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Recording as Heckling

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A growing body of authority recognizes that citizen recording of police officers and public space is protected by the First Amendment. But the judicial and scholarly momentum behind the emerging "right to record" fails to fully incorporate recording's cost to another important right that also furthers First Amendment principles: the right to privacy.

This Article helps fill that gap by comprehensively analyzing the First Amendment interests of both the right to record and the right to privacy in public while highlighting the role of technology in altering the First Amendment landscape. Recording information can be critical to future speech and, as a form of confrontation to authority, is also a direct method of expression. Likewise, efforts to maintain privacy while navigating public space may create an incubator for thought and future speech, and can also serve as direct, expressive resistance to surveillance regimes.

As this Article explains, once the First Amendment values of both the right to record and the right to privacy are systematically understood, existing doctrine—including the concept of the "heckler's veto"—can help restore balance between these sometimes-competing forms of "speech," permitting citizen recording of police and allowing government regulation of certain recordings that breach the privacy shields of other citizens.

Just as a heckler's suppression of another's free speech justifies government regulation of the heckler's speech, the government may limit the ability to record when recording (a form of speech) infringes on and pierces reasonable efforts to maintain privacy (also a form of expression). The heckling framework underscores the idea that liberated and vibrant public space is contingent on a balance between the ability to gather information and maintain privacy in public, while also providing a doctrinally grounded path for adjudicating those interests.

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INTRODUCTION

Citizen video and audio recording of public officials—police officers, politicians, and other government officers—serves important democratic functions. It creates a record of government action, rendering that action susceptible to critique and helping ensure government accountability.[1] For instance, citizen recording of police officers' excessive use of force against people of color served as a catalyst for public debate regarding embedded racism, catapulting these tragic deaths into the public limelight and engendering scrutiny of police brutality.[2] The role of recordings in spurring large-scale protests and social movements, both in the United States and abroad, further underscores the power of recording to create political change.[3]

Beyond serving a post hoc accountability function, citizen recording also serves as an in-the-moment form of expressive resistance to government officials—communicating a message of critique,[4] influencing official behavior,[5] and reclaiming public space for the people.[6] As both a record of government action enabling future expressive critique and a direct form of expression, citizen recording serves important First Amendment values. It is an indispensable "weapon of the weak" and a critical form of participatory democracy.[7]

For these reasons, courts and scholars have begun to coalesce around recognition that governmental restrictions on recording often clash with the First Amendment.[8]

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1. *See, e.g.*, Sarah Almukhtar et al., *Black Lives Upended by Policing: The Raw Videos Sparking Outrage*, N.Y. TIMES, https://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html?_r=0 (last updated Apr. 19, 2018). Of course, public attention has not always resulted in concrete accountability. *See generally* Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016) (documenting the special procedural protections afforded to police suspects).

2. *See, e.g.*, Nicole Narea, *Protecting the Right to Record Police Brutality*, NEW REPUBLIC (Oct. 7, 2016), https://newrepublic.com/article/137533/protecting-right-record-police-brutality [https://perma.cc/W444-6KL9]. Although attention focuses on police violence against black men, black women are also frequently overlooked victims of police violence, and citizen recording has documented instances of that abuse. *See, e.g.*, KIMBERLÉ WILLIAMS CRENSHAW & ANDREA J. RITCHIE, AFRICAN AM. POLICY FORUM SAY HER NAME: RESISTING POLICE BRUTALITY AGAINST BLACK WOMEN (2015), https://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/555cced8e4b03d4fad3b7ea3/1432145624102/merged_document_2+%281%29.pdf [https://perma.cc/YHA3-P2EX].

3. *See* ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 6–7 (2017) (highlighting the role of cell-phone cameras in amplifying social movements).

4. *See* Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1573 (2016).

5. *See* Fields v. City of Phila., 862 F.3d 353, 360 (3d Cir. 2017) ("[J]ust the act of recording, regardless [of] what is recorded, may improve policing.").

6. *Cf.* Scott Skinner-Thompson, *The Right to the Public Square: Hoodies, Head Veils, & Bathrooms*, MUFTAH (Mar. 23, 2017) (on file with author).

7. *See* JAMES C. SCOTT, WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE 278–84 (1985) (documenting the methods by which marginalized peasant farmers lacking formal means of democratic participation nevertheless engaged in quotidian acts of resistance, preserving some measure of autonomy).

8. *See, e.g.*, *Fields*, 862 F.3d at 360 (holding that the First Amendment protects the public's right to access information about government officials, including video recording of police activity); Am. Civil

But this growing consensus in favor of the emerging First Amendment "right to record" fails to fully incorporate recording's concomitant cost to another weapon of the weak—one that also furthers important First Amendment principles[9]: the right to privacy.[10] If the current lopsided trajectory persists, the largely unencumbered right to record will further weaken privacy-respecting norms and sanction privacy-invading behavior.

Citizen recording, although preferable to state surveillance in the form of police body-worn cameras,[11] has negative implications for the privacy rights of other citizens—including bystanders who may be unwittingly caught up in videos monitoring government officials. A recording can expose people to unwanted publicity and capture them engaging in stigmatized behavior, which may have devastating downstream consequences.[12] Depending on the context, a recording can out someone's sexuality or gender identity to unintended audiences, capture and expose intimate areas of someone's body, and make widely known that a person was engaged in unpopular kinds of political activity.[13] As events on the National Mall from January 2019 underscore, recordings can also be misinterpreted, obscuring more than they reveal.[14]

These privacy threats are exacerbated by advances in technology and the proliferation of recording devices,[15] including smartphone video cameras, wearable cameras, telephoto lenses that permit surreptitious recording from long

Liberties Union v. Alvarez, 679 F.3d 583, 608 (7th Cir. 2012) (striking down an Illinois eavesdropping statute as applied to recording of police); Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) (holding that the arrest of a bystander who recorded police violated the First Amendment).

9. *See* FINN BRUNTON & HELEN NISSENBAUM, OBFUSCATION: A USER'S GUIDE FOR PRIVACY AND PROTEST 55–57 (2015) (detailing how efforts to maintain some marginal form of anonymity can operate as "weapons of the weak," challenging surveillance systems).

10. Others, most notably Margot Kaminski, have attempted to balance the right to record with the right to privacy and have gestured toward how privacy may advance First Amendment values. *See, e.g.*, Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 218 (2017). But these scholars have stopped short of explaining precisely how privacy's First Amendment values might alter the doctrinal landscape. This Article builds on their important work.

11. Seth W. Stoughton, *Police Body-Worn Cameras*, 96 N.C. L. REV. 1363, 1400–05 (2018) (outlining some of the limitations of police body cameras).

12. For that reason, the Witness organization, which provides training on effectively filming law enforcement, cautions that activists should consider if a particular video will negatively impact any of the people recorded. *See* WITNESS, 10 TIPS FOR FILMING: PROTESTS, DEMONSTRATIONS, & POLICE CONDUCT, https://s3-us-west-2.amazonaws.com/librarywebfiles/Training+Materials/Training+PDFs/WITNESS+Tip+Sheets/English/FilmingProtests_PoliceConduct_v1_0.pdf [https://perma.cc/JQU6-LR6E] (last visited Oct. 1, 2019).

13. *See generally* Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159 (2015) (arguing that government outing of someone's status as a sexual minority or of someone's political beliefs implicates substantive due process privacy protections).

14. In this case, recording of a conservative high-school student confronting a Native American man at a rally made headlines for painting an incomplete picture. *See* Sarah Mervosh & Emily S. Rueb, *Fuller Picture Emerges of Viral Video of Native American Man and Catholic Students*, N.Y. TIMES (Jan. 20, 2019), https://www.nytimes.com/2019/01/20/us/nathan-phillips-covington.html.

