions regarding how people live their lives in practice and the privacy they expect, as others have also observed. It then turns to the prevailing pro-public-privacy theories and analyzes how they are accurate and incredibly important, but overlook public privacy’s expressive dimension, instead relying on the indirect support public privacy would provide to other constitutional rights.

### A. Privacy Only in Private

Several privacy doctrines provide that once a person enters the public realm, any claim to privacy over that person's activities while they remain in public is non-existent.<sup>11</sup> Likewise, to the extent a person's information is shared with another individual, the information is effectively deemed "public" and any right to privacy over that information that may once have existed is often extinguished. Under the "privacy-only-in-private" approach, the right to limit or control access to information subsists only to the extent the information is kept completely within the private realm — within the confines of one's home.<sup>12</sup> Pursuant to this notion, privacy is more or less synonymous with complete secrecy.<sup>13</sup> As many have noted, this anachronistic theory ignores the ways in which we communicate, the ways we live our lives, and has little or no basis in experience or logic.<sup>14</sup>

Nonetheless, it has found some support in scholarship and in several doctrinal contexts. For example, some academics have argued that once personal information enters the public domain, any claim to privacy over that information is lost.<sup>15</sup> Under this model, simply

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<sup>11</sup> See JULIE E. COHEN, *CONFIGURING THE NETWORKED SELF* 121 (2012) ("Generally speaking, surveillance is fair game within public space, and also within spaces owned by third parties, but not within spaces owned by the targets of surveillance.").

<sup>12</sup> See Andrew E. Taslitz, *Privacy as Struggle*, 44 *SAN DIEGO L. REV.* 501, 504-05 (2007) (documenting "the Court's requirement of superhuman individual efforts to attain secrecy, that is, totally veiling one's activities from the state's prying eyes as an essential prerequisite to the existence of privacy, all too often at the expense of human relationships, interpersonal trust, and political voice").

<sup>13</sup> Solove, *Taxonomy*, *supra* note 3, at 497 ("If the information is not previously hidden, then no privacy interest is implicated by the collection or dissemination of the information. In many areas of law, this narrow view of privacy has limited the recognition of privacy violations.").

<sup>14</sup> See, e.g., DANIEL J. SOLOVE, *NOTHING TO HIDE* 100-01, 108 (2011) (critiquing the "faulty reasoning" underlying the secrecy paradigm and observing that when one shares information with a friend, one does not, in fact, assume that it will be shared freely and widely); Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 *CALIF. L. REV.* 1887, 1920 (2010) (noting that "[p]eople expose information with varying expectations of the extent and nature of its future exposure"); Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 *U. CHI. L. REV.* 919, 919 (2005) (observing that most people share their "most embarrassing details with other people"); see also Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 *CORNELL L. REV.* 291, 347 (1983) (observing that "[c]ourts using the 'location' analysis commonly state that information individuals reveal about themselves in public places is by definition not private," but concluding that such a test ignores the varying degrees of "public" spaces and the difficulty of defining what counts as "public").

<sup>15</sup> See, e.g., W. A. Parent, *Privacy, Morality, and the Law*, 12 *PHIL. & PUB. AFF.* 269,



sharing information with a close friend is enough to constitute a voluntary disclosure that negates privacy.<sup>16</sup> Specifically, Heidi Reamer Anderson has defended a “no-privacy-in-public” regime, arguing in part that the pragmatic benefits of exposure of socially undesirable behavior outweigh any potential loss of personal dignity or loss of “thinking space.”<sup>17</sup> Others have largely endorsed Fourth Amendment rules that limit any privacy protections against government access once the information at issue is transmitted to another person or entity.<sup>18</sup>

Beyond scholarship, particular legal doctrines and court decisions suggest that any right to privacy is dramatically curtailed once a person or their information has entered the public realm. For example, in tort law, the Restatement (Second) of Torts provides with regard to the tort of publication of private facts that “there is no liability for giving further publicity to what the plaintiff himself leaves open to the public.”<sup>19</sup>

In the Fourth Amendment criminal procedure context, the third-party doctrine stipulates that, in certain situations, an individual’s reasonable expectation of privacy evaporates once an individual shares the relevant information with another person, sometimes referred to as a so-called “third-party.”<sup>20</sup> Correspondingly, under what has been

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270-71 (1983) (“What belongs to the public domain cannot without glaring paradox be called private; consequently it should not be incorporated within our concept of privacy.”).

<sup>16</sup> *Id.* at 273.

<sup>17</sup> Heidi Reamer Anderson, *The Mythical Right to Obscurity: A Pragmatic Defense of No Privacy in Public*, 7 *IS* 543, 597-98 (2012) (balancing purported benefits of no-privacy-in-public rule with costs, and tentatively concluding that the lack of privacy in public is most advantageous in terms of government accountability, criminal deterrence, and deception prevention).

<sup>18</sup> *E.g.*, Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 *MICH. L. REV.* 561, 576 (2009) (arguing that “[w]ithout the [third-party] doctrine, criminals could use third-party agents to fully enshroud their criminal enterprises in Fourth Amendment protection”).

<sup>19</sup> *RESTATEMENT (SECOND) OF TORTS* § 652D cmt. b (AM. LAW INST. 1977); *see also* *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 496-97 (1975) (holding that there is no privacy violation where press published information about a rape victim that was already in the public domain via court records); Paton-Simpson, *supra* note 6, at 310-11 (documenting that under American tort law, “[t]here is generally no liability for observing, following, or photographing someone in a public place,” and that “[p]laintiffs have been denied any right to privacy not only on the street but also in shops, laundromats, restaurants, health spas, parking lots, airports, common areas of cruise ships, and school buildings”).

<sup>20</sup> *Katz v. United States*, 389 U.S. 347, 351 (1967) (“What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth

dubbed “assumption of the risk,” the Supreme Court has concluded that when individuals volunteer information to others, they are assuming the risk that the other party may be an informant who may relay the information to law enforcement.<sup>21</sup> In such situations, the Court has held that no Fourth Amendment search occurred.<sup>22</sup>

A related Fourth Amendment concept, the open fields doctrine, has also been used to curtail the right to privacy — even on an individual’s own property. The open fields doctrine provides that an individual has no reasonable expectation of privacy for activities conducted out-of-doors, in fields or property not directly adjacent to the home (an area known as “curtilage”).<sup>23</sup> The Supreme Court has relied on the open fields doctrine to hold, for example, that no warrant was required for police to walk past a locked gate and “No Trespassing” signs and into secluded property in order to investigate reports that marijuana was being grown.<sup>24</sup> Interpreting the open fields doctrine on multiple occasions, the Supreme Court has taken a broad view of when privately-owned property is exposed or open to the public and thus entitled to minimal Fourth Amendment privacy protections.<sup>25</sup>

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Amendment protection.”). As Kathy Strandburg has pointed out, in certain contexts, the phrase “third-party doctrine” is a misnomer since not all cases involve information shared between more than two individuals. Katherine J. Strandburg, *Home, Home on the Web and other Fourth Amendment Implications of Technosocial Change*, 70 MD. L. REV. 614, 652 n.201 (2011) [hereinafter *Home, Home on the Web*]. For a nuanced discussion of the third-party doctrine and the Fourth Amendment more broadly, see generally Kiel Brennan-Marquez, *Fourth Amendment Fiduciaries*, 84 FORDHAM L. REV. 611 (2015).

<sup>21</sup> See, e.g., *Hoffa v. United States*, 385 U.S. 293, 302-03 (1966) (finding no Fourth Amendment violation where Jimmy Hoffa relied “upon his misplaced confidence that [the informant] would not reveal [Hoffa’s] wrongdoing”); see also Taslitz, *supra* note 12, at 501-02 (noting *Hoffa*’s “role in the growth of the ‘assumption of the risk’ doctrine as the primary basis for drastically limiting the scope of Fourth Amendment protections”).

<sup>22</sup> See *Smith v. Maryland*, 442 U.S. 735, 743-44 (1979) (confirming that “a person has no legitimate expectation of privacy in information” voluntarily shared with a third party); *United States v. White*, 401 U.S. 745, 749 (1971) (reiterating that pursuant to *Hoffa*, information shared with another based on the misplaced belief that the other party will keep it secret does not constitute a legitimate expectation of privacy for the purposes of the Fourth Amendment).

<sup>23</sup> *Oliver v. United States*, 466 U.S. 170, 178-80 (1984).

<sup>24</sup> *Id.* at 173, 177.

<sup>25</sup> See *Florida v. Riley*, 488 U.S. 445, 445 (1989) (no warrant required for police to inspect predominately enclosed but partially open greenhouse within curtilage of home from a helicopter 400 feet above the ground, notwithstanding that greenhouse could not be seen into from street); *United States v. Dunn*, 480 U.S. 294, 303-04 (1987) (no warrant required for police to enter onto a 198-acre property, cross over a perimeter fence as well as multiple interior fences, and peer into a locked barn located

The Court has also held that when an individual places garbage on the street curb for collection, even if temporarily and opaquely packaged, such “public exposure” defeats any reasonable privacy expectation.<sup>26</sup> A similar criminal procedure concept, the “plain view” doctrine, provides that police officers may seize evidence of contraband when visible from a lawful vantage point.<sup>27</sup>

The theme that links the third-party doctrine, the open fields doctrine, the plain view doctrine, assumption of the risk, and the secrecy paradigm more broadly, is the underlying notion that there is no right to privacy in public — if information is even marginally exposed to others, the government and private parties are often permitted broad access.

But, as others have argued, public privacy is not an oxymoron.<sup>28</sup> And rigid application of these doctrines ignores that individuals do, in fact, expect privacy when they share intimate information with a friend while in a public restaurant, for instance. They do not expect that the information will become universally accessible merely because they shared it within limited confines.<sup>29</sup> With regard to physical

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half of a mile from the public road and in close proximity to the property’s residence); *California v. Ciraolo*, 476 U.S. 207, 209-10 (1986) (no warrant required for aerial search of backyard within curtilage of home that was enclosed by 2 separate fences, one 6 feet tall and the other 10 feet tall); *Dow Chem. Co. v. United States*, 476 U.S. 227, 229, 238-39 (1986) (extending *Ciraolo* and permitting EPA aerial surveillance of outdoor area of Dow’s extensive power plant facility without a warrant despite “elaborate security around the perimeter of the complex”). *But see Kylo v. United States*, 533 U.S. 27, 40 (2001) (holding that the use of thermal imaging technology on house constitutes a search for which a warrant is required).

<sup>26</sup> *California v. Greenwood*, 486 U.S. 35, 39-41 (1988).

<sup>27</sup> See *Texas v. Brown*, 460 U.S. 730, 742-44 (1983) (no warrant required where police observed and then seized a balloon believed to contain drugs in an automobile that had been lawfully stopped at routine driver’s license checkpoint); *cf. Payton v. New York*, 445 U.S. 573, 586-87 (1980) (“It is . . . well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.”).

<sup>28</sup> E.g., Andrew Jay McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1044 (1995) (explaining that “public privacy” only sounds like an oxymoron because of the way we think of “public” and “privacy” in fixed, absolute terms).

<sup>29</sup> Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After Lawrence*, 57 UCLA L. REV. 1, 6 (2009) (describing how “[o]rdinary life involves sharing with other persons in ways that are simultaneously private and public”); Erin Murphy, *The Case Against the Case for Third-Party Doctrine: A Response to Epstein and Kerr*, 24 BERKELEY TECH. L.J. 1239, 1252 (2009) (arguing that the third-party doctrine ought to be revised to reflect that when disclosures are made in confidence, the

privacy, they do not expect that by dint of exiting their front door (a requirement of living in a society), they are providing open access to their movements to the government and private parties alike.

Not only is the secrecy paradigm descriptively inaccurate from a behavioral standpoint, it is increasingly debilitating as privacy-invading technologies<sup>30</sup> expand the reach of state and private, corporate surveillance regimes.<sup>31</sup> The physical and informational zone of what is truly secret — known to no one else — is shrinking dramatically.<sup>32</sup> As such, under the “privacy-only-in-private” theory, the law protects very little indeed. Paradoxically, as surveillance regimes expand (decreasing what can functionally be kept secret), the right to privacy is extinguished along with it.<sup>33</sup> Instead of serving as a

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government and the law should respect that confidence); Laurent Sacharoff, *The Relational Nature of Privacy*, 16 LEWIS & CLARK L. REV. 1249, 1270-71 (2012) (explaining that our privacy expectations exists in “widening circles” and that we expect more privacy from individuals with whom we are not personally close); Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159, 202 (2015) [hereinafter *Outing Privacy*] (“The third-party doctrine wrongly assumes that information is either openly public or completely secret.”).

<sup>30</sup> *Kyllo*, 533 U.S. at 33-34 (“It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. . . . The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy.”); see also Paton-Simpson, *supra* note 6, at 321 (“A rogue factor that not only disrupts normal expectations of public privacy but also undermines the distinction between public and private places is the use of privacy-invasive technologies.”).

<sup>31</sup> Of course, state and private surveillance often work hand-in-hand and are often far from distinct. Roy Coleman, *Reclaiming the Streets: Closed Circuit Television, Neoliberalism and the Mystification of Social Divisions in Liverpool, UK*, 2 SURVEILLANCE & SOCIETY 293, 296 (2004) (“For in reality there is not, and has not been, any easily maintained distinction between state and extra-state power, or ‘public’ and ‘private’ authority.”).

<sup>32</sup> Reidenberg, *supra* note 5, at 142 (“In a world of 24/7 data tracking, warehousing, and mining, technology has transformed obscurity, accessibility, and transparency of personal information in ways that subvert the utility of the ‘reasonable expectation of privacy’ constitutional standard.”); see Katherine J. Strandburg, *Monitoring, Datafication, and Consent: Legal Approaches to Privacy in the Big Data Context*, in PRIVACY, BIG DATA, AND THE PUBLIC GOOD 5, 10-11 (Julia Lane et al. eds., 2014) (stating that datafication enhances the ability to organize information therefore increasing the likelihood it will be put to unintended purposes).

<sup>33</sup> Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 118 (2008) (“So long as Fourth Amendment privacy is parasitical on private-sphere privacy, the former must die as its host dies, and this host is undoubtedly faltering today in the networked, monitored and digitized world we are learning to call our own.”); see also Crocker, *supra* note 29, at 6-7 (“If public exposure forfeits privacy protections, then how constitutional doctrine defines public exposure determines what aspects of ordinary life receive protection from government interference. What receives constitutional

bulwark against encroachments on privacy, the “privacy-only-in-private” theory is defined in such a way to ensure that privacy will, in fact, be dead.<sup>34</sup> And this cramped definition of privacy permits privacy-invading technologies and both criminal and administrative surveillance regimes to have free rein.

### B. Limited Privacy in Public

Observing the conceptual and practical shortcomings of “privacy-only-in-private” doctrines, other scholars have powerfully advocated for a limited right to privacy in public. These advocates for public privacy have begun to create limited cracks<sup>35</sup> in the secrecy paradigm by emphasizing that public privacy is necessary for several other constitutional values to have practical effect. As noted at the outset, these explanations for public privacy’s importance are accurate but perhaps incomplete. And justifying public privacy with reliance on other, indirect constitutional benefits has, thus far, had limited judicial purchase, in part because the benefits are more tangential and harder for courts to discern. And then harder still for courts to weigh the indirect constitutional benefits against competing government interests, such as security and public safety.<sup>36</sup> That is, courts are often forced to weigh

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protection in turn shapes the boundaries of ordinary life.”).

<sup>34</sup> Cf. Polly Sprenger, *Sun on Privacy: ‘Get over It’*, WIRED (Jan. 26, 1999), <http://archive.wired.com/politics/law/news/1999/01/17538> (quoting Sun Microsystems CEO Scott McNealy as arguing that “[y]ou have zero privacy anyway” and exhorting society to “[g]et over it”).

<sup>35</sup> E.g., *United States v. Jones*, 132 S. Ct. 945, 956-57 (2012) (Sotomayor, J., concurring) (suggesting that “it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties” and noting the chilling threat posed to associational and expressive freedoms); see *United States v. Lambis*, No. 15-cr-734, 2016 U.S. Dist. LEXIS 90085, at \*19-20 (S.D.N.Y. July 12, 2016) (ruling that third party doctrine did not excuse use of cell-site simulator, or StingRay, without a warrant because cellular data was communicated to government, not third party). *But see* *United States v. Graham*, 824 F.3d 421, 424-25 (4th Cir. 2016) (en banc) (ruling that third-party doctrine excuses collection of cell-site location data from warrant requirement because the criminal suspect exposed the data to cell phone service provider); *United States v. Houston*, 813 F.3d 282, 289-90 (6th Cir. 2016) (holding that a police video recording of person’s activities outside their home for ten weeks did not require a warrant).

<sup>36</sup> See, e.g., *Laird v. Tatum*, 408 U.S. 1, 12-16 (1972) (ruling that purported injury from chilling effect of Army surveillance of civil political activity was too attenuated to even support plaintiff’s standing to bring suit); Reporters Comm. for Freedom of Press v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1051-52 (D.C. Cir. 1978) (“Yet not every Government action that has an inhibiting or constrictive impact on First Amendment activity is said therefore to have an impermissible ‘chilling effect.’”); see also Skinner-Thompson, *Outing Privacy*, *supra* note 29, at 173 (collecting cases and arguing that, at

privacy concerns against concerns over safety and security, and if privacy's importance is limited to indirectly creating space for the exercise of other constitutional values, it will often lose out.<sup>37</sup>

In both criminal procedure and tort law, public-privacy proponents have emphasized public privacy's ability to indirectly prevent chilling of constitutionally protected activity, such as association or speech. For example, in the tort context, scholars have critiqued tort law's stubborn adherence to the no-privacy-in-public paradigm, and rightly observed that such a rule "is flawed in a modern technological society where the video camcorder has become a permanent fixture."<sup>38</sup> In making the case for a limited tort of "public intrusion" where the plaintiff has taken actions that manifest their desire for privacy in public, Andrew McClurg emphasizes the chilling effect that being observed while in public can have on behavior.<sup>39</sup> Elizabeth Paton-Simpson has advocated similarly for privacy tort protections even while in public, stressing how a right to privacy in public would give life to the freedom of association. Paton-Simpson observes, as an example, how surveillance of individuals who attend a union meeting chills the constitutionally protected ability to associate and organize.<sup>40</sup>

Similar instrumental justifications for public privacy are offered in the criminal procedure/Fourth Amendment context. For example, scholars have documented that the *Olmstead/Katz* "reasonable expectation of privacy" test, which dictates that no search implicating the Fourth Amendment warrant requirement occurs if a person does not have a reasonable expectation of privacy in the area or item searched, has been interpreted to give undue primacy to the home as the space where we expect privacy.<sup>41</sup> As Marc Blitz advocates, courts

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least in the context of informational privacy, courts struggle when there are "too many causal steps" between the privacy violation and the purported harm).

<sup>37</sup> As discussed more fully in Parts II and III, this Article's identification and promotion of "performative privacy" supplements existing normative justifications for public privacy by directly linking demands for public privacy with the First Amendment's robust protections for expressive conduct. See *infra* Parts II–III. Arguably, suggesting that efforts to maintain privacy are expressive is still an appeal to an "indirect" value, but by highlighting that the act of privacy is, in itself, expressive, the distance between the privacy effort and the constitutional harm is tightened.

<sup>38</sup> E.g., McClurg, *supra* note 28, at 990-91.

<sup>39</sup> *Id.* at 1035-36.

<sup>40</sup> Paton-Simpson, *supra* note 6, at 342. Paton-Simpson also astutely notes that a system without public privacy affords more protection to the affluent, who can afford to build higher walls — both literal and technological — to keep surveillance regimes at bay. *Id.* at 343.

<sup>41</sup> See, e.g., Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX.

should give more attention to the privacy architecture that exists within public space and should protect the “public” enclaves that provide refuge for individual freedom (for example, the freedom one can find in public by putting distance or barriers between others and one’s activities).<sup>42</sup> But Blitz, too, normatively justifies the right to public privacy with reference to the instrumental benefits it provides, i.e., because public privacy enables people the “freedom to reinvent themselves.”<sup>43</sup>

Likewise, Christopher Slobogin has explained that the Fourth Amendment ought to apply to government efforts to surveil public activity and that while a warrant may not be required, the government nevertheless is obliged to justify its use of public surveillance.<sup>44</sup> To Slobogin, public anonymity is important because it helps assure the freedom of movement and gives meaning to the freedoms of association and speech.<sup>45</sup> Without some degree of public privacy or anonymity, anonymous speech and the ability to organize in secret would be chilled.<sup>46</sup> Other scholars have rightly extended that

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L. REV. 1349, 1363-65 (2004) (arguing that the *Katz* framework set out the home as one of the prime protected spaces).

<sup>42</sup> *Id.* at 1415, 1444.

<sup>43</sup> *Id.* at 1480-81. Andrew Ferguson has also recently argued that there ought to be Fourth Amendment protections against government surveillance while in public, advancing a concept called “personal curtilage.” Under Ferguson’s personal curtilage conception, which is arguably consistent with this Article’s concept of performative privacy, individuals can gain freedom from government surveillance while in public by “affirmatively act[ing] to mark out the area of security.” Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1287-92 (2014).