15. *See, e.g.*, *Body-Worn Cameras Are Spreading Beyond the Police*, ECONOMIST (July 28, 2018), https://www.economist.com/britain/2018/07/28/body-worn-cameras-are-spreading-beyond-the-police.

distances,[16] and livestreaming technology such as Periscope or Facebook Live that empowers people to broadcast their recordings in real time across the globe. Increasingly available facial-recognition software that allows identification of individuals captured on film further intensifies these privacy dangers.[17] And widespread distribution networks available on the Internet allow any incursion to go viral.[18]

This Article contends that the privacy harms caused by citizen recordings impose corollary costs on First Amendment values. Efforts to maintain privacy while in public should be understood as advancing expressive, democratic functions themselves. The right to anonymity or privacy while in public is critical to the freedom of association, enabling people to gather together and politically organize without having their identities disclosed.[19] Privacy in public may also be critical to the cultivation of ideas and serve as an incubator for future speech.[20] Indeed, without privacy, private speech itself may be limited or chilled.[21] Like recording, functional efforts to maintain privacy while in public can serve as direct statements of resistance and critique to surveillance regimes.[22] For example, efforts to wear masks or hoodies at protests or to use Tor (an anonymizing software) to cloak online activity are often read by the state as expressing something threatening, and are therefore targeted for additional surveillance, highlighting the expressive quality of efforts to maintain privacy.[23] To the extent that citizen recording further burdens or infringes on individual efforts to maintain privacy, it erodes the expressive First Amendment purposes served by public privacy. In this way, citizen recording can threaten not just privacy rights, but also the expressive values upon which the right to record itself is often defended.

How can the law mediate the democratic First Amendment purposes served by citizen recording with the similar purposes served by efforts to maintain

16. *See, e.g.*, Foster v. Svenson, 7 N.Y.S.3d 96, 98 (N.Y. App. Div. 2015) (reviewing a privacy claim against an artist who used a high-powered camera lens to take photos of individuals through their apartment windows).

17. *See* CLARE GARVIE ET AL., GEO. LAW CTR. ON PRIVACY & TECH., THE PERPETUAL LINE-UP: UNREGULATED POLICE FACE RECOGNITION IN AMERICA 1 (2016), https://www.perpetuallineup.org/report [https://perma.cc/82R7-DS4M] (documenting that "one in two American adults is in a law enforcement face recognition database").

18. *See* Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image over the Internet*, 49 SANTA CLARA L. REV. 313, 369 (2009) (discussing the privacy threat posed by viral distribution networks).

19. *See* Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 252–63 (2002) (arguing that anonymity in public helps give practical meaning and effect to the freedoms of movement, speech, and association).

20. *See* Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 408–25 (2008) (detailing why intellectual privacy is critical to freedom of thought).

21. *See* Margot E. Kaminski, *Regulating Real-World Surveillance*, 90 WASH. L. REV. 1113, 1155 (2015); *cf.* Citizens United v. FEC, 558 U.S. 310, 483 (2010) (Thomas, J., concurring in part and dissenting in part) (emphasizing that disclosure and disclaimer requirements can chill political speech).

22. *See generally* Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673 (2017) (explaining that in the social context of ubiquitous surveillance, individual efforts to maintain privacy while in public take on an outward-facing expressive dimension).

23. *See id.* at 1697–1708.

privacy in public? How can both expressive tools of resistance to the government—citizen recording and efforts to maintain privacy in public—be preserved without one dismantling the other? Calibrating the balance between these two important rights is no easy feat. But a necessary first-order task in correcting the current disequilibrium is to comprehensively understand the competing expressive interests served both by recording and by privacy in public. Then, we can examine whether doctrine provides insight on how to referee those interests.

As this Article maintains, once privacy's expressive, democratic purposes are fully appreciated, the First Amendment, rather than serving only as a limit on government regulation of citizen recording (as the present legal trajectory suggests), actually enables government protection for the right to privacy and to resist recording.[24] Existing doctrine—including the concept of the "heckler's veto"—provides a path forward in terms of harmonizing the competing First Amendment interests at stake. Specifically, jurisprudence permitting the government to regulate a heckler's disruptive speech toward another speaker—thereby preventing a "heckler's veto"—provides insight into how courts should permit government regulation of citizen recording when it infringes on the corresponding First Amendment rights of those trying to maintain their privacy.[25] Granted, the First Amendment generally does not prevent private citizens from infringing on one another's attempts at expression. However, heckler's veto doctrine, supplemented by other First Amendment jurisprudence, suggests that where a heckler's speech disrupts the speech of another, government intervention via regulation of the heckler's speech is constitutionally permissible.[26] That is, where the speech regulation is justified in the name of protecting expression, the regulation is more likely to survive either strict or intermediate scrutiny under the First Amendment.[27] As recent high-profile protests on college campuses against controversial guest speakers underscore, facilitating First Amendment values sometimes requires limiting another person's disruptive speech.[28] Courts and society have successfully struck this balance when dealing with traditional conflicts

24. *Cf.* Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 6–7 (1991) (observing that in contests between government disclosures and privacy, although "scholarly analysis of the First Amendment disposes us toward the proposition that more information is better," the constitutional interests served by information dissemination and privacy must be balanced).

25. *See* ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 124 (2017) (describing how students' conduct while disrupting a political speaker on a college campus was not protected by the First Amendment).

26. *See infra* Section III.A (collecting authority regarding the heckler's veto).

27. *E.g.*, Holder v. Humanitarian Law Project, 561 U.S. 1, 26–27, 46 (2010) (explaining that strict scrutiny, requiring that a regulation be narrowly tailored toward a compelling governmental interest, applies when the regulation targets expression because of its content, and that intermediate scrutiny, requiring that a regulation burden expression no more than necessary to achieve an important governmental interest, applies when the regulation is content-neutral).

28. *See, e.g.*, Zach Greenberg, *Rejecting the 'Heckler's Veto*,' FIRE (June 14, 2017), https://www.thefire.org/rejecting-the-hecklers-veto/ [https://perma.cc/32HX-G6GZ] (explaining that "there is no First Amendment right to shout down a speaker" and that cancelling campus speakers because of protestors inflicts an impermissible First Amendment heckler's veto on the speaker).

between two competing forms of oral speech.[29] And once we have a comprehensive understanding of the expressive dimensions of both privacy and recording, we can use that understanding to successfully adjudicate these First Amendment interests without jeopardizing either the right to privacy or the right to avoid and resist recording. In this way, the important democratic functions of both citizen recording and efforts to maintain privacy can be protected.

Put differently, we must understand that speech rights are implicated on both sides of the ledger: by those recording and by those trying to avoid being recorded. By understanding that speech, including recording, sometimes has tangible, downstream impacts on other forms of speech,[30] we can strike the proper equipoise between guaranteeing the right to record in most instances and preserving the interests of private citizens seeking to remain anonymous. And as compared to other proposed frameworks for resolving the tension between the right to record and the right to privacy,[31] the heckling analogy creates a fair fight between two sets of expressive interests. In contrast, current attempts to weigh privacy against recording tend to result in privacy losing because of the privileged doctrinal position of the expressive interests of recording.[32] The heckling framework also best captures how courts resolve live conflicts between competing speakers, which occurs when one person is recording and another is trying to maintain privacy in real time and real space.

More broadly, in a jurisprudential moment at which the Court is finding speech where it previously failed to exist[33] and transforming the First Amendment into a deregulatory tool,[34] this Article provides a model for how the Supreme Court's capacious understanding of what counts as "expressive" could be used to

29. *C.f.* Bible Believers v. Wayne Cty., 805 F.3d 228, 261–62 (6th Cir. 2015) (en banc) (holding that it is impermissible for the government to silence speakers because of the reaction of the crowd).

30. *See generally* J. L. AUSTIN, HOW TO DO THINGS WITH WORDS (J. O. Urmson & Maria Sbisà eds., 2d ed. 1975) (explaining that certain utterances are speech acts that have a perlocutionary or downstream impact on the listener).

31. *See, e.g.*, Marc Jonathan Blitz, *The Right to Map (and Avoid Being Mapped): Reconceiving First Amendment Protection for Information-Gathering in the Age of Google Earth*, 14 COLUM. SCI. & TECH. L. REV. 115, 197–98 & n.266 (2012) (arguing that the First Amendment right to record could be overcome by "substantial" government interests in privacy); Kaminski, *supra* note 10, at 175 & n.37 (advocating that recording's situated, physical privacy harms should be balanced against recording's expressive interests under an intermediate scrutiny time, place, and manner test); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 395–96 (2011) (suggesting that balancing privacy against recording might be appropriate under Supreme Court jurisprudence).

32. *See infra* Section I.C.

33. *See, e.g.*, Nat'l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361, 2368, 2378 (2018) (striking down a California law requiring crisis pregnancy centers to inform clients of low-cost health services, including abortions, as infringing on First Amendment speech rights).

34. *See* Janus v. Am. Fed'n of State, Cty., & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501–02 (2018) (Kagan, J., dissenting) (lamenting the First Amendment's transformation "into a sword" used aggressively "against workaday economic and regulatory policy" and concluding that "[t]he First Amendment was meant for better things" than deregulation).

rehabilitate certain welfare-promoting regulations—in this instance, protections for privacy.[35]

This Article develops these arguments in three parts. Parts I and II offer detailed sociolegal and sociotechnical accounts of the important expressive, democratic functions served, respectively, by a right to record and a right to privacy. This paves the way for Part III, which analyzes how these competing First Amendment priorities interact with existing doctrine. Throughout, this Article unearths the role of technology in altering, and in some cases amplifying, the expressive interests implicated by both recording and efforts to maintain privacy.[36] Specifically, Part I further develops the expressive First Amendment interests served by citizen recording and outlines the growing body of law protecting the ability to record. In the process, Part I highlights how litigation protecting the right to record could give the mistaken impression that the privacy rights of citizens ought to uniformly take a backseat to the right of others to record, threatening privacy rights. Part II details the competing First Amendment principles embedded in the right to privacy in public and the importance of that right for democracy and control of public space. Finally, Part III explains that once the expressive, democratic dimensions of both privacy and recording are better understood, First Amendment jurisprudence will chart a true course for reconciling those competing rights, principally through the heckler's veto framework. In sum, this Article intervenes at a moment in which First Amendment protections for the right to record risk overwhelming competing rights to privacy. A comprehensive understanding of First Amendment interests dictates a more measured approach to the right to record.

I. RECORDING'S FIRST AMENDMENT VALUES

Supplementing long-standing precedent recognizing that the First Amendment limits the government's ability to regulate or punish information *dissemination*,[37] courts and scholars have increasingly concluded that citizen recording of public officials in public space—information *collection*—is covered by the First Amendment and is subject to its robust protections.[38] Recent jurisprudence has embraced the

35. In this way, contrary to the views of some scholars, the First Amendment can be made progressive in a limited fashion. *See* Louis Michael Seidman, *Can Free Speech Be Progressive?*, 118 COLUM. L. REV. 2219, 2239 (2018) (expressing pessimism that the First Amendment can be reclaimed for progressive purposes because of its link to property rights).

36. *Cf.* Citizens United v. FEC, 558 U.S. 310, 364 (2010) ("Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers.").

37. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 535 (2001) (holding that states cannot punish publication of speech regarding matters of public concern, notwithstanding that the information was illegally intercepted or obtained by a third party in the first instance); Florida Star v. B. J. F., 491 U.S. 524, 541 (1989) (holding that states cannot punish truthful publication of information obtained from government agency); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975) (holding that states cannot punish publication of truthful information already in court records).

38. *See, e.g.*, Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 61 (2014) (arguing that the creation of video recordings should receive First Amendment protection); Clay Calvert, *The Right to*

right to record as protected by the First Amendment[39] while largely neglecting, or pushing aside, the right to privacy and privacy's First Amendment values. This Part comprehensively explores, expands on, and catalogues recording's First Amendment benefits, with attention to the impact of technological change.

Recording advances First Amendment values along at least two dimensions.[40] *Instrumentally*, recording: (1) creates a record of an activity and is a form of information gathering, which (2) enables future dissemination and critique of the recorded activity and (3) facilitates a diversity of views. *Inherently*, recording the police and other government officials (4) serves as an in-the-moment statement of resistance and critique of the government officials' actions, helping to hold them immediately accountable. It also (5) helps to reclaim public space for the people, pushing back against efforts to police publicly owned land.

A. RECORDING'S INSTRUMENTAL FIRST AMENDMENT BENEFITS

1. Recording as Information Gathering

The First Amendment protects not just the right to espouse beliefs, but also the predicate right to gather and receive information upon which to base those beliefs.[41] The ability of individuals to obtain information, to listen, and to learn plays a foundational role in the American system of citizen self-governance, of which the First Amendment is the cornerstone.[42] In our "method of political self-government, the point of ultimate interest is not the words of the speakers, but

Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?, 64 UCLA L. REV. DISC. 230, 234 (2016) (documenting "a growing body of cases . . . that recognizes a qualified First Amendment right to record images of police doing their jobs in public venues"); Kaminski, *supra* note 10, at 177 (agreeing that "[r]ecording should be protected under the First Amendment," and noting that there is "a growing chorus of voices that advocates for a right to record"); Kreimer, *supra* note 31, at 339 (arguing that "personal image capture is part of a medium of expression entitled to First Amendment cognizance"); Ashley Billam, Note, *The Public's Evolution from News Reader to News Gatherer: An Analysis of the First Amendment Right to Videorecord Police*, 66 KAN. L. REV. 149, 150 (2017) ("Most of the courts presented with the question have found that the First Amendment protects the public's right to videorecord police." (citations omitted)); David Murphy, Note, *"V.I.P." Videographer Intimidation Protection: How the Government Should Protect Citizens Who Videotape the Police*, 43 SETON HALL L. REV. 319, 320 (2013) (showing that the "legal and academic consensus is trending towards enhancing [First Amendment] protection for videographers").

39. *See* 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 8:53 (Oct. 2019 update) ("There is essential consensus, however, on the underlying proposition that citizens do have a First Amendment right to record police activity, subject only to reasonable time, place, and manner restrictions.").

40. The categories of "instrumental" and "inherent" First Amendment values certainly blur and are not perfectly precise. But the categories serve as helpful guideposts or organizing tools underscoring that both recording and privacy instrumentally help facilitate future speech or discourse and are, in certain instances, inherently or immediately expressive.

41. *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 19 (1960) ("The freedom of mind which befits the members of a self-governing society is not a given and fixed part of human nature. It can be increased and established by learning, by teaching, by the *unhindered flow of accurate information* . . . ." (emphasis added)).

42. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 8 (1986) ("The constitutional guarantee of free speech 'serves significant societal interests' wholly apart from the speaker's interest in self-expression. . . . By protecting those who wish to enter the marketplace of ideas from government

the minds of the hearers. . . . The voters, therefore, must be made as wise as possible."[43] Access to information helps guarantee that citizens are able to develop wise thoughts, utter wise words, and vote wisely. Indeed, according to Alexander Meiklejohn's influential development of the First Amendment's role in self-governance, "[t]he primary purpose of the First Amendment is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them."[44] The importance of citizens' abilities to gather information is at its zenith when the information sought pertains to the government itself.[45] Relatedly (and perhaps more specifically), as underscored by Vincent Blasi's work on the "checking value" served by the First Amendment, the First Amendment's protections—including protections for newsgathering—serve a critical role "in checking the abuse of power by public officials."[46]

Consistent with these theoretical perspectives, the Supreme Court has protected citizen and press attempts to collect and receive information—particularly about government operations.[47] Although the right to gather information is not unlimited,[48] the Court has protected: the right of the public and the press to attend criminal trials;[49] the right of corporations and unions to participate in elections because it would otherwise limit "the stock of information from which members

attack, the First Amendment protects the public's interest in receiving information." (citations omitted)).

43. MEIKLEJOHN, *supra* note 41, at 26; *see also id.* at 60 (underscoring the pursuit of truth as a "uniquely significant" First Amendment interest); Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 441–42 (2019) (explaining that consistent with the First Amendment, the government can "regulate the speech of comparatively knowledgeable or powerful speakers when that expression frustrates their listeners' autonomy, enlightenment, and self-governance interests").

44. MEIKLEJOHN, *supra* note 41, at 75.

45. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575 (1980) (explaining that the "expressly guaranteed freedoms [of the First Amendment] share a common core purpose of assuring freedom of communication on matters relating to the functioning of government").

46. Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527.

47. Although I am increasingly reticent to further cement the Supreme Court—and doctrine more broadly—as the definitive, self-referential, positive source of norms, many judicial opinions in the First Amendment context are reflective of and give voice to broader democratic ideals—even if imperfectly—and I rely on them throughout. *Cf.* PIERRE SCHLAG, LAYING DOWN THE LAW: MYSTICISM, FETISHISM, AND THE AMERICAN LEGAL MIND 4–8, 163–66 (1996) (critiquing legal academic obsession with positive law, as embodied in Supreme Court jurisprudence, without engaging in and critiquing the law as a talisman of our own creation).