<sup>44</sup> Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 312-14 (2002).

<sup>45</sup> *Id.* at 252-58.

<sup>46</sup> *Id.* at 253; see also Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 153-55 (2007) (suggesting that the First Amendment ought to limit government information gathering when there is an indirect chilling effect on communications or associations that “implicate belief, discourse, or relationships of a political, cultural, or religious nature”). Joel Reidenberg, too, has argued that a limited right to be free from government surveillance while in public is necessary because “constitutional democracy depends on spheres of privacy in public to preserve public safety and fair governance.” Reidenberg, *supra* note 5, at 143. Reidenberg suggests that acts which occur in public but have no bearing on democratic governance (such as a phone call to a friend from a payphone) are entitled to public privacy, while acts which are directed at the government (such as a protest) are not entitled to public privacy. *Id.* at 155-57.

argument,<sup>47</sup> explaining how surveillance of our networked activities, not just our physical activities, chills the freedom to associate.<sup>48</sup>

On a broader, conceptual level, Helen Nissenbaum has critiqued the public-private divide that has dominated philosophical theories of privacy because that divide obscures that public surveillance injures the values associated with privacy in the same ways that intrusions into our intimate affairs may.<sup>49</sup> For Nissenbaum, the values served by public privacy “are wide-ranging, including individual values such as autonomy, liberty, individuality, capacity to form and maintain intimate relations, mental health, creativity, personal growth, as well as social values such as a free and democratic society.”<sup>50</sup> While not focused exclusively on the question of public privacy, others have also

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<sup>47</sup> See Deven R. Desai, *Constitutional Limits on Surveillance: Associational Freedom in the Age of Data Hoarding*, 90 NOTRE DAME L. REV. 579, 590 (2014) (explaining that “historical and recent government surveillance chills associational freedom” and that “data aggravates that problem”); Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 747-48 (2008) (arguing compellingly that surveillance of networked relationships ought to be viewed as implicating the freedom to associate and be subject to First Amendment strict scrutiny); Katherine J. Strandburg, *Membership Lists, Metadata, and Freedom of Association’s Specificity Requirement*, 10 *VS* 327, 356-65 (2014) (extending freedom of association’s protection to NSA’s telephony metadata program).

<sup>48</sup> Even in contexts less historically associated with privacy law, such as intellectual property, public privacy has often been promoted on the basis of its indirect, instrumental benefits. See, e.g., Sonia K. Katyal, *The New Surveillance*, 54 CASE WESTERN RES. L. REV. 297, 301 (2003) (arguing that extensive surveillance for the purpose of detecting piracy online has the potential to chill both legitimate and illegitimate creative development).

<sup>49</sup> Helen Nissenbaum, *Protecting Privacy in an Information Age: The Problem of Privacy in Public*, 17 LAW & PHIL. 559, 569-70 (1998) [hereinafter *Protecting Privacy*]. Similarly, in the information privacy context, Ari Waldman has powerfully explained how viewing privacy law as protecting relationships of trust will better capture when information should be entitled to protection than the faulty public-private divide. Ari Ezra Waldman, *Privacy as Trust: Sharing Personal Information in a Networked World*, 69 U. MIAMI L. REV. 559, 561-64 (2015).

<sup>50</sup> Nissenbaum, *Protecting Privacy*, *supra* note 49, at 593; see also Frank Rudy Cooper, *Surveillance and Identity Performance: Some Thoughts Inspired by Martin Luther King*, 32 N.Y.U. REV. L. & SOC. CHANGE 517, 537-38 (2008) (explaining that “surveillance has the power to prevent people from performing their identities as they would see fit” through “means of pressuring them to adhere to preexisting cultural norms”); Woodrow Hartzog & Frederic Stutzman, *The Case for Online Obscurity*, 101 CALIF. L. REV. 1, 7-8 (2013) (suggesting that obscurity while engaged on the “public” internet is important to protect individuals from being pressured to conform to social norms).



noted privacy's role in creating space for the development of political thought.<sup>51</sup>

These critiques of the secrecy paradigm and the ways in which it has manifested itself across many areas of substantive law are apt, and they have helped open certain courts' eyes to public privacy's potential.<sup>52</sup> But, by and large, the development of a right to public privacy has been slow in coming and many doctrines maintain their dogged commitment to the secrecy paradigm.<sup>53</sup>

It seems possible that the sluggishness with which the purported right to public privacy has manifested itself in doctrine is in part because it has been justified on the same instrumental terms and with the same values that the right to privacy writ large has been (with mixed success) defended. For example, as discussed above, some have attempted to draw a direct parallel between the norms underlying public privacy and the norms underlying privacy into our personal affairs.<sup>54</sup> But defending the right to privacy in courts with reference to amorphous values (such as dignity or autonomy) has by many accounts been a failed exercise.<sup>55</sup>

Perhaps more to the point, justifying the right to be free from public surveillance by, for example, closed-circuit television networks, by

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<sup>51</sup> See, e.g., Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1905 (2013) (“[F]reedom from surveillance, whether public or private, is foundational to the practice of informed and reflective citizenship.”); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 408-25 (2008) (outlining the connection between intellectual privacy and freedom of thought); Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1945-46 (2013) [hereinafter *Dangers*] (arguing “that new ideas often develop best away from the intense scrutiny of public exposure” and “that a meaningful guarantee of privacy — protection from surveillance or interference — is necessary to promote this kind of intellectual freedom”); cf. JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* xii (1990) [hereinafter *DOMINATION*] (documenting how subordinate groups create a “hidden transcript” that represents a critique of power spoken behind the back of the dominant”).

<sup>52</sup> See, e.g., *United States v. Jones*, 132 S. Ct. 945, 954-57 (2012) (Sotomayor, J., concurring) (arguing the third-party doctrine is ill-suited for today's society and technology, and noting that other constitutional liberties are at play).

<sup>53</sup> See *supra* Part I.A.

<sup>54</sup> E.g., Nissenbaum, *Protecting Privacy*, *supra* note 49, at 569-70.

<sup>55</sup> See, e.g., HELEN NISSENBAUM, *PRIVACY IN CONTEXT* 10, 108 (2010) (suggesting that reliance on “higher-order values” to justify privacy often fails to resolve conflicts between privacy and other interests); Tom Gerety, *Redefining Privacy*, 12 HARV. C.R.-C.L. L. REV. 233, 234 (1977) (“A legal concept will do us little good if it expands like a gas to fill up the available space.”); see also JOHN GILLIOM, *OVERSEERS OF THE POOR* 7 (2001) (documenting the shortcomings of privacy-centric approaches to combatting widespread administrative surveillance).

relying on indirect concerns about “chilling” the freedom to meet and associate requires courts to take more causal steps than may be necessary in order to normatively and doctrinally justify a right to public privacy.<sup>56</sup> It frames privacy as a tool used to harness other values and rights, rather than emphasizing privacy’s inherent, and more potent, power.<sup>57</sup>

As demonstrated below, conceptualizing efforts to maintain privacy in public as expressive, performative acts highlights a more direct dimension and value of public privacy and ties it more directly to the freedom of expression guaranteed by the First Amendment.<sup>58</sup> Such a framing may not only have doctrinal benefits, but may also have meaningful discursive, societal effects, elevating our understanding of privacy’s value.

## II. REVEALING PERFORMATIVE PRIVACY

Individuals’ efforts to maintain privacy, anonymity, or obscurity while simultaneously engaged in public activity ought to be understood as performative, expressive acts — expressions that may often be protected directly by the Free Speech Clause of the First Amendment.<sup>59</sup> Certainly, as outlined in Part I.B, maintaining anonymity while in public by wearing a hoodie or using internet obfuscation technology instrumentally aids one’s freedom of movement or freedom to associate without being detected by public surveillance. But it is more than that. As government and corporate surveillance of both our physical and cyber activities becomes ubiquitous, efforts taken to shield activities from surveillance are not always just a means to an end — a means to effectuate other constitutional values. Instead, they are often a direct statement of

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<sup>56</sup> See, e.g., *Laird v. Tatum*, 408 U.S. 1, 12-16 (1972) (chilling effect from surveillance was too indirect); cf. Skinner-Thompson, *Outing Privacy*, *supra* note 29, at 173.

<sup>57</sup> See Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 422-23 (1980) (arguing that once privacy is explicitly defended on its own merits, instead of justified in terms of other, ancillary rights, it would gain validation).

<sup>58</sup> Judith Wagner DeCew’s version of what she labels “expressive privacy” is quite different from what I identify as performative, expressive privacy. For DeCew, expressive privacy is more akin to the instrumental concept of intellectual privacy. See *supra* note 51. That is, under DeCew’s formulation, “privacy protects a realm for expressing one’s self-identity or personhood through speech or activity.” JUDITH WAGNER DECEW, *IN PURSUIT OF PRIVACY* 77 (1997). But for DeCew, the functional demand for privacy does not appear to be, in and of itself, outwardly expressive. *Id.*

<sup>59</sup> See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . .”).

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resistance to the pervasive surveillance regimes. In such instances, they are entitled to First Amendment protections from government infringement.

This Part demonstrates how “performative privacy” is conceptually coherent and descriptively accurate, and does the work of identifying and labeling examples of performative privacy. Evidence that functional efforts to maintain privacy in public are also expressive comes in three principal forms: (1) the state’s regulatory reaction to functional efforts to maintain privacy, (2) individuals’ self-identification of such acts as expressive, and (3) post-structural social theory, which elevates social context as a backdrop that helps make individuals’ actions intelligible. After outlining the post-structural theoretical foundations for performative privacy, this Part analyzes several real-world examples of performative privacy.

In Part III, the Article explains how conceptualizing public privacy demands as expressive will help such demands find doctrinal protection and protection in the court of public opinion.

#### A. *Performative Privacy in Theory*

This Article’s thesis — that functional efforts to maintain privacy can also serve as expressive forms of resistance to surveillance structures — is supported by, and in turn extends, post-structural theory. The post-structural concept of performative privacy serves to highlight the degree to which we, as individuals, are being observed, operated on, and controlled by surveillance systems, and at the same time helps label a form of resistance — and one with doctrinal footing. Put differently, the concept of performativity as applied to privacy can help expose the extent to which individuals are subjects of surveillance structures, and simultaneously reveals methods for maintaining democratic agency and points of resistance within those surveillance networks.<sup>60</sup> That is to say, “performative privacy” helps us understand the scope of privacy problems and identify potential solutions.

Political theorist Judith Butler first articulated the contemporary post-structural concept of performativity while scrutinizing prevailing,

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<sup>60</sup> See JOHN E. McGRATH, *LOVING BIG BROTHER* 16 (2004) (arguing that agency can be achieved by mocking surveillance, even if the agency is “never fully volitional,” but focusing on efforts to ape surveillance, rather than efforts to perform privacy and avoid identification); cf. Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1596-98 (2015) (discussing principled resistance through the assertion of individual rights as a form of political participation critical to checking state power).

heteronormative conceptions of gender and sex.<sup>61</sup> Butler explained that social performances of gender, rather than expressing anything innate, ingrained, essential, or “true” about what it meant to be male or female, were often mere reflections of the dominant social constructions and conceptions of a particular gender. In Butler’s words, “the anticipation conjures its object . . . the anticipation of a gendered essence produces that which it posits as outside itself.”<sup>62</sup> While Butler suggested that we were all, in essence, performing and reproducing socially-inscribed notions of gender, she also explained that both subconscious and self-conscious performances that challenged prevailing norms, for example, through drag, could “expose the tenuousness of gender ‘reality.’”<sup>63</sup> Drawing from Michel Foucault, Butler explained that rather than remaining a passive medium reflecting dominant norms, the body could be transformed into an expressive site of resistance.<sup>64</sup> And the expressive value of non-normative gender performances was amplified precisely because of the dominant structures of heteronormativity — that is, gender performances that deviated from the norm were imbued with agency and expressive meaning in part because of their oppositional positioning to hegemonic social expectations.<sup>65</sup>

But the pertinence of performativity is not limited to gender politics. As another example, in her more recent work, Butler extends the theory of gender performance to the plural performativity of social movements engaged in acts of public assembly. By physically occupying contested public space, public gatherings communicate and

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<sup>61</sup> See generally JUDITH BUTLER, *GENDER TROUBLE* (2006) (exploring the theory of gender performativity). While luminary, Butler’s development of performativity built on related concepts first identified by Michel Foucault, J.L. Austin, Erving Goffman, and others. See, e.g., J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 6-7 (1962) (explaining that certain utterances are performative in that they perform an action, or speech act).

<sup>62</sup> BUTLER, *GENDER TROUBLE*, *supra* note 61, at xv; cf. DEVON W. CARBADO & MITU GULATI, *ACTING WHITE?* 94 (2013) (“Grooming requirements such as makeup for women and short hair for men help to constitute gender. They shape what it means to be a man and what it means to be a woman.”); Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 611-14 (2013) (arguing that family roles are performed and that such performances have a “communicative effect, on others and the self” such that they “construct familial categories and create social meaning”).

<sup>63</sup> BUTLER, *GENDER TROUBLE*, *supra* note 61, at xxv.

<sup>64</sup> See *id.* at 175-78.

<sup>65</sup> As explained by David Hoy in his book on critical resistance, “[t]he particular social structure provides the grid of intelligibility for making sense of the actions as conforming to or dissenting from the given power configuration.” DAVID COUZENS HOY, *CRITICAL RESISTANCE* 3 (2004).

signify a message “prior to, and apart from, any particular demands they make.”<sup>66</sup> That message is one which calls “into question the inchoate and powerful dimensions of reigning notions of the political.”<sup>67</sup> In other words, the embodied plural performances of public assemblies question whether the body politic is being served by prevailing democratic governance. For Butler, public assemblies perform an “expressive and signifying function” demanding more livable political and economic conditions.<sup>68</sup>

In short, a post-structural theory of performative politics posits at least four things: (1) social performances conjure and re-inscribe normative identities and values; (2) actions (whether they be public assembly, drag, or, as I suggest, privacy demands) that deviate from prevailing performances can be expressive forms of resistance separate and apart from any linguistic utterance that may (or may not) accompany them; (3) these actions’ expressive value is derived, at least in part, from the fact that they are deviating from prevailing social performances; and (4) the deviant actions’ expressive power is so great that it can begin to erode, dismantle, or recraft the social structures to which they are responding.

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<sup>66</sup> JUDITH BUTLER, NOTES TOWARDS A PERFORMATIVE THEORY OF ASSEMBLY 8 (2015) [hereinafter ASSEMBLY]; cf. Bernard E. Harcourt, *Political Disobedience*, in OCCUPY: THREE INQUIRIES IN DISOBEDIENCE 45, 53 (Mitchell et al. eds., 2013) (“The [Occupy] resistance movement can only be ‘heard,’ syntactically, from its place of occupation . . .”).

<sup>67</sup> BUTLER, ASSEMBLY, *supra* note 66, at 9.

<sup>68</sup> *Id.* at 11. In a complementary vein, Camille Gear Rich has powerfully explained that “part of the process of constituting oneself as a social actor requires the acceptance and recognition of racial/ethnic codes and markings and the mobilization of these codes to ensure that other actors read them in the manner that ensures one is placed in the desired race or ethnic group.” Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1178 (2004). That is, crafting one’s social identity involves an expressive performance that feeds off of, and helps shape, social norms/structures. Similarly, as recently documented by Devon Carbado and Mitu Gulati, dominant, white workplace culture within the United States causes individuals to work their identities — that is, they either conform to the prevailing social norms and structures and attempt to “pass,” or resist such structures through non-conformance. Efforts to work one’s identity are clearly communicative and involve what Gulati and Carbado label “signaling strategies.” CARBADO & GULATI, *supra* note 62, at 23-26; see also Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 780-81 (2002) (documenting how people play down aspects of their identities in different contexts, and are sometimes encouraged to do so by the law); cf. John Gilliom, *Struggling with Surveillance: Resistance, Consciousness, and Identity*, in THE NEW POLITICS OF SURVEILLANCE & VISIBILITY 111, 114 (Kevin D. Haggerty & Richard V. Ericson eds., 2006) [hereinafter *Struggling with Surveillance*] (emphasizing the importance of understanding surveillance resistance as occurring within a structural context of networked surveillance technologies).

Put in context, when men engage in sodomy, they express a challenge to gender norms and create new, less violent and less restrictive norms; when people gather in Zuccotti Park, they contest neoliberal political governance and suggest that there are different ways to conceive of participatory democracy; and, as I will show, when individuals attempt to maintain privacy while in public, they express resistance to surveillance regimes and also help shape community norms regarding privacy as a valuable social good and help redraw the line separating public from private.<sup>69</sup>

This theory of performative privacy draws additional support from the work of Jean Baudrillard, who explained that while objects often have a functional value — the instrumental purpose for which the object is used — they also have symbolic and sign value relative to other objects and to people within a system of objects.<sup>70</sup> According to Baudrillard, objects signify certain messages and the content of that message is partially determined based on an object's relationship to other objects, and the people who use or display the object(s).<sup>71</sup> He labeled this system a “signifying fabric.”<sup>72</sup>

Here, I am addressing the signifying effects of privacy efforts within the social fabric of widespread surveillance. The extent to which the surveillance regime has penetrated our lives is vividly conveyed by

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<sup>69</sup> Cf. BUTLER, GENDER TROUBLE, *supra* note 61, at xxiv (“[N]o political revolution is possible without a radical shift in one’s notion of the possible and the real.”); TA-NEHISI COATES, BETWEEN THE WORLD AND ME 69 (2015) (“[T]he struggle, in and of itself, has meaning.”).

<sup>70</sup> JEAN BAUDRILLARD, FOR A CRITIQUE OF THE POLITICAL ECONOMY OF THE SIGN 29 (Charles Levin trans., 1981) (arguing that an object’s sign value is often more important and valuable than its pragmatic, functional value); JEAN BAUDRILLARD, THE SYSTEM OF OBJECTS 4 (James Benedict trans., 1996) [hereinafter THE SYSTEM OF OBJECTS] (isolating for study a “spoken’ system of objects — that is, the study of the more or less consistent meanings that objects institute”).

<sup>71</sup> BAUDRILLARD, THE SYSTEM OF OBJECTS, *supra* note 70, at 200 (explaining that an object “derives its consistency, and hence its meaning, from an abstract and systematic relationship to all other sign-objects”).

<sup>72</sup> *Id.* Indeed, to the extent that sociologists have often recognized that criminal punishment serves an expressive function — expressing the conscience collective of the community/state — it is no great leap to suggest that functional efforts to resist surveillance, discipline, and punishment are also expressive. See, e.g., DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY 68 (1990) (explaining that the penal process is “a means of evoking, expressing, and modifying passions, as well as an instrumental procedure for administering offenders”). As others have noted, surveillance systems are not neutral or a-political, but instead communicate and create normative, often neoliberal, messages. See, e.g., Kirstie Ball et al., *Big Data Surveillance and the Body-Subject*, 22 BODY & SOC’Y 58, 70-71 (2016) (“[S]urveillance communicates value systems to the surveilled.”); Coleman, *supra* note 31, at 299-300.

Bernard Harcourt — “ordinary life is uncannily converging with practices of punishment: The see-throughness of our digital lives mirrors the all-seeingness of the penal sphere.”<sup>73</sup> Put another way, “the infrastructure, by default, gathers data on you.”<sup>74</sup> As surveillance scholars have observed, “[i]n many respects surveillance is constitutive of modern society.”<sup>75</sup> That is, surveillance in its varied forms (administrative, technological, and penal) is pervasive and dramatically shapes and restricts behavior, a point richly highlighted by Julie Cohen, who argues that privacy theorists should abandon notions of selfhood cultivated purely through solitary development.<sup>76</sup> According to Cohen, surveillance regimes impact and alter the development of both space and individual identity, which are intimately linked.<sup>77</sup>

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<sup>73</sup> BERNARD E. HARCOURT, *EXPOSED* 21 (2015). As Harcourt and others have noted, society is now organized or structured in such a way that we willingly surrender or volunteer many aspects of our privacy in exchange for the mere opportunity to participate, or live, in society. *Id.* at 15; *see, e.g.*, Ball, et al., *supra* note 72, at 64 (explaining that big data succeeds “by co-opting individuals into de facto surveillance of their own private lives”).

<sup>74</sup> FINN BRUNTON & HELEN NISSENBAUM, *OBFUSSION* 49-50 (2015); *cf.* STEVEN LUKES, *POWER: A RADICAL VIEW* 21-22 (1974) (explaining that social structures are maintained not just by control over individual acts, “but also, most importantly, by the socially structured and culturally patterned behavior of groups, and practices of institutions, which may indeed be manifested in individuals’ inaction”).

<sup>75</sup> *E.g.*, Aaron K. Martin et al., *Understanding Resistance to Digital Surveillance: Towards a Multi-Disciplinary, Multi-Actor Framework*, 6 *SURVEILLANCE & SOC'Y* 213, 216 (2009).

<sup>76</sup> COHEN, *supra* note 11, at 129-30; *see also id.* at 140 (“Like identities, places are dynamic and relational; they are constructed over time through everyday practice.”).