48. *See, e.g.*, Houchins v. KQED, Inc., 438 U.S. 1, 16 (1978) (holding that the press have no special right to record within a county jail); McKay v. Federspiel, No. 14-cv-10252, 2014 WL7013574, at *18 (E.D. Mich. Dec. 11, 2014) (upholding a prohibition on the use of recording devices in a courtroom against a First Amendment challenge).

49. *Richmond Newspapers*, 448 U.S. at 580; *see also* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2197–2200 (2014) (explaining the government accountability role of audiences in non-trial criminal court settings).

of the public may draw;"[50] and the right of individuals to receive pornography.[51]

Lower courts have applied the First Amendment right to gather information about governmental affairs to citizen efforts to record police activity.[52] According to some accounts, information gathering and its role in furthering self-government has been the principal First Amendment value identified by courts for the right to record.[53] For example, in *Glik v. Cunniffe*, the First Circuit Court of Appeals protected the right to record the police under the First Amendment as a logical extension of protections for newsgathering.[54]

2. Recording as Creating Future Speech

Closely related to the notion that the First Amendment protects information gathering is the premise that it also protects the creation of future speech.[55] If only dissemination of speech were protected and the productive process of speech creation unprotected, governments could "simply proceed upstream and dam the source" of speech.[56] The Court has concluded that "[w]hether government regulation applies to creating, distributing, or consuming speech makes no difference."[57] Based on this reasoning, the Court has struck down laws that criminalize the creation of videos depicting cruelty to animals[58] and so-called "Son of Sam"

50. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978).

51. Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas. . . . This right to receive information and ideas, regardless of their social worth, is fundamental to our free society." (citations omitted)); *see also* Scott Skinner-Thompson, *The First Queer Right*, 116 MICH. L. REV. 881, 886 (2018) (discussing cases protecting the right to receive gay-themed erotic publications).

52. Fields v. City of Phila., 862 F.3d 353, 359 (3d Cir. 2017) (concluding that "recording police activity falls squarely within the First Amendment right of access to information"); Turner v. Lieutenant Driver, 848 F.3d 678, 688–89 (5th Cir. 2017) (protecting the right to record police as part of the right to gather information on governmental affairs); Am. Civil Liberties Union v. Alvarez, 679 F.3d 583, 597 (7th Cir. 2012) (noting that recording is entitled to First Amendment coverage as a form of news and information gathering); Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) (protecting recording because of its information-gathering role); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing the that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest"); Gerskovich v. Iocco, 15 Civ. 7280 (RMB), 2017 WL 3236445, at *8 (S.D.N.Y. July 17, 2017) (suggesting that the right to record the police was a protected form of access under First Amendment); State v. Russo, 407 P.3d 137, 148–49 (Haw. 2017) (agreeing that right to record police is key to accessing information); s*ee also generally* Blitz, *supra* note 31 (arguing that digitally mapping outdoor space is consistent with the First Amendment right to gather information and citizens' right to receive information).

53. Simonson, *supra* note 4, at 1569 ("Courts that recognize a right to record have relied almost exclusively on one First Amendment value: promoting self-government through the free discussion of governmental affairs.").

54. 655 F.3d at 82–84 (holding that the arrest of an individual filming police as they forcibly arrested another individual in the Boston Common—"the oldest city park in the United States and the apotheosis of a public forum"—violated the First Amendment right to record).

55. HANNAH ARENDT, THE HUMAN CONDITION 3 (1958) ("[S]peech is what makes [a person] a political being.") (gendered language revised).

56. Buehrle v. City of Key West, 813 F.3d 973, 977 (11th Cir. 2015).

57. Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 792 n.1 (2011).

58. United States v. Stevens, 559 U.S. 460, 482 (2010).

laws that prohibit individuals convicted of crimes from selling their stories for profit, disincentivizing the creation of work.[59]

Extending this rationale, lower courts have protected the right to record as a form of speech creation. For example, when invalidating the Illinois anti-eavesdropping statute as applied to recordings of the police, the Seventh Circuit reasoned that:

> The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected.[60]

By the same token, the Third Circuit in *Fields v. City of Philadelphia* concluded that for the protection of dissemination (that is, expression or speech) "to have meaning the Amendment must also protect the act of creating [the recording]."[61] Put differently, "[t]here is no practical difference between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them."[62] Other courts have reasoned similarly.[63]

This logic finds even more strength when considering that with the advent of live streaming, as through social media channels such as Facebook Live or Periscope, the formerly distinct acts of collecting, creating, and disseminating collapse into a single, indistinguishable activity.[64] Collecting the recording immediately communicates and transmits a message to the viewing world.

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59. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 123 (1991) (declaring New York's law preventing criminals from publishing books regarding their crimes unconstitutional).

60. Am. Civil Liberties Union v. Alvarez, 679 F.3d 583, 595–97 (7th Cir. 2012).

61. 862 F.3d 353, 358 (3d Cir. 2017).

62. *Id.*

63. *See* Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1189, 1203–04 (9th Cir. 2018) (explaining that the Idaho "Ag-Gag" law prohibiting recording of agricultural facility's operation regulated the creation of speech that is "inextricably intertwined" with the resulting speech and therefore covered by the First Amendment (citation omitted)); W. Watersheds Project v. Michael, 869 F.3d 1189, 1197 (10th Cir. 2017) (explaining that the Wyoming law that prohibited crossing private land to access adjacent land for the purposes of collecting data via photography or recordings interfered with the creation of speech, a protected First Amendment interest); Turner v. Lieutenant Driver, 848 F.3d 678, 689 (5th Cir. 2017) (protecting the right to record because "the First Amendment protects the act of making film"); *see also* Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1040 (2015) (arguing that recording should be protected to the extent it is part of the speech production process); Billam, *supra* note 38, at 168–70 (suggesting that recording is best understood as an antecedent to speech).

64. Kathryn Nave, *Entertainment, News or Real Life? Live Streaming is Complicated*, WIRED (Jan. 5, 2017), https://www.wired.co.uk/article/live-now-periscope-twitch-facebook-live [https://perma.cc/PS3M-Y53V] (documenting the proliferation of live-streaming apps). *But see* Kaminski, *supra* note 10, at 188 (distinguishing recording from speaking because speaking's expressive moment is created at the same time as its dissemination).

3. Recording as Facilitating Diversity of Views

Citizen recording also increases the diversity of views—in the most literal sense. In addition to facilitating self-governance, one of the other key functions of the freedom of speech is to safeguard a marketplace of divergent ideas from which "truth"[65] can emerge.[66] But for public discourse to so operate,[67] there must indeed be different viewpoints—there must be options from which to select. And so, the Supreme Court has held that in order to promote a diversity of ideas within the marketplace: students must be allowed to wear armbands of protest in schools;[68] states cannot prohibit government employees from being members of the Communist party;[69] and cable companies can be required to carry local television stations because of the government's interest in "promoting the widespread dissemination of information from a multiplicity of sources."[70]

The same principles extend to visual depictions. Diversity of perspective matters, as unfortunate recent events on the National Mall underscore.[71] Dashboard cameras and police body-worn cameras privilege the physical perspective and experience of the government. As Seth Stoughton's innovative research has highlighted, the same conduct can look quite different from different perspectives.[72] From the perspective of a body camera, a dance may look like a fight, and a person attempting to evade a bee may appear threatening. Moreover, people's life

65. In contrast to this standard democratic account of the normative value of the search for truth, the idea that truth or even consensus can emerge from public debate (or should even be the goal), is hotly contested by, among others, Chantal Mouffe. She explains that public space is a hegemonic one involving agonistic contestations among ideological adversaries—and that the contestation, rather than consensus, is the key value of public deliberation. CHANTAL MOUFFE, AGONISTICS: THINKING THE WORLD POLITICALLY 91–92 (2013).

66. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (emphasizing that "the theory of our Constitution" is that "the ultimate good desired is better reached by free trade in ideas," and "that the best test of truth is the power of the thought to get itself accepted in the competition of the market"); *see also generally* W. Wat Hopkins, *The Supreme Court Defines the Marketplace of Ideas*, 73 JOURNALISM & MASS COMM. Q. 40 (1996) (documenting the widespread use of the marketplace of ideas metaphor within the Supreme Court's First Amendment jurisprudence).

67. Despite its prevalence in First Amendment jurisprudence, the marketplace of ideas metaphor has come under critique for relying on the questionable notion that truth is objective, rather than subjective and the product of social forces—among other reasons. *See, e.g.*, Blasi, *supra* note 46, at 549–50.

68. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511–13 (1969).

69. Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603, 609–10 (1967).

70. Turner Broad. Sys., Inc., v. FCC, 512 U.S. 622, 661–64 (1994).

71. Mervosh & Rueb, *supra* note 14 (observing that varied video footage provided differing context to standoff between Native American man and white high school student wearing "Make America Great Again" hat on steps of Lincoln Memorial).

72. Timothy Williams et al., *Police Body Cameras: What Do You See?*, N.Y. TIMES (Apr. 1, 2016), https://www.nytimes.com/interactive/2016/04/01/us/police-bodycam-video.html (contrasting police body camera videos with videos from other physical perspectives); *see also* G. Daniel Lassiter et al., *Accountability and the Camera Perspective Bias in Videotaped Confessions*, 1 ANALYSES SOC. ISSUES & PUB. POL'Y 53, 54–55 (2001) (in the context of determining whether recorded confessions were coerced, explaining that the "biasing effect of camera perspective appears to be quite robust and pervasive").

experiences, prior attitudes, and cognitive biases can influence how they view the same supposedly objective video evidence.[73]

The Supreme Court's most prominent foray into the evaluation of video evidence further underscores the role of perspective in shaping people's understanding of supposedly objective and neutral evidence. In *Scott v. Harris*, the Court considered whether a dash-cam video of a high-speed chase established, as a matter of law, that the officer acted reasonably when he used deadly force to apprehend the fleeing suspect.[74] In an 8–1 decision, Justice Scalia wrote for the majority concluding that there was only one way to view the facts based on the video—and that the lower courts erred when they held that a reasonable jury could conclude that deadly force was unwarranted.[75] But at least one justice, Justice Stevens, in addition to the district court and court of appeals judges, believed that the facts—including the video—were susceptible to multiple interpretations, warranting resolution by the jury.[76] Beyond the divergent perspectives of these judiciary members, a study of 1350 people conducted by Dan Kahan and his co-authors confirmed that individuals' perception of the dash-cam video at issue in *Scott v. Harris* varied based on their demographic characteristics including race, geography, and political affiliation or ideology.[77]

Given the important role of perspective in gathering and evaluating facts, the use of citizen video recording serves an important diversity function. It provides additional perspectives to supplement those recorded on rapidly proliferating police body-worn cameras and other state surveillance tools.[78] Although it has received less emphasis from courts compared to the information gathering and speech creation rationales, the diversity rationale has also been extended to protect citizen recording by at least one federal appellate court. In *Fields*, the Third Circuit emphasized that citizen recording enriches public discourse on issues of public concern and provides different perspectives than police body-worn cameras and dashboard cameras.[79]

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73. Stoughton, *supra* note 11, at 1406 (discussing the role of cognitive bias in shaping how different people view and understand video evidence); Roseanna Sommers, Note, *Will Putting Cameras on Police Reduce Polarization?*, 125 YALE L.J. 1304, 1312 (2016) (conducting a study demonstrating that "video evidence remains susceptible to significant viewer bias and simultaneously causes some fact finders—namely those who feel a strong affinity with police officers—to become more certain of their judgments and more resistant to persuasion by others who disagree").

74. 550 U.S. 372 (2007).

75. *Id.* at 380–81.

76. *Id.* at 389–91 (Stevens, J., dissenting).

77. Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 903 (2009) ("Our empirical study found that when we 'allow the videotape to speak for itself,' what it says depends on to whom it is speaking.").

78. *See generally* THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS & UPTURN, POLICE BODY WORN CAMERAS: A POLICY SCORECARD (2017), https://www.bwcscorecard.org/static/pdfs/LCCHR%20and%20Upturn%20-%20BWC%20Scorecard%20v.3.04.pdf [https://perma.cc/A4EL-H4VL] (documenting and rating the growing number of metropolitan police departments using police body-worn cameras).

79. 862 F.3d 353, 360 (3d Cir. 2017).

B. RECORDING'S INHERENT FIRST AMENDMENT BENEFITS

1. Recording as Expressive Resistance

Watching isn't always about gathering information for future use or understanding. Sometimes watching expresses and even exerts control.[80] Although the use of state-operated surveillance technologies and architectures as a means of social control is well-known,[81] increasingly recognized is the role of "sousveillance"—or observation from below—to turn the tables on the government or powerful private surveillers.[82] Open and visible sousveillance of government actors can begin to exert influence on their behavior as the behavior is unfolding, and it also serves as an expression of critique of that behavior.[83] That is, separate and apart from any subsequent accountability function that recording may serve,[84] the act of openly and defiantly recording the government can, as Jocelyn Simonson has highlighted, express dissent and opposition to the government.[85] It is an "in-the-moment" statement of resistance.[86] And it is understood by the state as expressing a message of critique.[87] For example, police departments and individual officers sometimes object to or try to prevent

80. *Cf.* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 200–01 (Alan Sheridan trans., Pantheon Books 1977) (1975) (analyzing the power of surveillance to control human behavior and the capacity of visibility to assure "the automatic functioning of power"); ALAN F. WESTIN, PRIVACY AND FREEDOM 33 (1967) (explaining how lack of privacy can render someone susceptible to control).

81. DAVID LYON, SURVEILLANCE SOCIETY: MONITORING EVERYDAY LIFE 52–54 (2001) (documenting the productive power of surveillance in urban environments); TORIN MONAHAN, SURVEILLANCE IN THE TIME OF INSECURITY 8 (2010) (explaining that "[s]urveillance is, by definition, about power" and defining surveillance systems as "those that afford control of people through identification, tracking, monitoring or analysis of individuals, data or systems"); *see also* James B. Rule, *Social Control and Modern Social Structure*, *in* THE SURVEILLANCE STUDIES READER 19, 25–26 (Sean P. Hier & Joshua Greenberg eds., 2007) (discussing the extreme example of a "total surveillance society" in which all citizens are continuously surveilled).

82. Steve Mann & Joseph Ferenbok, *New Media and the Power Politics of Sousveillance in a Surveillance-Dominated World*, 11 SURVEILLANCE & SOC'Y 18, 25 (2013) ("[T]here is power in the act of looking back . . . .").

83. Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 66 (2007) (explaining that forms of sousveillance, such as deploying cameras at protests, "can be an empowering activity" because it "signals to authorities that citizens are aware of but not intimidated by the presence of surveillance devices").

84. *See supra* Section I.A.

85. *See* Simonson, *supra* note 4, at 1573; Laurent Sacharoff, *Cell Phone Buffer Zones*, 10 U. ST. THOMAS J.L. & PUB. POL'Y 94, 97 (2016) (agreeing that recording police can serve as a form of direct, protest expression holding police accountable).

86. Simonson, *supra* note 4, at 1568 (explaining that civilians who record the police "communicate to police officers in the moment that someone is watching them" and that "[t]he transfer of power inherent in the act of observation turns the filming of a police officer in public into a form of resistance—into a challenge to their authority"); *see also* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 415 (2016) (characterizing organized citizen copwatching as "a form of resistance").

87. *See* Mann & Ferenbok, *supra* note 82, at 20 ("[W]hen citizens point their cameras at the architects of the 'surveillance superhighway', or when photographers simply take pictures of bridges or buildings, they often come under attack, especially as police have placed photographers under suspicion.").

recording because it communicates resistance to their activities.[88]

To the extent that the act of recording expresses a message of resistance at the moment the recording occurs, it is a direct form of speech entitled to First Amendment coverage under the long line of Supreme Court authority recognizing that embodied conduct is often expressive.[89] And that expression directly furthers individual autonomy, another important First Amendment value.[90] That is, in addition to the collective, societal benefits of robust public discourse, protection for freedom of speech also advances individualistic autonomy, permitting self-exploration and self-determination.[91] The act of recording operates as an assertion of the recorder's agency toward the object being filmed—often the government—establishing the recorder's independence through the communicative act of recording *qua* resisting. Although courts have not yet heavily adopted the "recording as direct expression" thesis, it is nevertheless a critical reason that recording is entitled to First Amendment coverage.