<sup>77</sup> *See id.* at 141 (“Transparency alters the parameters of evolving subjectivity by imposing normalizing categories and distinctions; exposure alters the capacity of places to function as contexts within which identity is developed and performed.”). While Julie Cohen’s dismantling of networked surveillance is crucial, she seems to stop short of analyzing the implications of her critique for resistance efforts. In fact, at times, she appears skeptical of efforts to resist the normalizing and retarding effects of surveillance (efforts she calls “self-defense”) because, according to Cohen, they occur at the individual level and a collective response is needed. Julie E. Cohen, *Privacy, Visibility, Transparency, and Exposure*, 75 *U. CHI. L. REV.* 181, 199-201 (2008). Although I agree that collective responses are desirable, it is not clear to me why acts of performative privacy cannot be group based. But more significantly, the back-and-forth development/dialogue between social structures and individual play (that Cohen helps identify) is precisely why efforts to performatively resist can have such an impact — the efforts can help shape norms, expectations, and laws. *See* David J. Phillips, *From Privacy to Visibility*, 23 *SOC. TEXT* 95, 95 (2005) (“The ability to present the self [and, I would add, conceal the self], and to make moral claims about how one is to be perceived and acted toward, is a fundamental mechanism for structuring social relations and for asserting social power.”).

Into this (in some ways self-inflicted) Panopticon step efforts to maintain privacy while in public. I argue that such efforts are often a form of performative, expressive resistance to the surveillance regimes — that they communicate and signal opprobrium of surveillance, shine a critical spotlight on that surveillance,<sup>78</sup> and by so doing, offer a reimagined place for privacy in our social structures.<sup>79</sup> As with acts of public assembly, “some matter of political significance is being enacted and conveyed” by functional efforts to maintain (or take back) privacy.<sup>80</sup> Performative privacy as a dimension of public privacy has the potential to subvert the reality that a surveilled individual “is the object of information, never a subject in communication.”<sup>81</sup> The concept of performative privacy highlights that by mitigating the surveillance, one can be transformed from object into communicator.<sup>82</sup>

In the next subpart, I analyze several efforts to maintain privacy in order to demonstrate that the theory of performative privacy is descriptively accurate — that is, that it is more just a theory, but a lived reality. In the final Part, I outline the various implications for this Article’s theory of performative privacy.

### B. *Performative Privacy in Practice*

Even before Edward Snowden revealed details regarding the National Security Agency’s efforts to surveil the American public through sophisticated metadata programs, the extent to which our every digital and physical fingerprint was observed, recorded,

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<sup>78</sup> Because “power functions more effectively the less visible it is,” acts of performative privacy draw out exercises of state power from behind their cameras and force the use of more direct forms of power, thereby exposing power structures. HOY, *supra* note 65, at 83.

<sup>79</sup> Cf. SCOTT, DOMINATION, *supra* note 51, at 196 (“So long as the elite treat such assaults on their dignity as tantamount to open rebellion, symbolic defiance and rebellion do amount to the same thing.”); MCGRATH, *supra* note 60, at 218-19 (arguing that surveillance performance critiques help us comprehend responses to surveilled space).

<sup>80</sup> See BUTLER, ASSEMBLY, *supra* note, 66, at 22.

<sup>81</sup> See MICHEL FOUCAULT, DISCIPLINE AND PUNISH 200 (Alan Sheridan trans., 1977); cf. Mimi Thi Nguyen, *The Hoodie as Sign, Screen, Expectation, and Force*, 40 SIGNS 791, 813 (2015) (“To be an object is to be determined by another . . .”).

<sup>82</sup> As Hille Koskela has explained, “[s]pace can feel oppressive: ‘like an enemy itself,’ but reclaiming space can — at the same time — be the precondition of emancipation.” Hille Koskela, *The Gaze Without Eyes: Video-Surveillance and the Changing Nature of Urban Space*, 24 PROGRESS HUM. GEOGRAPHY 243, 259 (2000) (citation omitted). Performative privacy embellishes Koskela’s point by underscoring how reclaiming space through efforts to maintain privacy is directly emancipatory, directly expressive, and not merely a precondition for freedom.



aggregated, and scrutinized was relatively well-documented.<sup>83</sup> Indeed, the use of surveillance as a tool for social control is quite old.<sup>84</sup> In the face of that surveillance, individuals and groups have attempted to obscure their identities and activities in public.<sup>85</sup>

Other scholars, such as Elizabeth Joh, John Gilliom, and Ryan Calo have documented some of the ways in which individuals resist surveillance in diverse contexts, and begun to investigate the importance of these acts.<sup>86</sup> As Joh has explained, efforts to obscure are often not a means of hiding criminal activity (frequently there is no criminal activity), but instead merely an effort to express protest — to communicate to the state that they could not and should not observe.<sup>87</sup> However, for Joh, the value of privacy protests appears limited to (1) highlighting whether a particular form of surveillance is necessary and (2) demonstrating shifting privacy norms; that is, that

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<sup>83</sup> See, e.g., NOMOS XIII: PRIVACY vii (J. Roland Pennock & John W. Chapman eds., 1971) (“The products of modern technology and some of the direct and indirect effects of mass society combine to enhance [privacy’s] scarcity value.”); Froomkin, *supra* note 2, at 1468-501 (cataloguing privacy-invading technologies); Strandburg, *Home, Home on the Web*, *supra* note 20, at 626 (arguing that technology threatens privacy by enhancing the methods for invading traditionally private areas, and by creating more opportunities for intrusion through “technology-mediated social” interactions); cf. HARCOURT, *supra* note 73, at 7 (arguing that social media has become a surveillance dragnet).

<sup>84</sup> See, e.g., FOUCAULT, *supra* note 81, at 200-01 (observing the ways in which the state disciplines and controls populations through surveillance).

<sup>85</sup> See, e.g., GILLIOM, *supra* note 55, at 6 (documenting how those receiving welfare and subject to its surveillance “build a critique of surveillance that is based in the realities and demands of everyday life”); Gilliom, *Struggling with Surveillance*, *supra* note 68, at 113 (observing that there is “a widespread pattern of unconventional politics through which ordinary people can express and mobilize their opposition to surveillance policies while at the same time achieving short-term gains that are important in their daily lives” and listing as examples obscuring one’s license plate with mud and using false names for supermarket frequent shopper programs); Virginia Eubanks, *Want to Predict the Future of Surveillance? Ask Poor Communities*, AM. PROSPECT (Jan. 15, 2014), <http://prospect.org/article/want-predict-future-surveillance-ask-poor-communities> (“Resistance to surveillance is as common as surveillance itself.”).

<sup>86</sup> See GILLIOM, *supra* note 55, at 6; Ryan Calo, *Can Americans Resist Surveillance?*, 83 U. CHI. L. REV. 23, 30-31 (2016); Elizabeth E. Joh, *Privacy Protests: Surveillance Evasion and Fourth Amendment Suspicion*, 55 ARIZ. L. REV. 997, 1000-02 (2013); see also Finn Brunton & Helen Nissenbaum, *Vernacular Resistance to Data Collection and Analysis: A Political Theory of Obfuscation*, FIRST MONDAY (May 2, 2011), <http://www.firstmonday.org/ojs/index.php/fm/article/view/3493/2955> (documenting the practice of obfuscation as a form of resistance against data collection whereby individuals deliberately create false data to confuse or delay data collectors).

<sup>87</sup> Joh, *supra* note 86, at 1002.

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people do expect privacy.<sup>88</sup> Joh's focus appears limited to the Fourth Amendment, and she downplays any First Amendment role in protecting privacy protests.<sup>89</sup>

Here, I add to existing discussions regarding surveillance resistance not only by identifying and connecting additional examples of such resistance, but more importantly by situating these examples within performative, post-structural theory, which, in turn, helps uncover privacy's expressive dimension. In other words, part of my contribution is in demonstrating that there is expressive power in maintaining one's anonymity or privacy against an ever-watching surveillance regime, and highlighting the social impact of those privacy performances.

Examples of such performative privacy are not uncommon and I explore four of them in detail. These real world examples buttress the theoretical account provided in the preceding Section, and vice versa. Importantly, these examples do not necessarily illustrate performative privacy in exactly the same ways. That is, there are variations in how functional demands for privacy serve as acts of performative expression. But rather than detracting from this Article's theory of performative privacy, the subtle differences in the way performative privacy operates in the context of hoodies, cyber masks, gender expression, and head veils helps highlight the concept's potency and potential breadth.

Nor am I suggesting that all people who engage in functional efforts to maintain public privacy are enacting an expressive message at all times. People can seek privacy for lots of reasons. But this Article's purpose is to show how those functional acts are frequently expressive.

### 1. Hoodies

The hoodie has evolved from a functional apparel item to an iconic symbol of resistance that simultaneously obscures one's unique identity. The hoodie, by providing a level of privacy while in public, is increasingly worn as an expression of resistance against the

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<sup>88</sup> *Id.* at 1022-23.

<sup>89</sup> *Id.* at 1005 n.38; *see id.* at 1023. Similarly, while Ryan Calo has noted the importance of citizen resistance to surveillance, he does not appear sanguine about the prospect of legal protections for that resistance. Calo, *supra* note 86, at 36-39. Nor does Gilliom meaningfully explore doctrinal protections for the resistance he so importantly documents. *See* GILLIOM, *supra* note 55, at 6-7.

government. A brief history helps illustrate the hoodie's expressive pedigree and current performative role.<sup>90</sup>

In the 1970s, the hoodie was worn by graffiti artists to help them “keep a low profile” while engaged in graffiti.<sup>91</sup> The hoodie was subsequently adopted by hip-hop, skate, and punk cultures — cultures that shared perhaps reciprocal antipathy with mainstream society. As such, “the hoodie was further interwoven with a culture of defiance.”<sup>92</sup> As this history suggests, the hoodie has often been worn by individuals engaged in expressive mediums (e.g., graffiti, music).<sup>93</sup>

Over time, the hoodie's ability to cloak individuals became expressive in and of itself as a sign of resistance. As author and poet Jarrett Neal articulated in his collection *What Color is Your Hoodie*, “[a]t various times in our lives we all cloak ourselves in the same metaphorical hoodie whether the forces of our inequitable society impose it upon us or we conceal ourselves in it of our own free will, *an act of rebellion* or survival.”<sup>94</sup> In addition to this descriptive

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<sup>90</sup> As noted, this is not to say everyone who wears a hoodie is engaged in an act of expressive resistance. People wear hoodies for myriad reasons (warmth, comfort, etc.). But the hoodie is sometimes worn as a form of surveillance resistance. And even in instances where not worn for that purpose, it may be *understood* by the state and other surveilling actors as a form of resistance — highlighting its expressive role and, as will be outlined in Part III, the arguable invalidity of attempts to target, strip, and criminalize efforts to conceal oneself in public. See ALISON KINNEY, HOOD 7 (2016) (explaining that everyone wears hoods, but hoods nonetheless provoke responses, including legislative responses). More broadly, as surveillance scholar Kirstie Ball has observed, particularly in a world of big data, individuals may not be fully conscious of interacting with particular surveillance practices and, yet, their information is gathered and their bodies are read. Ball, *supra* note 72, at 67; cf. MCGRATH, *supra* note 60, at 100 (explaining that certain people may be unaware of the perlocutionary or performative effects of an act, does not negate those performative effects). As such (and important for the First Amendment analysis), the valence of a specific intent to express resistance at a particular point seems diminished. An internalized or routinized form of resistance may be more effective, and speak more loudly, than any self-conscious effort. Cf. HOY, *supra* note 65, at 10-11 (explaining that for many critical theorists, “although resistance should not be blind, agents need not know explicitly all their reasons and principles in advance”).

<sup>91</sup> Denis Wilson, *The History of the Hoodie*, ROLLING STONE (Apr. 3, 2012), <http://www.rollingstone.com/culture/news/the-history-of-the-hoodie-20120403>.

<sup>92</sup> *Id.*

<sup>93</sup> Cf. *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989) (“Music is one of the oldest forms of human expression.”); Margaret L. Mettler, Note, *Graffiti Museum: A First Amendment Argument for Protecting Uncommissioned Art on Private Property*, 111 MICH. L. REV. 249, 249-51 (2012) (documenting graffiti's expressive function).

<sup>94</sup> JARRETT NEAL, *WHAT COLOR IS YOUR HOODIE?* 163 (2015). Neal goes on to describe how a hoodie can signify the “halo of an avenging angel,” the “cape of a superhero,” or the “mythic cloak of invisibility.” *Id.* at 165. Similarly, in his recent

account, an empirical study of students at three British schools revealed that some students would actively resist CCTV surveillance cameras by putting up their hoods to avoid detection.<sup>95</sup>

And it is in part because the hoodie is a functional and yet expressive form of resistance to surveillance, adopted by multiple iconoclastic groups, that the hoodie is viewed with suspicion by state actors and others in positions of authority. Devon Carbado and Mitu Gulati have explained that, “as a matter of both socialization and formal or informal political advice, African Americans are encouraged to signal cooperation by giving up their privacy” when confronted by law enforcement.<sup>96</sup> The hoodie can signal, particularly for black communities who are disproportionately targeted for state surveillance, a lack of cooperation with surveillance efforts and the assertion of control and privacy over one’s identity and body.<sup>97</sup> Indeed, some have suggested that it was Trayvon Martin’s hoodie (coupled with his race) that prompted George Zimmerman to become suspicious of, and ultimately kill, the young, unarmed teenager.<sup>98</sup> This is not to say that race played no role in Martin’s killing or violence against black individuals — just the opposite.<sup>99</sup> Rather, it is to suggest that it is in part because black bodies are disproportionately subjected to surveillance and structural oppression that the wearing of a hoodie shielding those bodies can take on an hyper-expressive tenor — one of refusal to be surveilled.<sup>100</sup>

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book, Ta-Nehisi Coates tells the story of how the mother of a black boy killed by the police extolled Coates’s son that “You matter. You have value. You have every right to wear your hoodie, to play your music as loud as you want. You have every right to be you. And no one should deter you from being you.” COATES, *supra* note 69, at 113.

<sup>95</sup> Michael McCahill & Rachel Finn, *The Social Impact of Surveillance in Three UK Schools: ‘Angels’, ‘Devils’ and ‘Teen Mums’*, 7 SURVEILLANCE & SOC’Y 273, 283-84 (2010); see also HARCOURT, *supra* note 73, at 278 (discussing the McCahill & Finn findings).

<sup>96</sup> CARBADO & GULATI, *supra* note 62, at 102.

<sup>97</sup> Cf. *id.* at 102-03.

<sup>98</sup> See, e.g., COATES, *supra* note 69, at 130 (explaining that dominant discourse suggested that “Trayvon Martin’s hoodie got him killed”); Brian Palmer, *When Did Hoodlums Start Wearing Hoods?*, SLATE (Mar. 22, 2012, 6:08 PM), [http://www.slate.com/articles/news\\_and\\_politics/explainer/2012/03/trayvon\\_martin\\_killing\\_when\\_did\\_hoods\\_become\\_associated\\_with\\_illicit\\_activity\\_.html](http://www.slate.com/articles/news_and_politics/explainer/2012/03/trayvon_martin_killing_when_did_hoods_become_associated_with_illicit_activity_.html) (“Martin was wearing a hooded sweatshirt on the night he was killed, and it may have led Zimmerman to describe him as a ‘real suspicious guy’ to a 911 operator.”).

<sup>99</sup> Cf. Camille Gear Rich, *Angela Harris and the Racial Politics of Masculinity: Trayvon Martin, George Zimmerman, and the Dilemmas of Desiring Whiteness*, 102 CALIF. L. REV. 1027, 1047 (2014) (positing that the tragic killing of Martin arose not only from racial dynamics, but out of Zimmerman’s social desire for white, racialized masculinity) [hereinafter *Angela Harris and Racial Politics*].

<sup>100</sup> See Nguyen, *supra* note 81, at 791 (noting that Martin’s friend, Rachel Jeantel,

Ta-Nehisi Coates's contemporary description of the degree to which black bodies are targeted for surveillance and control is the most direct, and among the most powerful: "white America is a syndicate arrayed to protect its exclusive power to dominate and control [black] bodies."<sup>101</sup> Coates's moving account of the violence visited upon black bodies echoes that of James Baldwin and many others.<sup>102</sup> Surveillance — the erosion of public privacy — plays a prominent part in this syndicate.<sup>103</sup> A prime example of the role of surveillance in the toolbox of control over racial minorities is New York City's "stop-and-frisk" program, wherein black and Latino people were targeted on public streets for police questioning, detention, and often body frisks.<sup>104</sup> Put simply, to the extent that the physical bodies of black and Latino people are the targets of abuse and subjugation, the privacy barrier provided by the hoodie can serve the dual role of shielding and

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told Martin to pull up his hoodie because he was being followed); cf. Rashawn Ray, "If Only He Didn't Wear a Hoodie . . ." *Selective Perception and Stereotype Maintenance*, in *GETTING REAL ABOUT RACE* 81, 83-86 (Stephanie M. McClure & Cherise A. Harris eds., 2015) (arguing that to the extent Martin's hoodie motivated Zimmerman, it was because it was associated with his blackness — Zimmerman's primary motivator).

<sup>101</sup> COATES, *supra* note 69, at 42; see also Benjamin Wallace-Wells, *The Hard Truths of Ta-Nehisi Coates*, N.Y. MAG. (July 12, 2015, 9:00 PM), <http://nymag.com/daily/intelligencer/2015/07/ta-nehisi-coates-between-the-world-and-me.html> (describing the vulnerability of black bodies as the "main theme" of Black Lives Matter protests and Coates's writings).

<sup>102</sup> See, e.g., JAMES BALDWIN, *THE FIRE NEXT TIME* 33-34 (1963) (recounting how "[w]hen I was ten, and didn't look, certainly, any older, two policemen amused themselves with me by frisking me, making comic (and terrifying) speculations concerning my ancestry and probable sexual prowess, and for good measure, leaving me flat on my back in one of Harlem's empty lots."); BELL HOOKS, *WE REAL COOL: BLACK MEN AND MASCULINITY* 68 (2004) (lamenting the "ritual[ized] sexualized torture of the black body" throughout American history); see also BILLIE HOLIDAY, *STRANGE FRUIT* (Commodore 1939) ("Here is fruit for the crows to pluck, For the rain to gather, for the wind to suck, For the sun to rot, for the trees to drop, Here is a strange and bitter crop.").

<sup>103</sup> Cf. Erin Murphy, *Paradigms of Restraint*, 57 DUKE L.J. 1321, 1326-27 (2008) (documenting the state's "desire to preventatively regulate" individuals through innovative surveillance technologies, rather than physical restraint). Indeed, the state views the black body itself as expressive and symbolic and targets those bodies for surveillance, and worse. See Coleman, *supra* note 31, at 305 ("The black body has been and continues to be hugely symbolic and representative of disorder for state and corporate servants — just take current stop and search figures as one indicator of this. This body continues to be a site for the enactment of brutalising violence.").

<sup>104</sup> *Floyd v. City of N.Y.*, 959 F. Supp. 2d 540, 556 (S.D.N.Y. 2013) (observing that over 80% of the 4.4 million "stop and frisk" detentions made by NYPD between 2004 and 2012 were of black or Hispanic individuals). The program was ruled unconstitutional because it was being applied in a racially discriminatory manner in violation of the Fourteenth Amendment. *Id.* at 562.

concealing the body from the surveillance regime and communicating resistance to that same regime.<sup>105</sup>

Additional support for this Article's contention that the state views hoodies or other privacy-enhancing clothes as expressive and, from the state's perspective, "intimidating" can be found in the very existence of certain local laws that actually criminalize wearing of a hoodie or mask while in public.<sup>106</sup> For example, Georgia's criminal code provides that "[a] person is guilty of a misdemeanor when [she or] he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property."<sup>107</sup> The state recognizes the hoodie — simply by being worn — as a form of expressive resistance.<sup>108</sup> As Ruthann Robson has noted, "the mask is

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<sup>105</sup> Cf. COATES, *supra* note 69, at 14-17 (documenting how certain apparel items served as "armor" against social structures that rendered the black body "naked" to the world through, for example, stop-and-frisk policies).

<sup>106</sup> See, e.g., MINN. STAT. § 609.735 (2017) ("A person whose identity is concealed by the person in a public place by means of a robe, mask, or other disguise, unless based on religious beliefs, or incidental to amusement, entertainment, protection from weather, or medical treatment, is guilty of a misdemeanor."); N.C. GEN. STAT. § 14-12.7 (2017) ("No person or persons at least 16 years of age shall, while wearing any mask, hood or device whereby the person, face or voice is disguised so as to conceal the identity of the wearer, enter, be or appear upon any lane, walkway, alley, street, road, highway or other public way in this State."); Stephen J. Simoni, Note, "Who Goes There?" — *Proposing a Model Anti-Mask Act*, 61 *FORDHAM L. REV.* 241, 242-43 (1992) (collecting and comparing anti-mask laws which prohibit mere concealment of identity, with those that forbid mask-wearing during the commission of a crime).