2. Recording as Reclaiming the Public Square

First Amendment protections are at their most robust in public forums—public land such as sidewalks, parks, and town squares that are, at least in theory, open to all people and all forms of expression.[92] But access to such public forums is increasingly limited.[93] For one, the increased privatization of historically publicly-owned space has decreased the venues available for public expression and embodied forms of popular sovereignty.[94] First Amendment protections do not usually extend to private property because of the lack of state action.[95]

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88. *Cf.* Tina Moore & Sarah Trefethen, *City has 'Epidemic' of Bystanders Recording Cop Arrests: Bratton*, N.Y. POST (May 25, 2016, 9:56 PM), https://nypost.com/2016/05/25/city-has-epidemic-of-bystanders-recording-cop-arrests-bratton/ [https://perma.cc/752W-TWM8] (quoting NYPD Commissioner Bill Bratton suggesting that, in some instances, recording of arrests interferes with the arrest).

89. Examples of covered expressive conduct include flag burning, *Texas v. Johnson*, 491 U.S. 397, 405–06 (1989), cross burning, *R. A. V. v. City of St. Paul*, 505 U.S. 377, 391 (1992), and nude dancing, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981).

90. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1122 (1993) (centering individual autonomy as the critical value that must be protected by First Amendment jurisprudence).

91. *See id.* at 1137.

92. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.").

93. *See* Kevin Francis O'Neill, *Privatizing Public Forums to Eliminate Dissent*, 5 FIRST AMEND. L. REV. 201, 202–07 (2007) (documenting the decrease in traditional public forums and arguing for the extension of the First Amendment to privatized forums).

94. SMOLLA, *supra* note 39, at § 8:1 ("Particularly in light of the growth of the private ownership of many public spaces, such as outdoor shopping malls that form part of the 'new urbanism' of the American landscape and assume the role of the traditional public square, continued access to public forums is essential."). For a vivid exploration of privatization's threat to popular sovereignty and democratic values, see Maryam Jamshidi, *Citizen Privatization's Threat to American Democracy* (on file with author).

95. Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976) (holding that there are no First Amendment rights at a privately-owned shopping mall); *see also* Manhattan Cmty. Access Corp. v. Halleck, 139 S.

But through a variety of mechanisms, people are being excluded even from the spaces that remain state-owned and therefore subject to First Amendment protections. Overpolicing, particularly within communities of color,[96] Muslim communities,[97] immigrant communities,[98] queer communities,[99] and indigent communities,[100] claims public space for the state and for hegemonic, white, straight, wealthy, cisgender communities. Policing works with privatization to deny popular sovereignty and public representation.[101] Policing discourages marginalized identities from entering the public square in the first instance for fear that they might be taken forcibly from that square to prison, or even worse. As explained by Judith Butler, the "freedom of assembly is haunted by the possibility of imprisonment."[102] And, of course, imprisoned communities are foreclosed from appearing directly in the public square at all.[103]

This exclusion has at least two impacts. First and most plainly, it denies people the right and ability to participate in civil society—a personal liberty. Second, it prevents the excluded from contributing to and shaping the social fabric and community norms through their presence.[104] That is, the exclusion of various

Ct. 1921, 1926 (2019) (concluding that the First Amendment did not apply to private, nonprofit corporation that operated a public-access television channel).

96. *See, e.g.*, Floyd v. City of New York, 959 F. Supp. 2d 540, 556–57 (S.D.N.Y. 2013) (documenting racially disproportionate deployment of "stop-and-frisk" against black and Hispanic people).

97. *See, e.g.*, Hassan v. City of New York, 804 F.3d 277, 285–88 (3d Cir. 2015) (outlining NYPD surveillance of Muslim communities); BERNARD E. HARCOURT, THE COUNTERREVOLUTION: HOW OUR GOVERNMENT WENT TO WAR AGAINST ITS OWN CITIZENS 145–51 (2018) (documenting multi-level government surveillance of Muslims).

98. *See, e.g.*, Miriam Jordan, *Immigration Agents Arrest Hundreds in Sweep of Sanctuary Cities*, N.Y. TIMES (Sept. 28, 2017), https://www.nytimes.com/2017/09/28/us/ice-arrests-sanctuary-cities.html.

99. *See, e.g.*, JOEY L. MOGUL ET AL., QUEER (IN)JUSTICE: THE CRIMINALIZATION OF LGBT PEOPLE IN THE UNITED STATES 45–58 (2011) (documenting the over-policing of LGBT people throughout American history); 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) (relaying accounts of queer youth in the juvenile incarceration system).

100. *See, e.g.*, Donald Saelinger, Note, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL'Y 545, 556 (2006) (describing myriad forms of legislation, including anti-panhandling laws, designed to push homeless people from the public square).

101. JUDITH BUTLER, NOTES TOWARD A PERFORMATIVE THEORY OF ASSEMBLY 174 (2015) ("[T]he seizure of public space from popular sovereignty is precisely the aim of both privatization and police assaults on freedom of assembly.").

102. *Id.* at 173.

103. *See id.* at 172–73 (noting that, although prisoner advocacy can "traverse the walls of the prison" and thereby enter the public square "through networks of communication and proxy representation," the prison nevertheless "remains the limit case of the public sphere, marking the power of the state to control who can pass into the public and who must pass out of it").

104. Roy Coleman, *Reclaiming the Streets: Closed Circuit Television, Neoliberalism and the Mystification of Social Divisions in Liverpool, UK*, 2 SURVEILLANCE & SOC'Y 293, 305 (2004) (explaining that "the black body has been and continues to be hugely symbolic and representative of disorder for state and corporate servants," and is therefore targeted for policing because the state views it as disruptive to the established order).

identities from public space helps maintain and reinforce the hegemonic stasis.[105] Social structures are maintained in part by "the socially structured and culturally patterned behaviour of groups, and practices of institutions, which may indeed be manifested in individuals' inaction."[106] Excluding certain groups from public space—from public life—ensures that they are unable to shape or challenge the social structures of their exclusion.[107] This, in turn, ensures the maintenance of homogeneity within society, characterized not just by whiteness and heteronormativity, but by docility.[108] It is characterized by compliance with and ambivalence toward the dominant social structures and norms. As Hannah Arendt put it, "society expects from each of its members a certain kind of behavior, imposing innumerable and various rules, all of which tend to 'normalize' its members, to make them behave."[109]

To the extent recording, as discussed above, helps mitigate aggressive policing of the public square and helps disrupt some of the exclusionary tactics, it can help reclaim public space for marginalized communities, allowing them greater performative influence on the social tableau. Because the very existence of public space is a precondition for the exercise of participatory democracy and embodied acts of public assembly, citizen recording of the police can help mark that space for the people. Recording is a direct challenge to the state's efforts to regulate and control who appears in public through policing.

In short, recording reclaims public space in two ways. First, by expressively challenging police regulation, the deviation from business-as-usual acceptance of policing helps demarcate the space for the public—in particular, those marginalized communities that are the principal targets for exclusion from public space. And, second, because marginalized identities themselves help reshape social structures and norms (and are viewed by the state as threats), the space created

105. Skinner-Thompson, *supra* note 51, at 900 (arguing that, although our identities are the product of social forces, "[i]n turn, our outward facing identities contribute to the social tableau and shape others' identities," and that, "[i]n the end, our identities say something" both personal and political); Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, 25/26 SOC. TEXT 56, 63–65 (1990) (explaining how the idealized civic republican public sphere operated to exclude women formally and informally through, for example, gendered norms of speech and comportment).

106. STEVEN LUKES, POWER: A RADICAL VIEW 22 (1974).

107. *See* ARENDT, *supra* note 55, at 9 ("[People] are conditioned beings because everything they come in contact with turns immediately into a condition of their existence. . . . [T]hings that owe their existence exclusively to [humans] nevertheless constantly condition their human makers. . . . [People] constantly create their own, self-made conditions, which, their human origin and their variability notwithstanding, possess the same conditioning power as natural things. . . . This is why [people], no matter what they do, are always conditioned beings." (gendered language revised)).

108. *See* FOUCAULT, *supra* note 80, at 141–49 (explaining how the control and partitioning of space contributes to the maintenance of "docile bodies" subject to control by the state).

109. ARENDT, *supra* note 55, at 40; *see also id.* at 46 ("The monolithic character of every type of society, its conformism which allows for only one interest and one opinion, is ultimately rooted in the one-ness of [hu]man-kind . . . ." (gendered language revised)); *cf.* SCOTT, *supra* note 7, at 305 (explaining that normative social environments are shaped by the material conditions of the environments).

for these communities by recording will help further erode government control of the space and reconstitute the space for the body politic.