<sup>107</sup> GA. CODE ANN. § 16-11-38 (2017). The Georgia statute survived a First Amendment challenge, although the Georgia Supreme Court narrowed the statute to apply only to mask-wearing conduct that "provokes a reasonable apprehension of intimidation, threats or violence." *State v. Miller*, 398 S.E.2d 547, 552 (Ga. 1990). Ironically, several anti-mask laws were originally passed in order to target and criminalize the intimidating conduct of the Ku Klux Klan. Wayne R. Allen, Note, *Klan, Cloth and Constitution: Anti-Mask Laws and the First Amendment*, 25 *GA. L. REV.* 819, 821-27 (1991). The laws have more recently been seemingly used to target racial minorities. See Mark Joseph Stern, *Oklahoma Republican Proposes Bill Banning Hoodies in Public*, *SLATE* (Jan. 12, 2015, 2:53 PM) [hereinafter *Bill Banning Hoodies*], [http://www.slate.com/blogs/the\\_slatest/2015/01/12/hoodie\\_ban\\_oklahoma\\_republican\\_proposes\\_bill\\_to\\_outlaw\\_wearing\\_hoods\\_in.html](http://www.slate.com/blogs/the_slatest/2015/01/12/hoodie_ban_oklahoma_republican_proposes_bill_to_outlaw_wearing_hoods_in.html) (explaining that Oklahoma's proposed hoodie-ban was in response to protests over Trayvon Martin's killing). Other political protestors have been targeted, as well. See Noah Feldman, *The Constitution Has Masked Protestors Covered*, *BLOOMBERG* (Mar. 2, 2017), <https://www.bloomberg.com/view/articles/2017-03-02/the-constitution-has-masked-protestors-covered> (discussing new North Dakota laws targeting masks worn by Dakota Access Pipeline protestors).

<sup>108</sup> See Nguyen, *supra* note 81, at 802 (explaining that "because it hides, camouflages . . . the hoodie (and its racial, colonial sister-other, the hijab) becomes itself a criminal, even legally outlawed in some public places as a mobile border zone,

prohibited because of what it conveys.”<sup>109</sup> Put similarly by Margot Kaminski in her exceptionally thorough analysis of anti-mask laws, the anonymity provided by head and face coverings “is often seen as inherently threatening.”<sup>110</sup> Coverings are viewed by the state and its agents as a threat and criminalized.<sup>111</sup>

As another example, members of the group Anonymous, which works to undermine government surveillance (among other initiatives), often wear Guy Fawkes masks.<sup>112</sup> That the privacy

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obstructing the security powers that wish to see the body-as-information more perfectly”); Stern, *Bill Banning Hoodies*, *supra* note 107 (observing that hoodies function as “symbolic speech” and that the Oklahoma “bill is clearly aiming to hinder the power of such protests by outlawing one of their most powerful symbolic tools: a single piece of clothing”).

<sup>109</sup> RUTHANN ROBSON, *DRESSING CONSTITUTIONALLY: HIERARCHY, SEXUALITY, AND DEMOCRACY FROM OUR HAIRSTYLES TO OUR SHOES* 125 (2013).

<sup>110</sup> Margot Kaminski, *Real Masks and Real Name Policies: Applying Anti-Mask Case Law to Anonymous Online Speech*, 23 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 815, 830 (2013). As Kaminski documents, anti-mask statutes “vary widely in what behavior they criminalize.” *Id.* at 848. And courts have varied in their interpretation and treatment of anti-mask regulations, differing in their determinations of whether wearing a mask in violation of an anti-mask statute constitutes symbolic speech or simply conduct. *Id.* at 854-73. *Compare* *Aryan v. Mackey*, 462 F. Supp. 90, 90-92 (N.D. Tex. 1978) (holding that masks used to protest the Shah of Iran were symbolic speech and had “become a symbol of opposition to” the Shah), and *Knights of the Ku Klux Klan v. Martin Luther King Jr. Worshipers*, 735 F. Supp. 745, 751 (M.D. Tenn. 1990) (“In the context of parades and demonstrations, certain masks and disguises may constitute strong symbolic political expression that is afforded protection by the First Amendment.”), with *Ryan v. Cty. of DuPage*, 45 F.3d 1090, 1095-96 (7th Cir. 1995) (concluding that wearing of anti-filtration mask in courthouse communicates intimidation and, at the same time, that the mask was not symbolic speech). Sometimes the determination seems to hinge on the nature of the mask (i.e., is it worn in a parade, is it a Guy Fawkes mask?). The concept of performative privacy helps highlight how a broader array of masks or hoodies ought to be considered expressive because, even if they are bland, they may express resistance and opposition to the surveillance regime.

<sup>111</sup> *Cf.* NEAL, *supra* note 94, at 163 (arguing that Trayvon Martin’s hoodie “falsely marked him as a thug, a threat” — that is, it was interpreted as expressive by Zimmerman and the power structures he represented). There may be a legitimate law-enforcement purpose for a law seeking to prevent those committing crimes from wearing masks. But often the anti-masks laws are untethered to any legitimate law enforcement purpose — they apply broadly and are not limited to those engaged in wrongdoing. *See, e.g.*, LA. STAT. ANN. § 14:313 (2017).

<sup>112</sup> Euclides Montes, *The V for Vendetta Mask: A Political Sign of the Times*, *GUARDIAN* (Sept. 10, 2011, 9:00 AM), <http://www.theguardian.com/commentisfree/2011/sep/10/v-for-vendetta-mask> (“[T]he [Guy Fawkes] mask offers [Anonymous] at once a political symbol that provides anonymity. And therein lies the symbol’s increasing popularity, imbued with a political aura while simultaneously offering the comfort (and depending on your activities, the safety) of secrecy.”). The expressive

afforded by face coverings can itself express resistance is clear from the fact that several Occupy Wall Street protestors were issued citations for violating New York's anti-mask/hood law in 2011.<sup>113</sup> The government's own response to the masks highlights their inherent expressive content — the government finds the concealment expressive and intimidating and uses its own reaction to the expressive masks to justify stripping individuals of privacy.<sup>114</sup> And the Supreme Court has deemed *ex ante* state determinations that particular expressive conduct is intimidating to be unconstitutional regulation of speech.<sup>115</sup>

Similarly, the empirical study of British school children that documented instances where hoods were worn as an expression of resistance documented other instances where students would take their hoods down specifically because they knew that donning it up would mark them for additional surveillance — the hoodie would be read as expressing resistance.<sup>116</sup>

The expressive power of attempts at physical obfuscation is further highlighted by artistic public privacy endeavors. Principally, artist Adam Harvey has explored and developed methods for avoiding facial recognition software through makeup and hair styles — a project

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power of privacy as a form of resistance is also communicated by the group's name — Anonymous.

<sup>113</sup> Sean Gardiner & Jessica Firger, *Rare Charge is Unmasked*, WALL STREET J., (Sept. 20, 2011), at A17; Ruthann Robson, *Loitering While Masked: The Wall Street Protest Arrests*, CONST. L. PROF. BLOG (Sept. 22, 2011), [http://lawprofessors.typepad.com/conlaw/2011/09/loitering-while-masked-wall\\_street-protests.html](http://lawprofessors.typepad.com/conlaw/2011/09/loitering-while-masked-wall_street-protests.html).

<sup>114</sup> See, e.g., *State v. Berrill*, 474 S.E.2d 508, 514 (W. Va. 1996) (in upholding an anti-mask statute, concluding that “[t]he obvious governmental interest here is the protection of citizens from violence and from the fear and intimidation of being confronted by someone whom they cannot identify”); cf. D.C. CODE § 22-3312.03(a)-(b) (2017) (penalizing wearing of mask “[w]ith the intent to intimidate”); MASS. GEN. LAWS ANN. ch. 268, § 34 (2017) (criminalizing wearing of disguise with intent to “intimidate . . . an officer or other person in the lawful performance of his [or her] duty”).

<sup>115</sup> See *Virginia v. Black*, 538 U.S. 343, 366-67 (2003) (O'Connor, J., plurality opinion) (finding a Virginia statute that declared cross burning prima facie evidence of intent to intimidate unconstitutional because it ignored contextual factors that could render a cross burning non-intimidating).

<sup>116</sup> See McCahill & Finn, *supra* note 95, at 284 (documenting that “one pupil tried not to ‘raise the red flag’ by avoiding walking ‘round wiv my hood up . . . even if it’s raining because they [security guards] look at you real dodgy’, while another said ‘if I’ve got my hood up and I go into a shop, I’ll take it down before’” (citations omitted)); see also CARBADO & GULATI, *supra* note 62, at 18 (suggesting that black individuals may “avoid wearing hoodies” as part of their identity performances in order to avoid increased scrutiny from law enforcement).



called CV Dazzle.<sup>117</sup> The techniques attempt to change the lighting contrast and space between features, disrupting surveillance software's ability to detect a face. Harvey labels CV Dazzle as a form of "expressive interference" — the make-up and hairstyles gain political meaning and texture because they are designed to thwart facial recognition surveillance.<sup>118</sup> In a new, related project, Harvey has designed clothing designed to mimic the patterns that facial recognition technology interprets as a face in order to confuse and subvert the technology.<sup>119</sup> Harvey also created a Camoflash Anti-Paparazzi Clutch, which detects camera flashes and then emits its own high-powered light burst capable of overexposing the sensor of the camera, obscuring the subject of the photo and holder of the Clutch.<sup>120</sup> The Clutch — modeled after a fashion accessory — literally emits an expressive light message that disrupts the attempt to surveil.<sup>121</sup> Harvey has also created a line of hoodies and veils made of fabrics that block the thermal imaging sometimes done by UAVs or drones. He dubbed this apparel "Stealth Wear."<sup>122</sup> To Harvey, the apparel is both functionally privacy-enhancing and symbolic; communicative.<sup>123</sup> It "aims to make a tech statement."<sup>124</sup>

In sum, while Harvey's quite self-conscious projects are more obviously an expressive form of resistance to surveillance, part of this Article's purpose is to illustrate how even quotidian,<sup>125</sup> ordinary forms

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<sup>117</sup> See Adam R. Harvey, *CV Dazzle: Camouflage from Computer Vision*, AH PROJECTS, <https://ahprojects.com/projects/cv-dazzle/> (last visited Feb. 21, 2017).

<sup>118</sup> See Adam Harvey, *How to Hide from Machines*, DIS MAGAZINE, <http://dismagazine.com/dystopia/evolved-lifestyles/8115/anti-surveillance-how-to-hide-from-machines/> (last visited Feb. 3, 2017).

<sup>119</sup> Alex Hern, *Anti-Surveillance Clothing Aims to Hide Wearers from Facial Recognition*, THE GUARDIAN (Jan. 4, 2017, 2:00 AM EST), <https://www.theguardian.com/technology/2017/jan/04/anti-surveillance-clothing-facial-recognition-hyperface>.

<sup>120</sup> See Adam R. Harvey, *Camoflash*, AH PROJECTS, <https://ahprojects.com/projects/camoflash/> (last visited Feb. 21, 2017).

<sup>121</sup> See *id.*

<sup>122</sup> See Adam R. Harvey, *Stealth Wear*, AH PROJECTS, <https://ahprojects.com/projects/stealth-wear/#summary> (last visited Feb. 21, 2017).

<sup>123</sup> See Tim Maly, *Anti-Drone Camouflage: What to Wear in Total Surveillance*, WIRED (Jan. 17, 2013, 3:14 PM), <http://www.wired.com/2013/01/anti-drone-camouflage-apparel/>.

<sup>124</sup> Jenna Wortham, *Stealth Wear Aims to Make a Tech Statement*, N.Y. TIMES (June 29, 2013), <http://www.nytimes.com/2013/06/30/technology/stealth-wear-aims-to-make-a-tech-statement.html>.

<sup>125</sup> See MCGRATH, *supra* note 60, at viii ("While art and theatre work responding to surveillance society can help us exist productively in this world, it is still the banal experience of day-to-day footage and data that defines our encounter with surveillance.").

of functionally maintaining privacy in public spaces are more than just functional — they are often expressive.<sup>126</sup> As outlined above, the government often views the sartorial choice of a hoodie (and masks) as a form of resistance — views it as intimidating because it is interfering with surveillance — and therefore targets such privacy-enhancing efforts with specific criminal sanctions. And, drawing from the post-structural theory outlined in Part II.A., the expressive power of hoodies, masks, and outré forms of physical obfuscation gain additional volume precisely because the surveillance regimes have made privacy and anonymity such a scarce social resource. Purposeful wearing of identity-shielding apparel, and the state's reaction to that apparel, helps reveal the true scope of surveillance, and illuminates a mode of doctrinally-protected expressive opposition.

## 2. Cyber Masks

The physical world is, of course, not the only “public” realm policed and surveilled. The virtual world is also under observation. Perhaps even more so than the physical world. And as with efforts to mask one's physical identity, efforts to maintain online and cellular privacy, anonymity, or obscurity are also often acts of performative privacy intended to express resistance to prevailing surveillance norms. Like hoodies or other physical face coverings, technologies and tactics designed to obfuscate online activity also communicate. What I dub “cyber masks” shield the wearer's identity and activities but also express a particular, outward-facing message.

As noted in Part II.A, the online world is structured such that in order to “live” and participate online, one has to exchange or surrender one's privacy. In opposition to this dominant form of social participation sit those who obfuscate or hide their online movements through sometimes simple and other times elaborate techniques. Finn Brunton and Helen Nissenbaum's recent book, *Obfuscation: A User's Guide for Privacy and Protest*, collects and highlights several of the obfuscation techniques currently being used to avoid online or cellular surveillance.<sup>127</sup> Such tactics include, among many others, TrackMeNot, which is designed to prevent profiling of users based on

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<sup>126</sup> In this way, this Article's identification of widespread, culturally diverse forms of “performative privacy” helps respond to critiques of aestheticized counter surveillance resistance, such as Harvey's, that according to critics does not account for how surveillance's harms are disproportionately felt by marginalized communities. See, e.g., Torin Monahan, *The Right to Hide? Anti-Surveillance Camouflage and the Aestheticization of Resistance*, 12 COMMUN & CRITICAL/CULTURAL STUD. 159, 160-62 (2015).

<sup>127</sup> BRUNTON & NISSENBAUM, *supra* note 74.

their internet search queries by interspersing genuine queries with automated queries, making the individual's authentic activity more difficult for the search engine to discern, profile, and target.<sup>128</sup>

Another relatively prominent internet obfuscation method is the use of Tor relays.<sup>129</sup> At a most basic level, Tor helps conceal internet activity by passing the activity through a series of relays such that when a user accesses a particular web page, the request is not directly linked to the user's IP address but with an exit node.<sup>130</sup> As Brunton and Nissenbaum explain, the "labyrinth of relays" is strengthened by the number of users who volunteer to serve as relays in the chain of obfuscation.<sup>131</sup> Relatedly, danah boyd has documented how teenagers living public, networked lives actively attempt "to achieve [privacy] in spite of structural or social barriers that make it difficult to do so."<sup>132</sup> They do this, in part, through what boyd and Alice Marwick call "social steganography."<sup>133</sup> Aware that their online conversations may be read by adults, teens deploy inside jokes, nicknames, or code words to share information that cannot be understood by surveilling parents or others.<sup>134</sup> In this way, they mask or obfuscate the underlying meaning of their conversations.

Obfuscation techniques such as TrackMeNot, Tor, and their many cousins,<sup>135</sup> certainly serve the purpose of providing some functional level of privacy or obscurity. And they certainly serve as a form of code, enabling communication.<sup>136</sup> But they can serve the dual purpose of "expressing protest."<sup>137</sup> Many obfuscation techniques serve "to

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<sup>128</sup> *Id.* at 13-14.

<sup>129</sup> See *Tor Metrics*, TOR PROJECT, <https://metrics.torproject.org/> (last visited Nov. 28, 2016) (describing Tor as "the largest deployed anonymity network to date" and providing statistics on its scope).

<sup>130</sup> See *Tor: Overview*, TOR PROJECT, <https://www.torproject.org/about/overview.html.en> (last visited Feb. 13, 2016) (explaining that "[t]o create a private network pathway with Tor, the user's software or client incrementally builds a circuit of encrypted connections through relays on the network.").

<sup>131</sup> BRUNTON & NISSENBAUM, *supra* note 74, at 20.

<sup>132</sup> DANAH BOYD, *IT'S COMPLICATED: THE SOCIAL LIVES OF NETWORKED TEENS* 60 (2014).

<sup>133</sup> *Id.* at 65-66.

<sup>134</sup> *Id.*

<sup>135</sup> See Joh, *supra* note 86, at 1000-01 (cataloging surveillance defense mechanisms including encryption, disposable phone numbers, and ad hoc Faraday cages, among others).

<sup>136</sup> See McGRATH, *supra* note 60, at 218-19.

<sup>137</sup> BRUNTON & NISSENBAUM, *supra* note 74, at 4; see also *id.* at 59 ("Obfuscation can serve a function akin to the hidden transcript, concealing dissent and covert speech and providing an opportunity to assert one's sense of autonomy — an act of refusal

register discontent and refusal.”<sup>138</sup> And that discontent is with the structures of surveillance.<sup>139</sup>

As with the physical world, the prevailing structural norm online is that one’s privacy is surrendered or taken (depending on your perspective). The existence of that structural *modus operandi* means that any oppositional effort to maintain privacy within that structure is amplified — the expressive component of cyber masks gains amplification in part because of the prevailing norm of privacy surrender.<sup>140</sup>

The expressive nature of “cyber masks” is brought into relief by the fact that, as with physical hoodies or masks, the government responds to cyber masks with additional scrutiny and surveillance. As the Snowden leaks revealed, “[t]he online anonymity network Tor is a high-priority target for the National Security Agency.”<sup>141</sup> There is also evidence that the NSA tracks anyone who uses an anonymous email service, MixMinion; or employs a privacy enhancing operating system, Tails; and may even target anyone who searches the internet for privacy tools.<sup>142</sup> In the wake of attacks by the Islamic State in Paris in November 2015, law enforcement’s targeting of encryption users has also taken on a more public role.<sup>143</sup> Indeed, there are reports that an

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concealed within a gesture of assent — or can provide more straightforward tools for protest or obscurity.”); Daniel C. Howe, *Surveillance Countermeasures: Expressive Privacy Via Obfuscation*, 4:1 APRJA (2015), <http://www.aprja.net/surveillance-countermeasures-expressive-privacy-via-obfuscation> (explaining that obfuscation tools are “expressive technologies” in that “they exist not only to serve some instrumental function, but always also to amplify social, cultural or political perspectives”).

<sup>138</sup> *Id.* at 90. In fact, according to surveillance studies scholar Torin Monahan, although countersurveillance practitioners may have short term practical goals, “they are foremost engaged in acts of symbolic resistance.” MONAHAN, *supra* note 4, at 130.

<sup>139</sup> See HARCOURT, *supra* note 73, at 270-71 (describing Tor and other encryption and anonymity tools as weapons of resistance used to “fog up that plastic cube in which we are trapped”).

<sup>140</sup> See *supra* Part II.A.

<sup>141</sup> Bruce Schneier, *Attacking Tor: How the NSA Targets Users’ Online Anonymity*, GUARDIAN (Oct. 4, 2013, 10:50 AM EDT), <http://www.theguardian.com/world/2013/oct/04/tor-attacks-nsa-users-online-anonymity>; see also Jason Koebler, *How the NSA (or Anyone Else) Can Crack Tor’s Anonymity*, MOTHERBOARD (Nov. 19, 2014, 7:00 AM EST), <http://motherboard.vice.com/read/how-the-nsa-or-anyone-else-can-crack-tors-anonymity>; cf. Calo, *supra* note 86, at 38 (“If encryption is not usable, or at any rate, if it is not widely used, then those who do use encryption can wind up as targets . . .”).

<sup>142</sup> See Kim Zetter, *The NSA is Targeting Users of Privacy Services, Leaked Code Shows*, WIRED (July 3, 2014 5:45 PM), <https://www.wired.com/2014/07/nsa-targets-users-of-privacy-services/>.

<sup>143</sup> See Haley Sweetland Edwards, *Can Silicon Valley Help Beat ISIS?*, TIME (Nov. 19,

increasing number of government employees are turning to encrypted messaging software, such as Signal or Confide, to protect their conversations and that those in positions of authority understand the use of encryption to be a statement of resistance.<sup>144</sup> More broadly, Gary Marx has described how systems of surveillance and efforts to neutralize that surveillance are, in effect, engaged in a dialectical back and forth — a game of cat and mouse.<sup>145</sup> And that game is an expressive, communicative one.

### 3. Gender Expression

Efforts to obtain equal rights for transgender individuals sometimes involve the twin goals of guaranteeing a right to “gender expression” while at the same time ensuring that transgender individuals have the ability to keep their trans status private, should they see fit.<sup>146</sup> In this

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2015), <http://time.com/4119951/encryption-can-silicon-valley-help/> (noting that national-security officials are increasingly concerned about encryption technologies). To a degree, Apple’s recent stand against being forced to create a back door enabling law enforcement to subvert phone encryption, and the public praise Apple received, also reflects the expressive value of encryption. See Editorial, *Why Apple Is Right to Challenge an Order to Help the F.B.I.*, N.Y. TIMES (Feb. 18, 2016), <http://www.nytimes.com/2016/02/19/opinion/why-apple-is-right-to-challenge-an-order-to-help-the-fbi.html>.

<sup>144</sup> Jeff John Roberts, *Trump’s Press Secretary Targets Messaging Apps in Leak Crackdown*, FORTUNE (Feb. 27, 2017), <http://fortune.com/2017/02/27/spicer-phone-checks/> (discussing Sean Spicer’s “phone check” of staffers and prohibition from using secure messaging apps such as Signal and Confide).

<sup>145</sup> Gary T. Marx, Opinion, *A Tack in the Shoe and Taking Off the Shoe: Neutralization and Counter-Neutralization Dynamics*, 6 SURVEILLANCE & SOC’Y 294, 295-99 (2009); see also DAVID LYON, SURVEILLANCE STUDIES 167-169 (2007) (agreeing with Marx that everyday acts of resistance to surveillance do occur with some frequency).

<sup>146</sup> See, e.g., *Rumble v. Fairview Health Servs.*, No. 14-CV-2037 (SRN/FLN), 2015 U.S. Dist. LEXIS 31591, at \*3 (D. Minn. Mar. 16, 2015) (“Transgender is ‘[a]n umbrella term that may be used to describe people whose gender expression does not conform to cultural norms and/or whose gender identity is different from their sex assigned at birth. Transgender is a self-identity, and some gender nonconforming people do not identify with this term.’” (alteration in original) (quoting TRANS BODIES, TRANS SELVES: A RESOURCE FOR THE TRANSGENDER COMMUNITY 620 (Laura Erickson-Schroth, ed. 2014))). While recent public attention has been brought to the existence and importance of people who are transgender, in discussing transgender rights it is equally important not to ignore identities that do not fit neatly into “new” categories being socially and legally enshrined. See MAGGIE NELSON, THE ARGONAUTS 52-53 (2015) (“‘[T]rans’ may work well enough as a shorthand, but the quickly developing mainstream narrative it evokes (‘born into the wrong body,’ necessitating an orthopedic pilgrimage between two fixed destinations) is useless for some . . . ? [F]or some, ‘transitioning’ may mean leaving one gender entirely behind, while for others . . . it doesn’t?”). Indeed, as Eve Kosofsky Sedgwick observed, “no matter what

way, transgender individuals are often engaged in performative privacy — they express or perform their gender identity which, in turn, may keep aspects of their biology, medical history, and administrative sex classification hidden.<sup>147</sup>

As with racial minorities, surveillance and policing of gender non-conforming people has been extensively documented and affectingly described.<sup>148</sup> The harms of surveillance are particularly acute for those who are both gender non-conforming and racial minorities.<sup>149</sup> Pre-dating the advent of contemporary administrative proposals for policing transgender identities (such as restrictive laws for changing one's gender marker on a birth certificate or banning transgender access to bathrooms comporting with one's gender identity), the state and police have surveilled, criminalized, and harassed transgender individuals.<sup>150</sup> As Eric Stanley puts it, “[t]rans/gender-non-conforming and queer people, along with many others, are born into webs of surveillance.”<sup>151</sup>

Examples of the performative privacy rightfully demanded by transgender individuals can be seen in the context of opposition to laws that forcibly out trans people to potential employers, or laws which out a person's trans status when attempting to use public restrooms.<sup>152</sup> For instance, some jurisdictions require that in order for

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cultural construction, women and men are more like each other than chalk is like cheese.” Eve Kosofsky Sedgwick, *Queer and Now*, in *TENDENCIES* 1, 7 (Eve Kosofsky Sedgwick ed., 1993).

<sup>147</sup> That gender is performed does not suggest that it is in any way inauthentic.

<sup>148</sup> See, e.g., Wesley Ware, *Rounding Up the Homosexuals: The Impact of Juvenile Court on Queer and Trans/Gender-Non-Conforming Youth*, in *CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX* 77, 78 (Eric A. Stanley & Nat Smith eds., 2011) (documenting the policing of gender and sexuality in juvenile courts and describing one example where a black lesbian was repeatedly arrested anytime the perpetrator was described as a “boyish-looking” girl).

<sup>149</sup> Cf. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 140 (arguing in favor of an intersectional understanding of how people may be multiply-burdened).

<sup>150</sup> See, e.g., Eric A. Stanley, *Fugitive Flesh*, in *CAPTIVE GENDERS: TRANS EMBODIMENT AND THE PRISON INDUSTRIAL COMPLEX* 1, 1 (Eric A. Stanley & Nat Smith eds., 2011) (recounting how in 1969 New York City police would enter clubs, line up and check all gender-non-conforming people to ensure that people “were wearing the legally mandated three pieces of ‘gender appropriate clothing’”).

<sup>151</sup> *Id.* at 7.

<sup>152</sup> For a discussion of how the panoptic architecture of modern lavatories itself exposes gender non-conforming individuals, see SHEILA L. CAVANAGH, *QUEERING BATHROOMS* 81 (2010) (arguing that Canadian and American public restrooms “are voyeuristic spaces functioning to incite wonder and intrigue while maintaining a

an individual to change their gender marker on their birth certificate or driver's license, an individual must first present medical documentation indicating that they have undergone gender confirmation surgery (sometimes referred to as sex reassignment surgery).<sup>153</sup> For the many who are unable or choose not to undergo surgery,<sup>154</sup> such laws publicly out sensitive, intimate information to the public, including potential employers, who note the discord between the person's ID and gender presentation.<sup>155</sup> In response, transgender individuals have argued that they have a right to privacy over their transgender identity and a concomitant right to publicly live consistent with their true gender identity.<sup>156</sup>

Similarly, in a number of states over the last two years, so-called "bathroom bills" or "papers-to-pee" laws have been proposed, and in some instances (e.g., North Carolina), enacted.<sup>157</sup> Certain iterations of

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pretense (however dubious) of privacy").

<sup>153</sup> See, e.g., LA. O.M.V. GENDER CHANGE/REASSIGNMENT POLICY § I 22.01 (2009) (requiring "[a] medical statement signed by a physician stating that the applicant has undergone a successful gender change/reassignment" in order to change the gender marker on a driver's license); Lisa Mottet, *Modernizing State Vital Statistics Statutes and Policies to Ensure Accurate Gender Markers on Birth Certificates: A Good Government Approach to Recognizing the Lives of Transgender People*, 19 MICH. J. GENDER & L. 373, 400-01 (2013) (documenting jurisdictions that require surgery in order to change the gender marker on a birth certificate).

<sup>154</sup> See Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 291 (2013) ("[M]edical transition — particularly genital surgery — is not affordable, necessary, or appropriate for all transgender people.").

<sup>155</sup> DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF THE LAW* 146 (2015) ("Possessing identity documents with incorrect gender markers can identify people as transgender in the hiring process, exposing them to discrimination. People whose identity documents do not match their self-understanding or appearance also face heightened vulnerability in interactions with police and other public officials . . .").

<sup>156</sup> See, e.g., Brief of Appellant at 12, *K.L. v. Alaska*, No. 3AN-11-05431 CI (Alaska Super. Ct., July 19, 2011) (challenging purported surgery requirement for changing gender on Alaska driver's license as a violation of privacy because it both "[r]estrict[s] [plaintiff's] personal autonomy and right to control her appearance" and [f]orc[es] the involuntary disclosure of her sensitive, personal information").

<sup>157</sup> See Scott Skinner-Thompson, *North Carolina Just Lost Some of Its Charm: There's No Way the Governor's Backward Measures Legalizing Discrimination Against LGBT Individuals Can Stand*, SALON (Mar. 25, 2016, 11:57 AM UTC), [http://www.salon.com/2016/03/25/north\\_carolina\\_just\\_lost\\_some\\_of\\_its\\_charm\\_theres\\_no\\_way\\_the\\_governors\\_backward\\_measures\\_legalizing\\_discrimination\\_against\\_lgbtq\\_individuals\\_can\\_stand/](http://www.salon.com/2016/03/25/north_carolina_just_lost_some_of_its_charm_theres_no_way_the_governors_backward_measures_legalizing_discrimination_against_lgbtq_individuals_can_stand/) (critiquing North Carolina's House Bill 2, which excludes transgender individuals from using bathrooms that do not correspond to the sex listed on one's birth certificate); see also Joellen Kralik, "Bathroom Bill" Legislative Tracking, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/education/-bathroom-bill-legislative->

these bills would penalize transgender people for using restrooms inconsistent with the sex they were assigned at birth or inconsistent with an identification document.<sup>158</sup> As outlined above, accurate identification documents may be difficult to obtain because of onerous surgery requirements.<sup>159</sup> Some of the laws that have been proposed would charge owners of public accommodations with enforcement of the laws and punish those proprietors with fines for permitting patrons to use the “wrong” restroom.<sup>160</sup> And a ballot initiative proposed in California would have imposed a \$4,000 fine on any government entity or person who permitted a person to use a restroom inconsistent “with their sex as determined at birth, through medical examination, or court judgment recognizing a change of gender.”<sup>161</sup> In opposition to these draconian laws, transgender rights advocates have pointed out, among other arguments, both how they infringe on

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tracking635951130.aspx (last updated Mar. 13, 2017) (listing currently pending bathroom bills).

<sup>158</sup> See Jana Kasperkevic, ‘Papers to Pee’: Texas, Kentucky and Florida Consider Anti-Transgender Bills, *GUARDIAN* (Mar. 24, 2015, 9:30 PM EDT), <http://www.theguardian.com/society/2015/mar/24/papers-to-pee-texas-kentucky-and-florida-consider-anti-transgender-bills>; Scott Skinner-Thompson, *Anti-Transgender Bathroom Bills Are Unconstitutional*, *SLATE* (Feb. 11, 2016, 12:53 PM), [http://www.slate.com/blogs/outward/2016/02/11/anti\\_transgender\\_bathroom\\_bills\\_are\\_clearly\\_unconstitutional.html](http://www.slate.com/blogs/outward/2016/02/11/anti_transgender_bathroom_bills_are_clearly_unconstitutional.html).

<sup>159</sup> The significance of these bathroom regulations and their role as one of the next battlegrounds for LGBTQ rights prompted one *New York Times* commentator to deem 2015 the “Year of the Toilet.” Jennifer Weiner, Opinion, *The Year of the Toilet*, *N.Y. TIMES* (Dec. 22, 2015), <http://www.nytimes.com/2015/12/23/opinion/the-year-of-the-toilet.html>. But the laws are about much more than toilets; they involve questions about whether society will recognize the existence of transgender lives and permit transgender people to fully participate in public life. See *G.G. v. Gloucester Cty. Sch. Bd.*, No. 16-1733, 2017 U.S. App. LEXIS 6034, at \*3 (4th Cir. Apr. 7, 2017) (“G.G.’s case is about much more than bathrooms. It’s about a boy asking his school to treat him just like any other boy. It’s about protecting the rights of transgender people in public spaces and not forcing them to exist on the margins.”)

<sup>160</sup> See, e.g., H.B. 583, Reg. Sess. (Fla. 2015) (“An owner of public accommodations, a school, or a place of employment who maintains single-sex public facilities and knowingly advertises, promotes, or encourages use of those facilities in violation of subsection (2), or fails to take reasonable remedial measures after learning of such use, is liable in a civil action to any person who is lawfully using those facilities at the time of the unlawful entry for the damages caused by the unlawful entry, together with reasonable attorney fees and costs.”).

<sup>161</sup> Initiative 15-0019, Limits on Use of Facilities in Government Buildings and Businesses (Cal. 2015), <https://oag.ca.gov/initiatives/search?populate=15-0019>. Fortunately, in December 2015, Initiative 15-0019 failed to garner the requisite number of signatures to qualify for the ballot. Steven Nelson, ‘Bathroom Police’ Initiative Fails to Make California Ballot, *U.S. NEWS & WORLD REP.* (Dec. 22, 2015, 12:01 PM), <http://www.usnews.com/news/articles/2015-12-22/bathroom-police-initiative-fails-to-make-california-ballot>.



individuals' ability to publicly live and express their true gender identity and infringe on their privacy.<sup>162</sup>

Relatedly, students who argue that Title IX permits them to participate on sex-segregated athletic teams consistent with their gender identity are literally demanding the ability to perform in public in a way that also permits them to potentially downplay or keep private their sex assigned at birth.<sup>163</sup>

Certainly one could (and should) assert that an individual's right to express and live their gender identity is not necessarily contingent on maintaining an element of privacy over the gender one was assigned on a birth certificate or certain aspects of one's anatomy. And for many gender non-conforming people that is certainly the case, depending on the context. That is, many people are open and rightly proud about their transgender identity and make no qualms or efforts to pass as cisgender.<sup>164</sup> But even for those who are open as to their transgender identity within certain confines, they may well reject forced revelation of those intimate details in other contexts — for example, every time they attempt to use a public restroom.

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<sup>162</sup> See, e.g., First Amended Complaint, *Carcano v. McCrory*, No. 1:16-CV-00236-TDS-JEP (M.D.N.C. April 21, 2016) (asserting constitutional informational privacy claim); STUART BIEGEL, *THE RIGHT TO BE OUT* 190 (2010) (arguing that a student's access to the bathroom corresponding to their gender identity advances "the state's compelling interest in protecting the safety, equality, and privacy of all students"); *Civil Rights Coalition Ready to Launch Education Campaign Following Failed Anti-Transgender Ballot Push*, L.A. LGBT CTR. (Dec. 21, 2015), [http://www.lalgbtcenter.org/civil\\_rights\\_coalition\\_ready\\_to\\_launch\\_education\\_campaign\\_following\\_failed\\_ant\\_i\\_transgender\\_ballot\\_push](http://www.lalgbtcenter.org/civil_rights_coalition_ready_to_launch_education_campaign_following_failed_ant_i_transgender_ballot_push) (quoting Dave Garcia, the Director of Public Policy and Community Building for the Los Angeles LGBT Center as arguing that "[n]o one should fear harassment, interrogation or a lawsuit simply for using the bathroom that corresponds with their gender identity."); *Peeing in Peace: A Resource Guide for Transgender Activists and Allies*, TRANSGENDER L. CTR. (2005), <https://transgenderlawcenter.org/resources/public-accommodations/peeing-in-peace> (last visited Feb. 14, 2017) (emphasizing that sometimes the best strategy for avoiding confrontation or harassment when using the bathroom corresponding to one's gender identity is to try to be as invisible as possible).

<sup>163</sup> See Skinner-Thompson & Turner, *supra* note 154, at 288, 297 (outlining the social benefits of permitting trans students to participate on teams consistent with their gender identity, and explaining how locker room related privacy concerns of both trans and cisgender students can be accommodated); Scott Skinner-Thompson, *The Department of Education's Common-Sense Approach to Transgender Inclusion*, SLATE (Nov. 4, 2015, 10:42 AM), [http://www.slate.com/blogs/outward/2015/11/04/transgender\\_high\\_school\\_students\\_a\\_curtain\\_can\\_make\\_a\\_difference.html](http://www.slate.com/blogs/outward/2015/11/04/transgender_high_school_students_a_curtain_can_make_a_difference.html) (explaining that transgender privacy is part and parcel of ensuring equal participation in school activities).

<sup>164</sup> Someone is cisgender if their self-identity is consistent with the gender they were assigned at birth.

As Ruthann Robson has explained, rightly or wrongly, “[t]he doctrines that develop to elaborate constitutional rights are hierarchal ones: rights of political expression are valued more highly than rights of sexual expression.”<sup>165</sup> Therefore, to the extent that claims for gender expression are framed in terms of the politics of expression and a refusal to be surveilled by the state, they may be on stronger doctrinal and discursive footing, as elaborated more fully in Part III.<sup>166</sup>

In sum, many of the arguments raised by transgender rights advocates sound simultaneously in a right to expression and a right to privacy — they are, in some ways, demanding a right to performative privacy, to be able to express one’s true identity publicly<sup>167</sup> while concealing other, potentially linked aspects of that identity. And the importance of those gender and privacy performances cannot be understated. As Butler explained: “There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very ‘expressions’ that are said to be its results.”<sup>168</sup> As such, understanding the expressive, performative role of functional efforts to maintain privacy (and providing protections for those expressions) is critical to enabling the democratic constitution of privacy and gender norms.

#### 4. Head Veils

Head coverings worn by some Muslim women can also serve as a form of performative privacy. Without question, head coverings can have multiple meanings, including independent religious and cultural significance.<sup>169</sup> Of course, sometimes they are worn for no religious purpose at all.<sup>170</sup> But historically and with renewed vigor, Western

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<sup>165</sup> ROBSON, *supra* note 109, at 2.

<sup>166</sup> *See infra* Part III.

<sup>167</sup> *Cf.* ROBSON, *supra* note 109, at 67 (“Clearly, prohibitions on gender nonconforming sartorial choices implicate both equality and expressive constitutional concerns.”); Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 4-5 (2000) (suggesting that minority identities are often themselves expressive in part because they operate as a form of dissent); Nancy J. Knauer, “Simply So Different”: *The Uniquely Expressive Character of the Openly Gay Individual After Boy Scouts of America v. Dale*, 89 KY. L.J. 997, 1001 (2000-2001) (arguing that because of heteronormative social structures, openly gay individuals’ identity operates as both expressive and politicized).

<sup>168</sup> BUTLER, GENDER TROUBLE, *supra* note 61, at 33.

<sup>169</sup> *See generally* FADWA EL GUINDI, VEIL: MODESTY, PRIVACY AND RESISTANCE (DRESS, BODY, CULTURE) (1999) (extensively documenting the role of the veil across history, different countries and cultures, sexes, and religions).

<sup>170</sup> For an illuminating discussion regarding the meaning of head scarves to both

societies and governments have attempted to force Muslim women to remove their veils. The veils have, in certain contexts, come to serve as an expressive demand for, and claim to, modesty at the same time they functionally provide a degree of privacy/modesty.<sup>171</sup> And this is true with regard to head coverings that leave the face exposed, such as a hijab, or veils that cover the face or the whole body, such as a niqab or burka.<sup>172</sup>

To reiterate, a head veil can be worn for many reasons — many of which have nothing to do with privacy or religion.<sup>173</sup> And, as with hoodies or questions of gender expression, I would hesitate before speculating why a particular individual decided to wear a veil.<sup>174</sup> But for present purposes — for the purposes of discerning the role of performative privacy — it is significant and telling that governments and corporations *react* to the wearing of head veils as if it were an expressive demand for control over one's body. That is, the veil is read and interpreted by surveillance regimes as a form of expressive resistance.<sup>175</sup>

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Muslims and those, such as the French government, who seek to limit their use, see generally JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL* (2007) [hereinafter *POLITICS OF THE VEIL*].

<sup>171</sup> EL GUINDI, *supra* note 169, at xvii (explaining that at the end of the twentieth century, veiling in certain Arab cultures “is largely about identity, largely about privacy – of space and body,” and sometimes “symbolizes an element of power and autonomy and functions as a vehicle for resistance,” but also observing that conceptions of privacy are not consistent across cultures).

<sup>172</sup> The fact that veils may not, in all instances, totally obscure the wearer's identity does not render them meaningless as privacy protections. As with hoodies, body and face coverings still keep aspects of one's identity secret — privacy is not all or nothing. ANITA L. ALLEN, *UNPOPULAR PRIVACY* 47 (2011) (“Clothing can conceal the precise look and contours of a person's body. Clothing can render age, sex, or race invisible. Clothing can be a shelter, a cocoon, an emblem of reserve.”).

<sup>173</sup> See JOHN R. BOWEN, *WHY THE FRENCH DON'T LIKE HEADSCARVES* 70 (2007) (noting that sociologists have “traced the range and variation in motives and meanings attached to scarf-wearing” and that “these studies showed these motives and meanings to be complex, to be quite different from one woman to the next, and to shift over a lifetime”).

<sup>174</sup> *Id.* at 78 (interviewing three women who “objected to efforts by others to attach objective meanings to the voile”); see also Raja El Habti, Dir. Of Research, KARAMA, *THE VEIL CONTROVERSY: INTERNATIONAL PERSPECTIVES ON RELIGION IN PUBLIC LIFE*, Panel at The Brookings Center of the United States and Europe and the Pew Forum on Religion and Public Life (Apr. 19, 2004), <http://www.brookings.edu/~media/events/2004/4/19france/20040419.pdf> (explaining that Muslim women “should have the right to speak for themselves and that we should ask them what this veils means for them, not what it means for us”).

<sup>175</sup> Cf. Amy Adler, *Performance Anxiety: Medusa, Sex and the First Amendment*, 21 *YALE J.L. & HUMAN.* 227, 243-49 (2009) (arguing that Medusa resisted the male gaze

Before turning to American governmental responses to head veils, it is important to discuss the European reaction, which has often been more extreme. For example, in 2004 the French Parliament banned the wearing of head veils in public schools.<sup>176</sup> By its terms, the law targets all “conspicuous” religious symbols, but the focus of the debate surrounding the law was on banning Muslim head veils and scarves.<sup>177</sup> In discussion leading up to the ban, then-President Jacques Chirac said that there was “something aggressive” in a head veil and that “[w]earing a veil, whether we want it or not, is a sort of aggression that is difficult for us to accept.”<sup>178</sup> As with anti-mask laws, head coverings are interpreted by the state as expressing something aggressive. They are read as hostile, in part, because they cut off the ability of the state and dominant society to surveil, to gaze.<sup>179</sup> As Joan Wallach Scott has explained, French cultural imperialism is built in part on the ability “to know one’s subjects” and part of knowing one’s subject involves “‘tear[ing] off the veil which still hides the mores, customs, and ideas’ of Arab society.”<sup>180</sup> Put more bluntly by Scott, the

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with her own deadly stare, expressing herself and casting herself as a gender outlaw).