* * *

On multiple levels, then, recording furthers critical First Amendment interests. Taken up by citizens informally and in formal networks,[110] recording is a kind of everyday resistance to policing and the power structures represented by the police. The videos do not always go viral; they don't always serve as "flashes in the pan" igniting greater social protest.[111] Nevertheless, by gathering information on the government, facilitating speech, diversifying perspectives, expressing resistance, and reclaiming public space, citizen recording can play a powerful role in fulfilling the First Amendment's guarantee of participatory democracy and popular sovereignty.

C. THE LOPSIDED FIRST AMENDMENT TRAJECTORY

Although courts and scholars have yet to comprehensively capture all of the expressive interests served by recording (documented above), they are nevertheless correct that the First Amendment covers recording of government officials. But the developing law regarding the right to record the police coupled with broader law rejecting tort claims of privacy-invading recording in public is creating a lopsided jurisprudence in favor of a largely unfettered right to record in public space. Courts have recognized some of the First Amendment values to protecting recording while ignoring or downplaying the First Amendment values of privacy.

In case after case, courts have recognized a broad right to record government officials, often without squarely incorporating the ambient privacy harms that such a right may have on private citizens captured in the video.[112] The Seventh Circuit came the closest to integrating privacy into the doctrinal framework in 2012, but still fell short. In *American Civil Liberties Union v. Alvarez*, the court held that an Illinois eavesdropping statute impermissibly burdened the First Amendment when applied to recordings of law enforcement officers because the "statute operates at the front end of the speech process by restricting the use of a common, indeed ubiquitous, instrument of communication . . . suppress[ing] speech just as effectively as restricting the dissemination of the resulting recording."[113] Although the court found the eavesdropping statute content-neutral and

110. Simonson, *supra* note 86, at 408–09 (juxtaposing organized copwatching efforts with spontaneous citizen recording of police).

111. *See* SCOTT, *supra* note 7, at 29 (contrasting the often menial struggles of day-to-day peasant resistance with attempts at revolution or open rebellion, which may attract more attention while achieving less).

112. *See, e.g.*, Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1203–05 (9th Cir. 2018); W. Watersheds Project v. Michael, 869 F.3d 1189, 1195–97 (10th Cir. 2017); Turner v. Lieutenant Driver, 848 F.3d 678, 688–90 (5th Cir. 2017); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Gerskovich v. Iocco, 15 Civ. 7280 (RMB), 2017 WL 3236445, at *8 (S.D.N.Y. July 17, 2017); State v. Russo, 407 P.3d 137, 148–49 (Haw. 2017).

113. 679 F.3d 583, 595–96 (7th Cir. 2012).

therefore applied the intermediate scrutiny test, requiring an important public-interest justification and a reasonably close fit between the law's means and ends, instead of strict scrutiny, it nevertheless struck down the statute as applied to recording of the police in public.[114] The court recognized that the government's theoretical interest in protecting conversational privacy was an important governmental interest—and indeed, that "protection of personal conversational privacy serves First Amendment interests."[115] But the court neglected to meaningfully integrate those privacy interests into its analysis because it concluded that the case "has nothing to do with private conversations or surreptitious interceptions."[116] Perhaps the case's procedural posture—a preenforcement challenge devoid of actual facts—facilitated the court's ability to presume that recording of police would not endanger bystander privacy interests.[117] The end result is that the expressive privacy interests of those captured by citizen recording (including citizen recording that includes both police and other citizens or bystanders) were diminished.

Similarly, as noted, in *Fields v. City of Philadelphia*, the Third Circuit held that citizen efforts to digitally record the police were protected pursuant to First Amendment safeguards over collecting information.[118] In *Fields*, while observing that the right to record was not absolute and could be subject to time, place, and manner restrictions, the court was less than clear about what level of scrutiny it applied to the challenged police suppression of recording because the defendants, in fact, offered no government interest to justify the suppression of the recordings.[119]

As a final example, in *Glik v. Cunniffe*, the First Circuit also upheld the right to record police as falling within the First Amendment's protection of gathering and disseminating information.[120] There, as in *Fields*, the court recognized that "the right to film is not without limitations" and "may be subject to reasonable time, place, and manner restrictions."[121] But, based on the facts of the case which involved police arrest of an individual attempting to film the officers arresting another person, the court found no occasion to consider which government interests could justify limitations on the right to record.[122]

In short, although courts have gestured to theoretical limitations on the right to record in the form of content-neutral time, place, and manner restrictions, they have rarely upheld any restrictions. Put differently, though the outcomes of these particular cases may have been correct because ambient or bystander privacy harms were not vociferously raised, the gestalt of this jurisprudence risks the

114. *Id*. at 603–05.
115. *Id*. at 605.
116. *Id*. at 606.
117. *See id*. at 586.
118. 862 F.3d 353, 359 (3d Cir. 2017).
119. *Id*. at 360.
120. 655 F.3d 78, 79 (1st Cir. 2011).
121. *Id*. at 84.
122. *Id*. at 79, 84.

impression that the right to record activity in public space and government actors is not susceptible to meaningful constitutional limitation.

The arc of the right to record police jurisprudence is perhaps not surprising given that even when the recording of public space has been targeted at private citizens (as opposed to government officials), courts have historically rejected tort suits seeking to regulate such recording. In such tort suits, courts have often embraced a requirement of complete secrecy—concluding that once information is exposed to the public at all, it is fair game.[123] Based on the requirement of complete secrecy, courts have rejected: efforts to regulate a magazine that published photos of a woman briefly exposing her torso among a group of friends because it occurred in a public place;[124] tabloids that publish photos of people taken through the windows of their homes;[125] and people who take photos up the skirts of women in public.[126] As Elizabeth Paton-Simpson has summarized, "Plaintiffs 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."[127] And tort law rejects these suits attempting to regulate recording of public space in part because such regulation would purportedly violate the First Amendment.[128] On multiple occasions, the Supreme Court has confirmed that tort law is a form of state action or regulation because judges make the rule of law and enforce the decision.[129] Pursuant to this reasoning, privacy tort suits run afoul of the First Amendment when they punish speech that further disseminates information already in the public sphere.[130]

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123. Andrew Jay McClurg, *Bringing Privacy Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1070–71 (1995); Scott Skinner-Thompson, *Privacy's Double Standards*, 93 WASH. L. REV. 2051, 2056 (2018).

124. Barnhart v. Paisano Publ'ns, LLC, 457 F. Supp. 2d 590, 593 (D. Md. 2006).

125. Solomon v. Nat'l Enquirer, Inc., Civ. A. No. DKC 95-3327, 1996 WL 635384, at *3 (D. Md. June 21, 1996).

126. Gary v. State, 790 S.E.2d 150, 151, 154 (Ga. Ct. App. 2016); s*ee* Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1914–15 (2019) (explaining that "up-skirt photos" have traditionally not been protected by privacy torts).

127. Elizabeth Paton-Simpson, *Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places*, 50 U. TORONTO L.J. 305, 310–11 (2000) (citations omitted).

128. McClurg, *supra* note 123, at 1070–71 (explaining that the First Amendment has been applied to limit the public disclosure tort and attempts to regulate the dissemination of information); *cf*. 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, 1123 (2000) (arguing that tort restrictions on the disclosure of someone's personal information could violate the First Amendment).

129. *See, e.g*., N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press.").

130. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975) (holding that the First Amendment protects the publication of information contained in court records); *see also* Florida Star v. B.J.F., 491 U.S. 524, 532 (1989) (holding that imposing civil liability on a newspaper for publication of rape victim's name that had previously been contained in public police report was inconsistent with the First Amendment); *cf*. Bartnicki v. Vopper, 532 U.S. 514, 533–35 (2001) (holding that imposing civil liability on a media outlet that lawfully obtained information of public concern was inconsistent with the First Amendment).

There are important exceptions to this general trajectory toward an unbounded right to record. There are instances of courts recognizing that privacy is not all-or-nothing and that it exists along gradations—even in public.[131] But they are the exception. The following Part's effort to amplify the First Amendment interests served by privacy in public builds on those cases and, as discussed in Part III, provides a stronger normative and doctrinal framework for privacy in public—one grounded in the First Amendment itself.