<sup>176</sup> Loi 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics [Law 2004-228 of March 15, 2004 Governing, Under the Principle of Secularism, the Wearing of Symbols or Clothing Denoting Religious Affiliation in Schools, Colleges and Public High Schools], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], March 17, 2004, p. 5190.

<sup>177</sup> See SCOTT, POLITICS OF THE VEIL, *supra* note 170, at 151-56.

<sup>178</sup> John Henley, *Something Aggressive About Veils, Says Chirac*, GUARDIAN (Dec. 5, 2003, 9:21 PM EST), <http://www.theguardian.com/world/2003/dec/06/france.jonhenley>; see also ALLEN, *supra* note 172, at 53 (recounting an incident where a retired French school teacher ripped the veil off a Muslim woman in a retail store because “wearing the veil is an act of aggression”).

<sup>179</sup> Cf. TIMOTHY MITCHELL, COLONISING EGYPT 33 (1988) (describing the importance of observation and ordering to the colonial enterprise); Sonia Dayan-Herzbrun, *The Issue of the Islamic Headscarf*, in WOMEN, IMMIGRATION AND IDENTITIES IN FRANCE 77 (Jane Freedman & Carrie Tarr eds., 2000) (quoting one Algerian Muslim women as explaining that: “In covering my body, I present myself in such a way that men are only interested in my character and my behavior, in short they consider me as a human being. In freeing myself from the male gaze I affirm my liberty.”); EL GIUNDI, *supra* note 169, at 23 (“The Euro-Christian gaze at Muslim culture . . . has been a gaze of violence, dominance, distortion and belittlement”).

<sup>180</sup> SCOTT, POLITICS OF THE VEIL, *supra* note 170, at 49 (citing Julia Clancy-Smith, *La Femme Arabe: Women and Sexuality in France’s Northern African Empire*, in AMIRA EL AZHARY SONBOL, ed., WOMEN, THE FAMILY, AND DIVORCE LAWS IN ISLAMIC HISTORY 56 (Syracuse, N.Y. Syracuse University Press, 1996).

veil is “an impenetrable membrane, the final barrier to political subjugation.”<sup>181</sup>

Not content with banning head veils in public schools, in 2010 France banned the wearing of full-face veils — including niqabs and burkas — in public places.<sup>182</sup> The French ban was upheld by the European Court of Human Rights in 2014.<sup>183</sup> In justifying the ban, the ECHR specifically relied on the French government’s argument that head veils interfered with people’s ability to “live together” because it limited social interaction.<sup>184</sup> In other words, the court viewed people’s ability to surveil and observe one another in public as a key constitutional value. As Judith Butler has argued, veil restrictions “condition the entrance to the public sphere” on a compulsory disaffiliation with one’s religion and, I would add, a surrender of one’s privacy.<sup>185</sup> Public space, rather than being a place where people are able to come and engage in the market place of ideas on their own terms, is instead a site where they are stripped and exposed to surveillance.<sup>186</sup> In short, while the French government’s motivation for such laws is complex, touching on issues of race, religion, immigration, and sexuality, the laws are part of a history of attempting to surveil and observe Muslim bodies.

But France is not alone in its efforts to surveil Muslim communities generally, nor in its attempts to force women to remove their head coverings specifically.<sup>187</sup> The veil has also been targeted in the United

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<sup>181</sup> *Id.* at 67. The reality of the gendered surveillance gaze is amplified by the fact that though certain surveillance regimes, such as CCTV cameras, are sometimes justified as a means of protecting women from harassment, surveillance cameras can just as plausibly serve as a means of harassment by peeping toms. See Hille Koskela, *Video Surveillance, Gender, and the Safety of Public Urban Space: “Peeping Tom” Goes High Tech?*, 23 *URB. GEOGRAPHY*, 257, 264 (2002).

<sup>182</sup> See Loi 2010-1192 du 10 Octobre 2010 interdisant la dissimulation du visage dans l’espace public [Law 2010-1192 of October 10, 2010 on prohibiting concealment of the face in the public space], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], Oct. 7, 2010.

<sup>183</sup> *S.A.S. v. France*, App. No. 43835/11, 2 *Eur. Ct. H.R.* 59-60 (2014).

<sup>184</sup> *Id.* at 55.

<sup>185</sup> BUTLER, ASSEMBLY, *supra* note 66, at 82.

<sup>186</sup> EL GIUNDI, *supra* note 169, at 77-82 (explaining how, in certain contexts, Arab conceptions of privacy are relational and public and that the veil can help negotiate boundaries within public space).

<sup>187</sup> Other European countries, such as the Netherlands and Belgium, have also restricted face coverings in public spaces. See Alice Foster, *Where in the World Are the Burka and Niqab Banned?*, *EXPRESS* (Dec. 7, 2016), <http://www.express.co.uk/news/world/652842/Burka-Niqab-Islamic-Face-veil-Ban-UK-Fine-France-Belgium-Netherlands-Europe-Muslim-dress>.

States, albeit to a lesser degree.<sup>188</sup> For example, law enforcement agencies such as the New York Police Department have created specific initiatives targeting Muslim communities for surveillance.<sup>189</sup> The legality of such programs is currently being challenged in federal court.<sup>190</sup> These programs have had a specific effect on those who would otherwise wear a head or full-body covering. A report co-led by three non-governmental organizations documented how the NYPD's surveillance program was causing Muslim individuals to avoid wearing clothes, including head coverings, that might identify them as Muslim out of fear that such clothing would draw law enforcement suspicion.<sup>191</sup> Such fear is no surprise given that a 2007 NYPD report on its theory of Muslim radicalization suggested that one "typical signature" of radicalization was the wearing of traditional Islamic clothing.<sup>192</sup> The NYPD has viewed head coverings as expressing something dangerous, and has responded to that expression with additional surveillance and targeting by law enforcement.

Of course, there may also be discriminatory racial and religious motivations for such laws. But part of what colors Western society's view that head veils are rhetorically aggressive is that it prevents the state and its agents from observing and surveilling Muslim women's

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<sup>188</sup> Cf. Yvonne Yazbeck Haddad, *The Post 9/11 "Hijab" as Icon*, 68 SOC. OF RELIGION 253, 263 (2007) (explaining that "in an America traumatized by 9/11, many Americans began to identify the *hijab* as the standard of the enemy").

<sup>189</sup> *Hassan v. City of N.Y.*, 804 F.3d 277, 285 (3d Cir. 2015) (outlining alleged scope of NYPD's Muslim surveillance program, which includes video monitoring mosques and those who enter and exit those mosques and embedding undercover officers in Muslim community organizations, among other tactics).

<sup>190</sup> See *id.*; see also Matthew A. Wasserman, Note, *First Amendment Limitations on Police Surveillance: The Case of the Muslim Surveillance Program*, 90 N.Y.U. L. REV. 1786, 1821-23 (2015) (arguing that the surveillance program chills expressive behavior in violation of the First Amendment).

<sup>191</sup> MUSLIM AM. CIVIL LIBERTIES COAL. ET AL., MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON MUSLIM AMERICANS 15-16 (2013) ("Almost all our interviewees noted that appearing Muslim, or appearing to be a certain type of Muslim, invites unwanted attention or surveillance from law enforcement. Outward displays of Muslim identity could include the choice to wear the hijab (headscarf), the *niqab* (full covering), grow a beard, or dress in certain kinds of traditional or Islamic clothing. That surveillance should focus on such details results from the NYPD's radicalization theory, which posits that decisions about dress or appearance are no longer just signifiers of personal, religious choices or cultural identities but rather serve as indicators of 'dangerousness.'").

<sup>192</sup> MITCHELL D. SILBER & ARVIN BHATT, NYPD INTELLIGENCE DIVISION, RADICALIZATION IN THE WEST: THE HOMEGROWN THREAT 31 (2007), [http://sethgodin.typepad.com/seths\\_blog/files/NYPD\\_Report-Radicalization\\_in\\_the\\_West.pdf](http://sethgodin.typepad.com/seths_blog/files/NYPD_Report-Radicalization_in_the_West.pdf).

bodies.<sup>193</sup> Indeed, in the aftermath of the attacks by members/sympathizers of the Islamic State in Paris and San Bernardino in the fall of 2015, there was an uptick in targeting of women wearing head veils in the United States<sup>194</sup> — even when the veils were being worn by people out of sympathy with Muslim women rather than any independent personal conviction.<sup>195</sup>

One may be inclined to believe that America's protections for religious freedom are enough to provide Muslims with the legal rights they need to wear a head covering, and that conceptualizing head veils as acts of performative privacy is redundant. That would be a mistake. The U.S. Constitution and statutory protections such as Title VII of the Civil Rights Act and Religious Freedom Restoration Acts extend formal protections for religious free exercise.<sup>196</sup> But, in practice, those purported safeguards fail to fully protect Muslim individuals' ability to wear religious apparel or fully embrace Muslim grooming requirements. For example, in *Equal Employment Opportunity Commission v. GEO Group Inc.*, the Third Circuit Court of Appeals held that a private company that ran a Pennsylvania correctional facility was entitled to summary judgment in a claim by a class of female Muslim employees notwithstanding that the company refused to allow the women to wear head coverings, called khimars, to work.<sup>197</sup> While the employer purported to ban head coverings of all kinds, including hats, for security and contraband purposes, evidence suggested that the policy was inconsistently applied and that certain hats were, in fact, permitted notwithstanding security concerns.<sup>198</sup> The safety rationale was further undermined by evidence suggesting that

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<sup>193</sup> See SCOTT, *POLITICS OF THE VEIL*, *supra* note 170, at 49.

<sup>194</sup> Eric Lichtblau, *Crimes Against Muslim Americans and Mosques Rise Sharply*, N.Y. TIMES (Dec. 17, 2015), <http://www.nytimes.com/2015/12/18/us/politics/crimes-against-muslim-americans-and-mosques-rise-sharply.html> (noting that hate crimes against Muslims, including hijab-wearing students, had tripled in the wake of attacks in Paris and San Bernardino).

<sup>195</sup> See, e.g., Christine Hauser, *Wheaton College Professor Is Put on Leave After Remarks on Islam*, N.Y. TIMES (Dec. 16, 2015), <http://www.nytimes.com/2015/12/17/us/wheaton-college-professor-larycia-hawkins-muslim-scarf.html> (documenting suspension of professor who wore head veil in solidarity with Muslims).

<sup>196</sup> See, e.g., U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”); see also Scott Thompson, *House of Wisdom or a House of Cards? Why Teaching Islam in U.S. Foreign Detention Facilities Violates the Establishment Clause*, 88 NEB. L. REV. 341, 346 (2009) (outlining the religion clause).

<sup>197</sup> *EEOC v. GEO Group, Inc.*, 616 F.3d 265, 277 (3d Cir. 2010).

<sup>198</sup> *Id.* at 286 (Tashima, J., dissenting).

the employer made little effort to enforce the policy until it became aware of a request by an employee to wear her khimar.<sup>199</sup>

There are several other examples of courts failing to protect women's ability to wear Muslim head coverings notwithstanding the existence of laws protecting religious expression.<sup>200</sup> As Robson has summarized, such cases "belie simplistic [and I would add widespread] assumptions that the First Amendment's religious protections prevent prohibitions of women wearing the hijab or niqab."<sup>201</sup> Instead, the religious protection that ought to be afforded to such head coverings is often subverted in the courts.<sup>202</sup>

There is therefore space for the concept of performative privacy to help advance the doctrinal protections for head veils. To be certain, often legal protections for identity-based claims are only enforced when that claim is coupled or linked with a non-identity-based claim.<sup>203</sup> The recent Supreme Court decisions in *United States v. Windsor*<sup>204</sup> and *Obergefell v. Hodges*<sup>205</sup> help highlight this point. In both cases, the Supreme Court relied on equal protection *and* substantive due process principles to protect the rights of same-sex couples to marry.<sup>206</sup> Thus, in ways similar to hoodies, the state reads

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<sup>199</sup> See *id.* (Tashima, J., dissenting).

<sup>200</sup> See, e.g., *Webb v. City of Phila.*, 562 F.3d 256, 258 (3d Cir. 2009) (affirming grant of summary judgment for defendant City of Philadelphia notwithstanding its refusal to permit plaintiff employee to wear her Muslim headscarf); *United States v. Bd. of Educ.*, 911 F.2d 882, 891 (3d Cir. 1990) (refusal to permit substitute teacher to teach in Muslim full body covering did not violate Title VII); *Muhammad v. Paruk*, 553 F. Supp. 2d 893, 900 (E.D. Mich. 2008) (denying woman relief when she was required to remove face veil in order to testify in her own lawsuit); *Freeman v. Dep't of Highway Safety & Motor Vehicles*, 924 So. 2d 48, 57 (Fla. App. 2006) (Florida's Religious Freedom Restoration Act did not forbid state from requiring Muslim woman to remove face veil for driver's license photo).

<sup>201</sup> ROBSON, *supra* note 109, at 151.

<sup>202</sup> *But see* *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2037 (2015) (denying employer summary judgment in Title VII employment discrimination where employer refused to hire Muslim applicant because her headscarf would violate the employer's dress code).

<sup>203</sup> Cf. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748-50 (2011) (observing that "constitutional equality and liberty claims are often intertwined" and that liberty themes may find broader acceptance with the Supreme Court).

<sup>204</sup> 133 S. Ct. 2675 (2013).

<sup>205</sup> 135 S. Ct. 2584 (2015).

<sup>206</sup> In *Windsor*, the Court also used federalism principles to bolster its holding. See, e.g., Neil S. Siegel, *Federalism as a Way Station: Windsor as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87, 144 (2014) (documenting the use of federalism to as "an enabling device" for the protection of individual rights).



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the veil as an aggressive form of resistance to its surveillance efforts and targets the veil for specific sanction, highlighting the ways in which a veil does, in fact, sometimes serve as a form of performative privacy and expression against those surveillance regimes.

To conclude, post-structural performativity theory suggests that societal structures can imbue certain functional acts with expressive meaning in relation to those social structures. In the context of public privacy, the widespread surveillance regimes now in place help steep individual efforts to maintain privacy with expressive value — the functional wearing of a hoodie, utilization of Tor, or refusal to comply with laws designed to out one’s birth-assigned gender are not normatively neutral acts. They are replete with meaning and often express opposition to the widespread attempts by surveillance regimes to eradicate privacy while in public. As this Part suggested, evidence of performative privacy’s salience comes not just from theory, but also from the state’s reaction to functional efforts to maintain privacy. In the final Part, I discuss the doctrinal and discursive implications for conceiving of efforts to maintain privacy in this way; for understanding acts of public privacy as performative and expressive.

### III. PERFORMATIVE PRIVACY’S POWER

Part III turns to the implications, or payoffs, of a theory of performative privacy. First, identification of performative privacy as a conceptual theory of public privacy may help bring acts of public privacy within the First Amendment’s doctrinal ambit, avoiding current barriers posed by the secrecy paradigm. Second, performative privacy may help redraw the line between public and private, helping positively frame acts of public privacy, and discursively shaping public attitudes towards attempts to obtain privacy in public (and the social controversies that are often closely tied to such attempts).

#### A. Doctrinal Implications

The First Amendment provides robust protections for freedom of expression. That protection extends to what has been dubbed “expressive conduct” and “symbolic speech,” and is not limited to so-called “pure speech.”<sup>207</sup> To be clear, I am not suggesting that all regulation of acts of performative privacy are necessarily content-based and would fail under the First Amendment. My objectives with

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<sup>207</sup> See, e.g., *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989) (holding that flag burning is conduct protected by the First Amendment).

regard to doctrine are more modest — to show that the concept of performative privacy helps us understand how acts of public privacy are expressive and, therefore, how the First Amendment might cover and provide meaningful protection for acts of public privacy.

Generally, the test applied to determine whether government action unconstitutionally infringes on expressive conduct or symbolic speech is the same as that applied to “pure” speech.<sup>208</sup> If the government regulation at issue is content-based (that is, targeted toward a particular subject matter or message), it is subject to strict scrutiny and often found to be unconstitutional.<sup>209</sup> However, as the Court held in *United States v. O’Brien*, the government may impose content-neutral time, place and manner restrictions on expressive conduct so long as those restrictions are narrowly tailored to serve a significant government interest and leave open ample alternative channels for communication.<sup>210</sup>

But more crucial for present purposes is whether acts of performative privacy could satisfy the initial hurdle — that is, whether they could be classified as expressive.<sup>211</sup> An analysis of Supreme Court

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<sup>208</sup> See, e.g., *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.”); Melville B. Nimmer, *The Meaning of Symbolic Speech Under the First Amendment*, 21 UCLA L. REV. 29, 33 (1973) (“Any attempt to disentangle ‘speech’ from conduct which is itself communicative will not withstand analysis. The speech element in symbolic speech is entitled to no lesser (and also no greater) degree of protection than that accorded to so-called pure speech. Indeed, in one sense all speech is symbolic.”).

<sup>209</sup> See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 457-58 (2011) (holding that Westboro Baptist’s political speech outside of a funeral was entitled to “special protection” against content-based tort regulation of that speech); *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (“[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”); *R.A.V.*, 505 U.S. at 382 (“Content-based regulations are presumptively invalid.”).

<sup>210</sup> *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (applying intermediate scrutiny to regulation which had incidental impact on expressive conduct); see also *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); cf. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (noting that if a generally applicable law is directed at an individual because of their expressive conduct, the *O’Brien* intermediate scrutiny standard will not apply).

<sup>211</sup> See *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006) (determining whether the conduct was, in fact, expressive before applying the *O’Brien* level of scrutiny); *Johnson*, 491 U.S. at 403 (noting that the first step is to determine if the conduct is expressive and, if so, then determine whether strict scrutiny or the more relaxed *O’Brien* standard applies); see also Jed Rubenfeld, *The First Amendment’s Purpose*, 53 STAN. L. REV. 767, 772 (2001) (“As the Supreme Court has reemphasized in subsequent cases such as *Texas v. Johnson*, a flag-burning

jurisprudence scrutinizing whether a particular act is expressive conduct — whether it is “speech” — and thus entitled to First Amendment protections, demonstrates that many of the acts of performative privacy outlined above ought to be protected against government incursion by the First Amendment.<sup>212</sup>

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, the Supreme Court articulated in detail the close relationship between conduct that is also communicative and the right to free expression.<sup>213</sup> In that case, the Court considered whether the private organizers of a St. Patrick’s Day parade could be forced by a local non-discrimination ordinance to include a gay, lesbian, and bisexual organization in the parade or whether the forced inclusion violated the parade organizers’ First Amendment rights. The Court analyzed whether the parade, while certainly involving conduct, was also a form of expression. The Court rather easily concluded that parades are “a form of expression, not just motion,” notwithstanding that they involve a large degree of conduct — marching, waving, sign holding.<sup>214</sup> The Court explained that “[t]he protected expression that inheres in a parade is not limited to its banners and songs, however, for the Constitution looks beyond written or spoken words as mediums of expression.”<sup>215</sup> The Court reiterated that “symbolism is a primitive but effective way of communicating ideas.”<sup>216</sup>

Importantly, as others such as Stuart Benjamin have observed,<sup>217</sup> in *Hurley*, the Court defined the kinds of conduct entitled to First Amendment protection expansively, holding that “a narrow,

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decision, the *O’Brien* test is not triggered — indeed no First Amendment scrutiny is triggered — if the defendant was not engaged in ‘expressive conduct.’”).

<sup>212</sup> Again, my purpose here is not to methodically determine whether each of the regulations discussed in Part II is content-based or content-neutral, thereby determining the appropriate level of scrutiny, strict or intermediate. Both forms of scrutiny are relatively robust, requiring either compelling or substantial government interests and narrowly tailored regulations, and are certainly more robust than the weak protections provided by the Fourth Amendment discussed in Part I. Rather, it is to show how acts of performative privacy could be considered expressive conduct, implicating First Amendment scrutiny in the first instance.

<sup>213</sup> See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Bos., Inc.*, 515 U.S. 557, 568-70 (1995).

<sup>214</sup> *Id.* at 568.

<sup>215</sup> *Id.* at 569.

<sup>216</sup> *Id.* (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943)).

<sup>217</sup> See, e.g., Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1464 (2013) (noting that the Supreme Court has, on many occasions, protected communication that does not express a clear viewpoint and that *Hurley* seemed to reject the “particularized message” requirement).

succinctly articulable message is not a condition of constitutional protection” and that the expression need not convey a particularized message.<sup>218</sup> In fact, the Court noted that mere participation in the parade was expressive.<sup>219</sup> By emphasizing that no particularized message need be communicated by the conduct, the *Hurley* opinion seemed to soften the standard articulated in *Spence v. Washington*, where the Court had suggested that affixing a peace symbol to an American flag was protected speech because “[a]n intent to convey a particularized message was present.”<sup>220</sup>

Consistent with its expansive approach to determining whether conduct counts as protected speech, the Court has protected, to varying degrees, cross burning,<sup>221</sup> flag burning,<sup>222</sup> black armbands worn to express a certain view,<sup>223</sup> sit-ins at public libraries,<sup>224</sup> nude dancing and other forms of entertainment,<sup>225</sup> among many other examples.<sup>226</sup> Famously, the Court has also held that the expenditure of

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<sup>218</sup> *Hurley*, 515 U.S. at 569.

<sup>219</sup> *See id.* at 570.

<sup>220</sup> *Spence v. Washington*, 418 U.S. 405, 410-11 (1974); *see also* *Condon v. Wolfe*, 310 Fed. App'x. 807, 819 (6th Cir. 2009) (“The Supreme Court subsequently minimized the ‘particularized message’ requirement.”); *Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (noting that the Supreme Court liberalized the standard and therefore that “in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message.”); *cf.* Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423, 1423 (2014) (suggesting that even speech deemed “nonsense” may be entitled to First Amendment protections).

<sup>221</sup> *See* *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992).

<sup>222</sup> *See* *Texas v. Johnson*, 491 U.S. 397, 405-06 (1989) (holding that the American flag is “[p]regnant with expressive content” and that the government may not “proscribe particular conduct because it has expressive elements”).

<sup>223</sup> *See* *Tinker v. Des Moines Indep. Cty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (holding that wearing of armbands to protest Vietnam War “was closely akin to ‘pure speech’ which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.”).

<sup>224</sup> *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (“As this Court has repeatedly stated, [First Amendment] rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities.”).

<sup>225</sup> *See* *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981); *see also* *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 302 (2000) (O'Connor, J., plurality) (concluding that nude dancing is expressive conduct but that ban on public nudity survived *O'Brien* intermediate scrutiny).

<sup>226</sup> *Cf.* *Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (holding fist in air during pledge of allegiance was expressive conduct and possibly even pure

money in political campaigns, while sometimes containing an element of conduct, is protected First Amendment speech.<sup>227</sup>

Within the specific context of clothing, relevant to multiple examples of performative privacy, “[a]ttire bearing words or symbols is much more likely to meet the expressive threshold necessary to invoke First Amendment protections . . . [but] even unadorned apparel can speak volumes.”<sup>228</sup> And while First Amendment challenges to regulation of people wearing saggy pants for indecent exposure, disorderly conduct, or violation of dress codes have met with mixed results (often because it is not clear if a message is being communicated<sup>229</sup> or that the message is understood<sup>230</sup>), the concept of performative privacy helps give shape and contour to the message conveyed by hoodies, head veils, and the like — a political message of resistance to surveillance.

That is, to the extent the *Spence* “particularized message” requirement does survive *Hurley*, performative privacy helps distinguish hoodies and head veils from other kinds of apparel (such as saggy pants) that have not received consistent First Amendment protection.

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speech); see also ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1063 (3d ed. 2006) (listing several examples of symbolic speech); Genevieve Lakier, *Sport as Speech*, 16 U. PA. J. CONST. L. 1109, 1111 (2014) (arguing that spectator sports are expressive and entitled to First Amendment coverage). But see *Zalewska v. Cty. of Sullivan*, 316 F.3d 314, 320 (2d Cir. 2003) (holding that a woman who wore a skirt when dress code required that she wear pants was not protected by First Amendment because message she sought to convey was not particularized or easily comprehensible by others).

<sup>227</sup> See *Buckley v. Valeo*, 424 U.S. 1, 16 (1976) (“Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two.”); cf. *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

<sup>228</sup> ROBSON, *supra* note 109, at 110; see also Onika K. Williams, Note, *The Suppression of a Saggin’ Expression: Exploring the “Saggy Pants” Style Within a First Amendment Context*, 85 IND. L.J. 1169, 1173 (2010) (explaining that “[b]ecause the saggy-pants style communicates a message of fashionable disobedience . . . wearing saggy pants is an expressive form of conduct through which the style assures individual self-fulfillment in a democratic society, that saggy pants are a form of communication, and that the saggy-pants style satisfies the expressive-conduct test of *Spence v. Washington*”).

<sup>229</sup> ROBSON, *supra* note 109, at 121.

<sup>230</sup> *Bivens ex rel. Green v. Albuquerque Pub. Sch.*, 899 F. Supp. 556, 561 (D.N.M. 1995) (finding “that Plaintiff’s subjective message supposedly conveyed by wearing saggy pants is by no means apparent to those who view it”).

Similarly, with regard to the requirement, also from *Spence*, that the audience be able to “understand” the message,<sup>231</sup> the government does, indeed, understand that efforts to functionally resist surveillance by wearing a hoodie or head veil are expressing a message of resistance to surveillance, deems that particular message as one of resistance or intimidation, and responds with regulation, as outlined in Part II.<sup>232</sup>

Furthermore, acts of performative privacy are unlike the conduct involved in cases such as *Rumsfeld v. Forum for Academic and Institutional Rights*.<sup>233</sup> There, the Supreme Court rejected a First Amendment challenge to the Solomon Amendment, which required educational institutions to permit military recruitment on campus, because the conduct at issue (refusal to permit recruiters) only gained expressive meaning when accompanied by speech.<sup>234</sup> Acts of performative privacy are more intrinsically expressive even when unaccompanied by separate speech because of the context or structures of surveillance. That is, like the wearing of black arm bands in *Tinker v. Des Moines*,<sup>235</sup> which only became expressive in the social context of the Vietnam War, acts of performative privacy are imbued with expression because of the social context of widespread surveillance. In fact, *Spence*, too, emphasizes the importance of “surrounding circumstances” to the determination of whether conduct is understood as expressive.<sup>236</sup> Similarly, as Jocelyn Simonson has artfully explained, “by visibly challenging authority, the action of filming police officers in public is an expression of dissent,” separate and apart from any First Amendment activity the filming may facilitate.<sup>237</sup> It is the “in-the-moment” context of filming police activity or abuse (or, as I argue, demanding privacy) that helps provide that conduct its expressive meaning.

In sum, in the same way that conduct can be audibly silent and yet protected expression, merely because some conduct may involve an aspect of actual, oral communication, does not dictate that the

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<sup>231</sup> See *Spence v. Washington*, 418 U.S. 405, 411 (1974).

<sup>232</sup> See *supra* Part II.B (discussing enforcement of anti-mask laws where hoodies are deemed intimidating).

<sup>233</sup> 547 U.S. 47, 66 (2006).

<sup>234</sup> See *id.*

<sup>235</sup> 393 U.S. 503, 505 (1969).

<sup>236</sup> See *Spence*, 418 U.S. at 411; *cf.* *Virginia v. Black*, 538 U.S. 343, 367 (2003) (O'Connor, J., plurality opinion) (noting the importance of “contextual factors” to determining expressive conduct’s meaning).

<sup>237</sup> Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1573 (2016).

communication is protected by the First Amendment, as explained in *Rumsfeld*.<sup>238</sup> The use of words is not the lynchpin, one way or another, in determining whether the First Amendment applies.<sup>239</sup> Speech is not the *sine qua non* of expression.

That said, reinforcing the view that functional demands for privacy may also be viewed as legally-protected speech — as expressive — is the Supreme Court’s broad view of what types of information, or data, counts as protected expression. There is a growing body of law recognizing that mere transmission of facts, or data, can communicate and that, in certain situations (but not necessarily always), the transmission of data ought to be entitled to First Amendment protections.<sup>240</sup> There is also authority concluding that computer code itself is protected speech.<sup>241</sup> And others have documented authority suggesting that algorithm-based search engine results might also be entitled to First Amendment protection.<sup>242</sup>

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<sup>238</sup> 547 U.S. at 66; see e.g., *Pickup v. Brown*, 740 F.3d 1208, 1229-30 (9th Cir. 2014) (holding that a law banning the provision of gay conversion therapy to minors by state-licensed mental health professionals regulated conduct, not protected speech, even though communication was involved), *cert. denied*, 2014 U.S. LEXIS 4636.

<sup>239</sup> As Erwin Chemerinsky has explained: “To deny First Amendment protection for [symbolic] forms of communication would mean a loss of some of the most effective means of communicative messages. Also, words are obviously symbols, and there is no reason why the First Amendment should be limited to protecting just these symbols to the exclusion of all others.” CHEMERINSKY, *supra* note 226, at 1063; cf. *R.A.V. v. St. Paul*, 505 U.S. 377, 390 (1992) (“Where the government does not target conduct on the basis of its expressive content, acts are not shielded from regulation merely because they express a discriminatory idea or philosophy.”); BUTLER, ASSEMBLY, *supra* note 66, at 18 (“[W]e have to rethink the speech act in order to understand what is made and what is done by certain kinds of bodily enactments: the bodies assembled ‘say’ we are not disposable, even if they stand silently.”); *id.* at 45 (“It cannot be that agency is a specific power of speech, and that the speech act is the model of political action.”).

<sup>240</sup> See Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 58, 70, 90 (2014) (explaining that “[d]ata communicates,” that one fact is often more persuasive than thousands of opinions, and that focusing on the government’s intent or motive for regulating a particular piece of data will shed light on whether the data is entitled to First Amendment protections).

<sup>241</sup> See, e.g., *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 449 (2d Cir. 2001) (concluding that computer code can warrant First Amendment protection).

<sup>242</sup> See Benjamin, *supra* note 217, at 1458-71 (collecting Supreme Court authority suggesting that algorithm-based search engine results were protected speech); cf. *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (concluding that video games are protected by the First Amendment). For a contrasting view as to whether computer-generated communications are entitled to First Amendment coverage, see Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1498 (2013) (arguing that when data is operating merely as a functional communication tool or conduit, as opposed to

Moreover — and particularly relevant to efforts to obfuscate online activity, which sometime involve supplying inaccurate information — the Supreme Court recently suggested in *United States v. Alvarez* that even false speech is entitled to First Amendment protections.<sup>243</sup> In that case, the Supreme Court held that the Stolen Valor Act, which criminalized false claims about having a military medal, was unconstitutional under the First Amendment.<sup>244</sup> The Court specifically rejected the Government’s contention that “false statements generally should constitute a new category of unprotected speech” and, instead, suggested merely that the falsity of a statement could be relevant to the First Amendment analysis if the speech also fell within one of the other, less protected categories of speech.<sup>245</sup>

Acts of performative privacy will often not fall into such categories. As the Court recounted in *Alvarez*, categories of less protected speech include speech inciting imminent lawless action, obscenity, defamation, fighting words, fraud, true threats, and child pornography.<sup>246</sup> And these categories themselves are narrowly defined and subject to certain exceptions, which move the speech into the protected realm.<sup>247</sup> Indeed, even when speech is so generally offensive, such as the speech by Westboro Baptist Church outside the funeral of a fallen Marine, which included signs such as “Thank God for Dead Soldiers,” the expression is entitled to robust First Amendment protections.<sup>248</sup>

Further, while the Supreme Court has noted a broad number of goals served by the First Amendment, it has on multiple occasions emphasized that the First Amendment’s primary goal is the protection of political speech. As recently as 2011, the Court has held that “[t]he

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actually serving to curate content, the data is not “speech” covered by the First Amendment).

<sup>243</sup> See *United States v. Alvarez*, 132 S. Ct. 2537, 2539-40 (2012).

<sup>244</sup> See *id.* at 2543.

<sup>245</sup> *Id.* at 2546-47; see also Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1438 (2015) (documenting when lies may be entitled to First Amendment protection); Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 171-72 (2012) (suggesting that regulation of lies should be limited by First Amendment interests in limiting the government’s ability to serve as the ultimate judge of truth).

<sup>246</sup> See *Alvarez*, 132 S. Ct. at 2544 (collecting authority). For an important critique of whether the diminished protection provided to so-called low-value speech is supported by the First Amendment history, see Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2182-92 (2015).

<sup>247</sup> See *Alvarez*, 132 S. Ct. at 2544.

<sup>248</sup> *Snyder v. Phelps*, 562 U.S. 443, 448, 458 (2011).



Free Speech Clause exists principally to protect discourse on public matters.”<sup>249</sup> As Part II demonstrated, acts of performative privacy are at their heart political in nature — statements of resistance to surveillance structures.

Nor is it irrelevant to any consideration of the scope of protections afforded to performative privacy that the Supreme Court has long protected anonymous speech.<sup>250</sup> Significantly, in *Watchtower Bible & Tract Society of New York v. Village of Stratton*, the Supreme Court held that the First Amendment’s protections for anonymous speech extended to invalidate an ordinance prohibiting canvassers from going onto private property to promote any cause unless they had first received a permit to do so, and the resident had not opted to display a “no solicitation” sign.<sup>251</sup> The Court noted that the registration requirement “necessarily results in a surrender of anonymity” because the canvasser is identified in the application, which in turn is available for public inspection.<sup>252</sup> Notwithstanding the fact that a canvasser known to a resident would “reveal their allegiance to a group or cause when they present themselves at the front door to advocate an issue or to deliver a handbill,” canvassers who were “strangers to the resident certainly maintain their anonymity” absent the registration requirement.<sup>253</sup> The court directly rejected an appeal to infect the First Amendment with the third-party doctrine.<sup>254</sup> It recognized the importance of practical anonymity when engaged in public expression.

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<sup>249</sup> *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 790 (2011); *see also* *Citizens United v. FEC*, 558 U.S. 310, 329 (2010) (characterizing political speech as “central to the meaning and purpose of the First Amendment”); *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (“Political speech, of course, is ‘at the core of what the First Amendment is designed to protect.’” (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003))); *Black*, 538 U.S. at 365 (explaining that conduct, including cross burning, can mean “that the person is engaged in core political speech”).

<sup>250</sup> *See, e.g., McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (“Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.”); *Talley v. California*, 362 U.S. 60, 64 (1960) (overturning statute restricting the distribution of anonymous pamphlets because “[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of [person]kind” and observing that “[p]ersecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all”).

<sup>251</sup> *See Watchtower Bible & Tract Soc’y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 154, 169 (2002).

<sup>252</sup> *Id.* at 166.

<sup>253</sup> *Id.* at 166-67.

<sup>254</sup> *See id.*

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Even upon entering the public realm to advocate a particular idea, the Court held that permitting the canvasser to remain anonymous (to the extent possible) was critical under the First Amendment.<sup>255</sup>

Accordingly, depending on the context in which they arise, many of the acts of performative privacy discussed in Part II may be construed as expressive, political conduct entitled to First Amendment protections. In the context of the living history of state-sanctioned violence against black bodies, wearing a hoodie can be an attempt to maintain public anonymity and a statement of resistance against a surveilling, violent state. In the context of attempts to force trans people to publicly disclose intimate information in order to access public restrooms or participate on public sports teams, demands for privacy by trans people are performative expressions of their true gender identity. In the context of state and corporate efforts to strip Muslim women of their coverings, refusal to do so is not only a statement of religion, but can also serve as a responsive call for privacy/modesty in the face of public gaze. In the context of attempts to identify and intimidate peaceful, lawful protestors, the wearing of masks is an expressive refusal to succumb to the surveillance state.<sup>256</sup> Likewise, in the context of panoptic state and private surveillance of online activity, attempts to obfuscate cyber activity (in effect, donning a “cyber mask”) are also performative privacy acts.<sup>257</sup>

Doctrinally, once these activities are deemed to include expressive conduct they become subject to the First Amendment’s protection, meaning that any attempt by the government to regulate the content of the expression is likely subject to strict scrutiny and any content-neutral time, place, and manner restriction must nevertheless be

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<sup>255</sup> *But see, e.g., Doe v. Reed*, 561 U.S. 186, 194-99 (2010) (recognizing the First Amendment interest in anonymously petitioning the government for a referendum, but concluding, as a general matter, that there is no First Amendment violation where the identity of petition signatories is publicly disclosed because of an overriding government interest in preserving the integrity of the electoral process).

<sup>256</sup> *But see Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 206-07 (2d Cir. 2004) (upholding New York’s anti-mask law against First Amendment challenge and concluding that KKK’s desire to wear masks was not protected expressive conduct because it was “redundant” of the rest of the expression conveyed by the rest of the costume).

<sup>257</sup> One may be concerned that requiring courts to determine whether these acts are entitled to First Amendment protection will require laborious individualized inquiries. And that may be so, but courts are well-accustomed to making such First Amendment inquiries as it stands. Indeed, in the First Amendment context, even appellate courts are charged with examining the whole record and often scrutinize underlying facts as “ultimate” or so-called “constitutional” subject to de novo review. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501, 504-05 (1984).

narrowly tailored and satisfy intermediate scrutiny.<sup>258</sup> This is in contrast to the Fourth Amendment reasonable expectation of privacy inquiry, which often amounts to little more than a balancing test tilted in favor of the government.<sup>259</sup> In *Alvarez*, the Supreme Court reiterated its rejection of a balancing test for First Amendment claims, explaining that “a free-floating test for First Amendment coverage . . . [based on] an ad hoc balancing of relative social costs and benefits” would be “startling and dangerous.”<sup>260</sup>

While case-by-case application of scrutiny is beyond the scope of this Article, many of the laws targeting acts of performative privacy would seem to fail such scrutiny.<sup>261</sup> For example, bathroom bills that limit transgender individuals’ ability to express their gender identity by using the restrooms that correspond to that identity, are often specifically designed to restrict and punish gender expression.<sup>262</sup> Similarly, laws that specifically target hoodies for criminalization could be considered content-based limitations on the ability to express opposition to the state’s surveillance regime and the corresponding structural oppression of racial minorities. Nor is it doctrinally irrelevant, as then-Professor Elena Kagan pointed out,<sup>263</sup> that many of

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<sup>258</sup> See *supra* note 210 (discussing level of scrutiny for First Amendment claims).

<sup>259</sup> See Skinner-Thompson, *Outing*, *supra* note 29, at 196 n.208 (outlining Fourth Amendment balancing test).

<sup>260</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (alteration in original) (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)).

<sup>261</sup> This is not to say that there may never be legitimate government interests for regulating acts of public privacy or that law enforcement will be paralyzed. But instead of the Fourth Amendment’s milquetoast balancing test, those interests should be substantial or compelling. Nor is it to suggest that expressive conduct can never form the basis of reasonable suspicion that a crime has occurred, warranting further police investigation or arrest. People’s words and expression often function as evidence and serve as the basis for reasonable suspicion. But the expression must be suggestive of a crime and, as discussed with regard to *Virginia v. Black*, ex ante criminalization of particular communications is unconstitutional. See *Virginia v. Black*, 538 U.S. 343, 366-67 (2003). And nothing about maintaining one’s privacy — without more — is suggestive of criminal activity. See Joh, *supra* note 86, at 1002.

<sup>262</sup> See *Doe v. Yunits*, No. 00-1060-A, 2000 Mass. Super. LEXIS 491, at \*10 (Oct. 11, 2000) (concluding that a transgender female student’s desire to dress in female clothes was protected expressive conduct likely to be understood by others because “by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender” and that the “plaintiff’s expression is not merely a personal preference but a necessary symbol of her very identity”).

<sup>263</sup> See Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (explaining that First Amendment doctrine “has as its primary, though unstated, object the discovery of

the attempts to regulate acts of performative privacy suggest that the government is itself motivated by an illicit attempt to target a particular message.<sup>264</sup> As the Supreme Court just concluded in *Heffernan v. City of Paterson*, the First Amendment is implicated when the government intends to regulate a particular message, even if the regulated individual intended no such message and was engaged in no speech.<sup>265</sup>

Importantly, the protection provided by the First Amendment is also not limited by the “secrecy paradigm” that would circumscribe arguments that these laws run afoul of traditional privacy protections. *Village of Stratton* makes that very clear.<sup>266</sup> A comparison of how a law infringing on acts of performative privacy might fare under the Fourth Amendment and First Amendment helps illustrate the importance of avoiding the secrecy paradigm or third-party doctrine. For instance, consider a person subject to a bathroom bill requiring that they show their birth certificate to confirm that they were using the bathroom corresponding to their birth-assigned sex. If such a person challenged enforcement of the law under the Fourth Amendment, a court may conclude that because a transgender individual’s identity as trans was partially public (because they had shared that information with friends, or had already been forced to disclose that information by the government in other contexts), the individual therefore has no reasonable expectation of privacy. Conversely, under the First Amendment, individuals’ expressive efforts to resist attempts to surveil aspects of their anatomy when using a restroom would be protected as speech notwithstanding that aspects of their identity might be publicly available and accessible elsewhere.<sup>267</sup>

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improper governmental motives” and that the “doctrine comprises a series of tools to flush out illicit motives and to invalidate actions infected with them”); *see also* Bambauer, *supra* note 240, at 89 (suggesting that focusing on the motive behind state action can help shed light on whether data is subject to First Amendment regulation).

<sup>264</sup> *See supra* Part II.B.

<sup>265</sup> 136 S. Ct. 1412, 1418 (2016).

<sup>266</sup> *See* Watchtower Bible & Tract Soc’y of N.Y. v. Vill. of Stratton, 536 U.S. 150, 166 (2002); *see also* Kaminski, *supra* note 110, at 838 (observing that the Court in *Stratton* acknowledges “that anonymity may be contextual rather than absolute”).

<sup>267</sup> As noted at several points, it is not this Article’s contention that all functional efforts to maintain privacy are necessarily expressive. But that point does not severely limit the doctrinal impact of the concept of performative privacy. Certainly, for those who do intend something expressive, they will likely be covered by the First Amendment. But to the extent that a government regulation is overly broad and regulates expressive and non-expressive conduct, the First Amendment’s overbreadth doctrine may still limit the regulation and provide privacy protections. *See, e.g.,* United States v. Stevens, 559 U.S. 460, 481-82 (2010) (statute criminalizing the

As such, once conceptualized as acts of performative, expressive resistance, attempts to maintain privacy in public may fare better under the First Amendment's protections for expressive conduct than under traditional Fourth Amendment privacy protections,<sup>268</sup> which have been severely hamstrung by doctrines such as the third-party doctrine.<sup>269</sup>

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creation, sale, or purchase of depictions of animal cruelty was overbroad under the First Amendment).

<sup>268</sup> It is worth noting that by embracing the First Amendment as a means of advancing privacy protections, this Article might be accused of contributing to what some, such as Paul Carrington, have dubbed the "imperial First Amendment." See Paul D. Carrington, *Our Imperial First Amendment*, 34 U. RICH. L. REV. 1167, 1209-10 (2001). And to what others have deemed First Amendment Lochnerism, whereby the First Amendment is used to strike down otherwise valid and commonplace government regulations. See generally Howard M. Wasserman, *Bartnicki as Lochner: Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 421, 433, 457 (2006) (outlining purported regulatory risks associated with so-called "First Amendment Lochnerism," but concluding that the phrase cuts off discussion). While sensitive to this concern, my sense is that the concept of performative privacy is much more modest in its formulation of what constitutes protected "speech" than say, for example, cases which identify pure data as speech or corporations as speakers. In short, while wary of an imperial First Amendment, the concept of performative privacy does not dramatically expand doctrine. Instead, performative privacy fits more squarely with traditional notions of expressive conduct, as outlined in this Part.

Relatedly, there may be concern that this Article's structural relationship approach to expression unwittingly buttresses expression-based defenses to LGBT anti-discrimination ordinances by, for example, wedding photographers or florists, who argue that by being forced to participate in gay weddings they are being compelled to express a particular view. But there are important differences. First, it is unclear that taking photographs or baking a cake compels embrace of any message, unlike *Hurley* and *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2010), where groups purportedly dedicated to an expressive association were implicated. See *Elane Photography, LLC v. Willock*, 309 P.3d 53, 65-66 (N.M. 2013) ("The United States Supreme Court has never found a compelled-speech violation arising from the application of antidiscrimination laws to a for-profit public accommodation."). Second, the compelling government interest of ensuring LGBT equality likely outweighs any purported speech interest, even assuming it exists. See Erwin Chemerinsky & Catherine Fisk, *The Expressive Interest of Associations*, 9 WM. & MARY BILL RTS. J. 595, 596 (2001) (arguing that *Dale* was flawed, in part, because it failed to recognize the compelling interest in achieving equality and because it took an overly narrow view of the Scouts' expressive message).

<sup>269</sup> While less direct, the concept of performative privacy also has doctrinal implications for tort law which could be used to limit corporate surveillance. As discussed in Part I.A, tort claims for invasion of privacy against a private corporation are hampered by the secrecy paradigm/third-party doctrine. But to the extent performative privacy helps change societal norms regarding what is reasonably regarded as private, it can increase the sphere of protected space deemed "private" under tort jurisprudence.

### B. Discursive Implications

In addition to providing stronger doctrinal protections for public privacy demands, conceptualizing acts of public privacy as expressive also has the potential to help alter how efforts to maintain public privacy are perceived by American society. I analyze several potential discursive, societal benefits to understanding privacy as performative/ expressive.

#### 1. From Suspicion to Embrace

As it stands, certain privacy-supplementing acts, such as wearing a hoodie, head veil, mask, or demanding gender privacy, are viewed with suspicion. As outlined in Part II.B, there are examples of laws, policies, or bills specifically targeting each of these activities,<sup>270</sup> reflecting at least some level of discomfort with these practices by certain portions of the populace.

But while many view acts of public privacy as suspicious — influenced by the inaccurate adage that those who seek privacy have something to hide<sup>271</sup> — freedom of expression maintains broad and deep support among the American public.<sup>272</sup> In fact, in a 2013 survey, nearly half (47%) of those surveyed identified freedom of speech as the single most important freedom citizens enjoy.<sup>273</sup> The runner-up — freedom of religion — was selected by only 10% of those surveyed.<sup>274</sup> As such, there is reason to believe that if acts of public privacy are

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<sup>270</sup> See, e.g., H.B. 663, 2016 Gen. Assemb. Reg. Sess. (Va. 2016) (“Local school boards shall develop and implement policies that require every school restroom, locker room, or shower room that is designated for use by a specific gender to solely be used by individuals whose anatomical sex matches such gender designation.”).

<sup>271</sup> For example, in 2009, Google CEO Eric Schmidt remarked that “[i]f you have something that you don’t want anyone to know, maybe you shouldn’t be doing it in the first place.” Richard Esguerra, *Google CEO Eric Schmidt Dismisses the Importance of Privacy*, ELECTRONIC FRONTIER FOUND. (Dec. 10, 2009), <https://www EFF.ORG/deeplinks/2009/12/google-ceo-eric-schmidt-dismisses-privacy> (last visited Feb. 17, 2017).

<sup>272</sup> See, e.g., FIRST AMENDMENT CTR., STATE OF THE FIRST AMENDMENT: 2014 (2014), <http://www.firstamendmentcenter.org/madison/wp-content/uploads/2014/06/State-of-the-First-Amendment-2014-report-06-24-14.pdf> (reflecting that relatively consistently since 1997 a large majority of Americans express support for the First Amendment, with most disagreeing that the First Amendment goes too far in protecting rights (though in recent years, the number of those agreeing that the First Amendment goes too far has increased)).

<sup>273</sup> FIRST AMENDMENT CTR., STATE OF THE FIRST AMENDMENT: 2013 2 (2013), <http://www.firstamendmentcenter.org/madison/wp-content/uploads/2013/07/SOFA-2013-final-report.pdf>.

<sup>274</sup> *Id.*

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framed less as defensive efforts for secrecy, and more as affirmative acts of expression, they may be viewed more receptively by American society.

Changing social attitudes towards acts of public privacy may be just as important for providing doctrinal protections for those acts and could go a long way in reducing societal violence against those engaged in acts of public privacy. In other words, if a hoodie is viewed as an exercise of the cherished right to expression rather than a defensive attempt at concealment, law enforcement officials and private individuals alike may hesitate before engaging in violence and aggression against those who wear a hoodie. As a concept, performative privacy could help change the starting point for any conversation regarding public privacy from one of suspicion to one of sympathy or even embrace. As others have explained, “[h]ow we name [a] struggle seems to matter very much, given that sometimes a movement is deemed antidemocratic, even terrorist, and on other occasions or in other contexts, the same movement is understood as a popular effort to realize a more inclusive and substantive democracy.”<sup>275</sup> The same holds true for efforts to maintain privacy. Privacy has been deemed suspicious — but it could be understood as the expressive articulation of a desire to be free.<sup>276</sup>

## 2. From Inward to Outward

Equally important, even when demands for privacy are not viewed as raising a red flag of suspicion and are viewed “positively,” privacy has nevertheless been critiqued as inward-looking, conservative, and potentially self-oppressive. For example, framing women’s abortion rights<sup>277</sup> or rights to contraception<sup>278</sup> as rights to privacy has been critiqued as rhetorically reinforcing Victorian values that relegate women to the private sphere — the home — which, in turn, is often a

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<sup>275</sup> BUTLER, ASSEMBLY, *supra* note 66, at 2.

<sup>276</sup> See COHEN, CONFIGURING THE NETWORKED SELF, *supra* note 11, at 125 (“The way that we talk about privacy shapes our understanding of what it is — and what it is not.”); Woodrow Hartzog, *The Fight to Frame Privacy*, 111 MICH. L. REV. 1021, 1021-26 (2013) (reviewing DANIEL J. SOLOVE, NOTHING TO HIDE: THE FALSE TRADEOFF BETWEEN PRIVACY AND SECURITY (2011) and highlighting that how privacy is framed influences how its viewed by audiences).

<sup>277</sup> E.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973); cf. Scott Skinner-Thompson et al., *Marriage, Abortion, and Coming Out*, 116 COLUM. L. REV. ONLINE 126, 148 (2016) (observing that “respect for women’s reproductive choices, like respect for consensual same-sex sexual relations, is rooted in respect for decisional privacy”).

<sup>278</sup> E.g., *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

site of oppression and even violence against women.<sup>279</sup> Similarly, efforts to advance lesbian and gay rights through a privacy lens<sup>280</sup> have been questioned as suggesting that there is something shameful about non-heteronormative sexual identities.<sup>281</sup> From this perspective, privacy has been criticized as a demand to remain in the “closet.”<sup>282</sup> Broadly speaking, demands for privacy rights often appear inward looking or pre-political.<sup>283</sup> And even those that advance public privacy with reliance on its instrumental benefits feed into the notion that privacy is, in fact, inward looking and pre-political, serving merely as an incubator for later public thought.<sup>284</sup>

Performative privacy alters the conceptual landscape and helps us understand that efforts to maintain privacy — refusals of the surveillance gaze — are in fact outward facing political acts that are public exercises of an individual’s agency.<sup>285</sup> Privacy does not simply

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<sup>279</sup> See, e.g., Catharine A. MacKinnon, *Reflections on Sex Equality Under the Law*, 100 YALE L.J. 1281, 1311 (1991) (“The problem is that while the private has been a refuge for some, it has been a hellhole for others, often at the same time. In gendered light, the law’s privacy is a sphere of sanctified isolation, impunity, and unaccountability.”).

<sup>280</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 564, 567 (2003) (holding a Texas statute forbidding same-sex sexual conduct unconstitutional because adults are free to engage in “private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment”).

<sup>281</sup> See generally Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM L. REV. 1431, 1455 (1992) (suggesting that the problem with privacy as a foundation for lesbian and gay rights is, in part, that the closet is “less a refuge than a prisonhouse” that helps perpetuate heterosexual privilege).

<sup>282</sup> See, e.g., Cathy A. Harris, Note, *Outing Privacy Litigation: Toward a Contextual Strategy for Lesbian and Gay Rights*, 65 GEO. WASH. L. REV. 248, 265 (1997) (arguing that “[t]he implication [of privacy protections for one’s sexuality] is that gay and lesbian sexuality must be shrouded in a secrecy/privacy veil, and that disclosure of one’s aberrant sexuality by a third party is a legal harm that warrants a legal remedy”). But see, e.g., Anita L. Allen, *Privacy Torts: Unreliable Remedies for LGBT Plaintiffs*, 98 CALIF. L. REV. 1711, 1764 (2010) (observing that as long as intolerance against LGBT individuals persists, privacy rights will remain an important protection for non-normative sexualities).

<sup>283</sup> Cf. BUTLER, ASSEMBLY, *supra* note 66, at 206 (questioning whether the fact that the “private sphere becomes the very background of public action” suggests necessarily that it should “for that reason be cast as prepolitical”).

<sup>284</sup> See, e.g., Richards, *Dangers*, *supra* note 51, at 1945-46 (“Intellectual-privacy theory suggests that new ideas often develop best away from the intense scrutiny of public exposure.”).

<sup>285</sup> Cf. Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 308 (2010) (stating that the Fourth Amendment “protects a political ‘right of the people’ to organize community life free from pervasive government surveillance and interference”).



serve as an incubator, creating space for subsequent political expression (though it does do that). It is more than just a passive virtue — it is frequently an exercise and expression of power. Privacy is not *pre*-political — it is political.<sup>286</sup> In this way, the concept of performative privacy can also help turn the First Amendment into a sword for privacy rights; whereas currently the First Amendment is often used to limit regulatory enforcement of privacy under the belief that limiting the exchange of (private) information is limiting the exchange of speech.<sup>287</sup>

When a transgender person refuses to show their “papers” in order to access the bathroom that corresponds with their true gender identity, they are not hiding in the closet, but instead are expressing a political message and living their agency.<sup>288</sup> The same holds true for those who use encryption or wear a hoodie to subvert public surveillance.<sup>289</sup> And this discursive implication — this way of thinking

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<sup>286</sup> Cf. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 783-84 (1989) (arguing that, at least in the abortion context, privacy should be viewed as curtailing the state’s authority to mandate conformity rather than as cabining areas where the government may not restrict our activity). Relatedly, by understanding that privacy demands are outward facing and not merely pre-political, the concept of performative privacy can help destabilize gendered conceptions of privacy as “feminine” and, correspondingly, of “feminine” as inward and passive. Cf. Rich, *supra* note 99, at 1047-49 (noting that police surveillance is understood and socialized as a form of white masculinity and domination).

<sup>287</sup> See, e.g., 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, 1051-52 (2000) (arguing that First Amendment doctrine makes it difficult to stop dissemination of private information and that efforts to change this would have unfortunate consequences); cf. AMY GAJDA, *THE FIRST AMENDMENT BUBBLE: HOW PRIVACY AND PAPARAZZI THREATEN A FREE PRESS* (2015) (making a similar argument with regard to privacy and the freedom of the press).

<sup>288</sup> Significantly, while certain acts of performative privacy may rely on the act of obfuscation being visible, at the same time they refuse the regulatory regime’s power to recognize, or constitute, the actor. Cf. BUTLER, *GENDER TROUBLE*, *supra* note 61, at 4; see also MCGRATH, *supra* note 60, at 77 (while advocating for performance critiques of surveillance, explaining that “we should not fall into the representational trap of equating value with exposure to view”).

<sup>289</sup> To the extent regimes are surveilling for particular purposes — for particular information — overwhelming self-exposure or inundation can also be a form of resistance. Kirstie Ball, *Exposure*, 12 INFO., COMM. & SOC’Y 639, 653 (2009). Similarly, the Surveillance Camera Players, who perform plays critical of surveillance regimes in front of CCTV surveillance cameras, highlight another form of performative resistance to surveillance regime that is based on being seen — not remaining private. See MONAHAN, *supra* note 4, at 137-39 (describing the Surveillance Camera Players and other forms of counter surveillance resistance as publicly challenging institutional agents of surveillance); see also MCGRATH, *supra* note 60, at 208-09 (describing examples of surveillance performance/critique that are based on creatively flaunting

about privacy — may, in turn, have doctrinal effects because it can help both society and the courts better appreciate privacy’s value, the weight of which is historically underappreciated relative to other societal concerns (namely, security).<sup>290</sup>

Relatedly, to the extent that the concept of performative privacy isolates, labels, and identifies certain arguably quotidian tasks as privacy-enhancing, it could help shape where we locate the battle lines between the public and private sphere. As discussed, the state and corporate actors are continually expanding what is deemed “public” and therefore subject to regulation. Expanded surveillance erodes societal expectations of privacy, and expands what is subject to regulation in the public sphere. Consequently, surveilled “public” space is no longer for the people, the body politic — but is instead a space where the state and corporate interests have unchecked control. Conversely, private space is for the individual, and individuals collectively, as a public.

What, then, of performative privacy? Performative privacy helps us understand that efforts are being made to lay claim to purportedly “public” space by refusing to be surveilled, and keeping that space for one’s self. It recognizes that efforts are being made to push back the encroaching front line of the “public” sphere.<sup>291</sup>

This discursive, conceptual implication, too, has a potential legal impact, even assuming no change in the conservative, limited protections provided by the Fourth Amendment. Because Fourth Amendment protections for privacy continue to hinge on where there is an expectation of privacy society is prepared to recognize as “reasonable,”<sup>292</sup> the concept of performative privacy helps us identify

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surveillance). But, in my view, acts of performative privacy are even more powerful than efforts to ape surveillance because performative privacy acts maintain integrity and fidelity to the value they are designed to protect — privacy or anonymity — instead of potentially surrendering one’s identity.

<sup>290</sup> See SOLOVE, *supra* note 14, at 2 (“Privacy often loses out to security when it shouldn’t. Security interests are readily understood, for life and limb are at stake, while privacy rights remain more abstract and vague.”).

<sup>291</sup> Cf. BUTLER, ASSEMBLY, *supra* note 66, at 75 (describing how public occupation efforts “exercise the performative power to lay claim to the public”); see also Scott Skinner-Thompson, *The Right to the Public Square: Hoodies, Head Veils & Bathrooms*, MUFTAH (Mar. 23, 2017), <http://muftah.org/right-public-square-hoodies-head-veils-bathrooms/> (discussing the relationship between public privacy and participatory democracy).

<sup>292</sup> *Katz v. United States*, 389 U.S. 347, 360-61 (1967) (Harlan, J., concurring) (concluding that an individual has a “reasonable expectation of privacy” in an enclosed telephone booth).

certain acts as privacy-enhancing, as laying claim to certain spaces as “private,” and, therefore, reasonably entitled to legal protection.<sup>293</sup>

### 3. From Silos to Universality

Finally, to the degree that performative demands for privacy are made by many marginalized groups including racial, religious, and sexual minorities, as well as socio-economically marginalized people, the concept of performative privacy has the potential to serve as a unifying organizing principle across identity-based movements. This is not to suggest that movements should not continue to foreground how discrimination and surveillance are often motivated by engrained structural animus against minority groups. Nor am I suggesting that performative privacy could serve as a panacea to all the social problems afflicting various minority groups, or that minority groups are the only ones targeted for surveillance. Indeed, as John Gilliom and others have powerfully demonstrated, socio-economically depressed groups, including white working people, are subjected to vast privacy invasions by the government into their homes and personal lives in return for government benefits.<sup>294</sup> And workers of all stripes are subjected to surveillance by their employers.<sup>295</sup> But the range of those impacted by surveillance underscores how the concept of performative privacy may foreground how different marginalized people are all targeted by state and private surveillance regimes (to differing degrees and in differing ways). This, at the very least could help such groups recognize the shared aspects of their struggles and, somewhat more ambitiously, provide a legal/social project around which to collectively organize. As Butler notes, “identity politics fails to furnish a broader conception of what it means, politically, to live together, across differences, sometimes in modes of unchosen proximity.”<sup>296</sup> More particularly, and as an example, Butler has criticized feminists who support the right of transgender individuals to appear in public as they desire, but simultaneously supported

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<sup>293</sup> See Joh, *supra* note 86, at 1023 (arguing that “privacy protests can demonstrate the shifting boundaries of privacy norms”).

<sup>294</sup> See generally GILLIOM, *supra* note 55 (examining welfare surveillance regimes from the perspective of low-income mothers in Appalachia).

<sup>295</sup> See, e.g., Karen E.C. Levy, *The Contexts of Control: Information, Power, and Truck-Driving Work*, 31 THE INFO. SOC'Y 160 (2015) (documenting industry surveillance of blue collar truck drivers).

<sup>296</sup> BUTLER, ASSEMBLY, *supra* note 66, at 27; see also *id.* at 50 (“[T]he struggle to form alliances is paramount, and it involves a plural and performative positing of eligibility where it did not exist before.”).

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restrictions on head veils in the name of secular universalism.<sup>297</sup> And while identity-based claims remain of critical importance, performative privacy helps illustrate a more plural conception of rights, and how they can be exercised.<sup>298</sup>

Further, to the extent that identity-based claims tend (unfortunately) to be viewed skeptically by both American society and the courts,<sup>299</sup> framing issues of targeted surveillance against racial, religious, and sexual minorities in terms of performative privacy and freedom of expression has the potential to provide a more universal and coalescing normative response to these conflicts.

#### CONCLUSION

In response to aggressive surveillance regimes by the government and private sector, many individuals engage in acts of performative privacy — expressive demands for privacy in public that communicate a refusal to be surveilled. Conceptualizing such functional demands for public privacy as expressive acts has doctrinal and social implications. Doctrinally, as expressive conduct, such acts may be entitled to strict First Amendment protections and be given more weight relative to the security concerns that often trump privacy's indirect benefits — benefits that currently dominate theoretical conceptions of public privacy's value. Discursively, linking demands for privacy with the broadly-supported freedom of expression may engender societal acceptance of acts of performative privacy, while also shifting rhetorical norms on the dividing line between public and private. At the same time, to the extent acts of performative privacy traverse many different marginalized communities, the concept has the potential to help us better appreciate the commonality of our struggles against social structures that maintain control, in part, through the surveillance of marginalized bodies.

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<sup>297</sup> See *id.* at 49-50. This critique is, of course, not isolated at any particular group. As Torin Monahan and others have observed, the narrow focus of many groups — including those focused on privacy concerns — has stunted meaningful coalition building. See MONAHAN, *supra* note 4, at 143.

<sup>298</sup> That said, in order to avoid re-enshrining certain identity categories, efforts at coalition politics should be open to “an emerging and unpredictable assemblage of positions,” not assume the content of any particular identity, and leave space for the announcement of distinct identity. BUTLER, *GENDER TROUBLE*, *supra* note 61, at 20.

<sup>299</sup> See Yoshino, *supra* note 203, at 751-55 (noting the pluralism anxiety of American society and courts and the increased skepticism to claims framed in terms of group-based identity politics).