II. PRIVACY'S FIRST AMENDMENT VALUES

Despite its First Amendment pedigree, recording also has costs—costs to privacy and its equally critical role in furthering democratic, First Amendment values.[132] Privacy, like recording, furthers First Amendment interests on both instrumental and inherent levels.[133] *Instrumentally*, privacy can: (1) serve as an incubator for future speech, (2) enable simultaneous speech that would not occur without anonymity, and (3) facilitate the freedom of association. *Inherently*, efforts to maintain privacy can: (4) operate as a direct statement of expression, (5) help reclaim public space for the people, and (6) prevent homogenization.

Although scholars, including myself, have trumpeted some of the First Amendment interests served by privacy,[134] thus far relatively little attention has been paid to how privacy's First Amendment interests might be used to justify modest regulation of citizen recording in public. That is, although a connection has been drawn between privacy's ability to promote certain First Amendment values on a general level, there has been less effort to explain how those values interact with doctrine to justify limitations on recording.[135] Instead, in efforts to satisfy the First Amendment requirements that restrictions on speech satisfy strict scrutiny if the restriction is content-based or intermediate scrutiny if content-neutral,[136] litigation and scholarship have attempted to justify limitations on recording largely by emphasizing privacy regulations' content-neutrality and

131. *See, e.g.*, Safari Club Int'l v. Rudolph, 862 F.3d 1113, 1116, 1126 (9th Cir. 2017) (explaining that the mere fact that the defendant recorded a conversation with plaintiff in a public restaurant did not automatically defeat claims that the recording and subsequent posting on YouTube were privacy violations because privacy is "relative"); Daily Times Democrat v. Graham, 162 So. 2d 474, 477–78 (Ala. 1964); *see also generally* Woodrow Hartzog, *The Public Information Fallacy*, 99 B.U. L. REV. 459 (2019) (critiquing the notion that there is no right to privacy in public).

132. *See generally* J. Alex Halderman et al., *Privacy Management for Portable Recording Devices*, PROC. OF 2004 ACM WORKSHOP ON PRIVACY IN ELECTRONIC SOC'Y (documenting privacy threats imposed by ubiquitous portable recording devices such as cell phone cameras).

133. *Bartnicki*, 532 U.S. at 518 (recognizing privacy's role in fostering speech).

134. *See, e.g.*, Paul M. Schwartz, *Free Speech vs. Information Privacy: Eugene Volokh's First Amendment Jurisprudence*, 52 STAN. L. REV. 1559, 1572 (2000) (arguing that "information privacy law is an integral element of the mission of free speech and not its enemy").

135. *See, e.g.*, Kaminski, *supra* note 10, at 218 (detailing that limitations on recording may, in fact, advance First Amendment values, but not explaining how that alters the doctrinal framework).

136. Clay Calvert, *The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 3 TEX. A&M L. REV. 131, 172 (2015) (arguing that strict scrutiny should apply to restrictions on recording the police).

the situated, physical harms imposed by recording.[137] This Article bridges that gap while also offering a more comprehensive, sociolegal and sociotechnical account of the First Amendment interests that privacy furthers. To the extent that either a compelling or significant government interest must justify restrictions on recording,[138] this Article's emphasis on the First Amendment values of privacy most comprehensively satisfies that requirement by capturing the true scope of the interests that privacy serves.

A. PRIVACY'S INSTRUMENTAL FIRST AMENDMENT BENEFITS

1. Privacy as Incubator for Future Speech

Privacy can serve as a protective barrier, creating shelter for the development of ideas and playing a crucial role in identity formation.[139] In other words, privacy operates as an incubator for both ideas and identity.[140]

The notion that privacy advances the development of ideas and future speech has found its most robust defense in the work of Neil Richards. As Richards explains, "new ideas often develop best away from the intense scrutiny of public exposure" and "a meaningful guarantee of privacy — protection from surveillance or interference — is necessary to promote this kind of intellectual freedom."[141] What Richards labels "intellectual privacy" plays a critical role in the freedom of thought and any speech flowing from that thought.[142]

Beyond scholarship, the Supreme Court has emphasized the relationship between the First Amendment and privacy over one's thoughts or ideas.[143] For example, in *Stanley v. Georgia*, the Court struck down a law that criminalized

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137. Kaminski, *supra* note 10, at 224 (arguing that "[t]he government interest in governing recording is . . . an interest in managing the qualities of physical space so as not to allow one person's behavior to disrupt the behavior of others"); Kreimer, *supra* note 31, at 395–403 (suggesting that narrowly tailored protections for privacy might sometimes be permissible under the First Amendment but doubting that privacy trumps in context of filming public space); Blitz, *supra* note 31, at 190–201 foregrounding individual interests in avoiding identification and avoiding being tracked *cf*. Brief of Amici Curiae First Amendment Law Professors in Support of Plaintiffs-Appellants and Supporting Reversal, Fields v. City of Phila., 862 F.3d 353 (3d Cir. 2016) (Nos. 16-1650 & 16-1651) (suggesting that the right to record be limited to public locations, to matters of public concern, or to situations involving an intent to distribute).

138. *See* Heffron v. Int'l Soc'y for Krishna Cosciousness, Inc., 452 U.S. 640, 649 (1981).

139. Kreimer, *supra* note 24, at 63 ("The First Amendment imposes a need for 'breathing space' . . . ." (quoting Boos v. Barry, 485 U.S. 312, 322 (1988))); *see also id*. at 67 n.187 ("Private refuges are part of what has saved America from the tyranny of the majority . . . .").

140. *Id*. at 69 ("The citizen who is truly free in forming her identity should have the opportunity to experiment with roles she does not wish to adopt in public.").

141. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1946 (2013); s*ee also* Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1905 (2013) (explaining that "freedom from surveillance . . . is foundational to the practice of informed and reflective citizenship").

142. Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 408–25 (2008); *see also* Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 802 (2006) (explaining that the right to privately receive information is a way "for individuals to exercise liberty of conscience and self-development").

143. Kreimer, *supra* note 24, at 68 ("The Court has regularly recognized that shelter from public exposure is often a prerequisite to the contribution of unorthodox views to the marketplaces of ideas.").

possession of pornography because, pursuant to the First Amendment, "a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[144] According to the Court, "[o]ur whole constitutional heritage rebels at the thought of giving government the power to control [people's] minds."[145] Similarly, in *Lamont v. Postmaster General*, the Court struck down an act of Congress requiring those wishing to receive so-called "communist political propaganda" from Eastern European governments to affirmatively disclose to the government that they wanted to receive it.[146] Jurisprudence recognizing that the freedom of speech also contains a freedom not to speak, but rather to keep one's thoughts and ideas to oneself, buttresses the notion that the freedom of expression is advanced by privacy over one's thoughts.[147]

Moreover, although privacy helps safeguard space for the free development of ideas that will be shared publicly in the future, those privately expressed ideas also can serve as a form of catharsis even if the ideas never see the light of day.[148] And it can operate as a safety valve or vent for pernicious ideas that ought not to be acted on.[149] Privacy can be a sort of testing ground and vetting mechanism before ideas are expressed publicly.

Closely related to the concept of intellectual privacy, people also have a constitutional interest in avoiding unwanted speech in public.[150] Based on that interest, the Court has upheld restrictions on speech outside of health care facilities (including facilities where abortions are performed),[151] picketing outside of

144. 394 U.S. 557, 565 (1969).

145. *Id.* (gendered language revised); *see also* West Virginia State Bd. of Ed. v. Barnett, 319 U.S. 624, 642 (1943) (holding that compelling students to salute flag "invades the sphere of intellect and spirit which it is the purpose of the First Amendment . . . to reserve from all official control").

146. 381 U.S. 301, 307 (1965).

147. *See, e.g.*, Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 559 (1985) (emphasizing that the freedom of thought and expression contain "both the right to speak freely and the right to refrain from speaking at all" (quoting Wooley v. Maynard, 430 U.S. 705, 714 (1977))).

148. *See* SCOTT, *supra* note 7, at 284 (documenting that peasant workers would vent their anger at unfair treatment in the privacy of their homes); ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE 7–8 (1959) (discussing how subordinate groups, including service workers, engage in ridicule and gossip behind the scenes).

149. *Cf.* Andrew Gilden, *Punishing Sexual Fantasy*, 58 WM. & MARY L. REV. 419, 475–76 (2016) (explaining that the Internet can, in some instances, "provide a safety valve for sexual practices that individuals have no intention of ever acting out offline").

150. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 943–51 (2009) (explaining that in several public places, including on public transit and at medical facilities, the government has a constitutionally valid interest in protecting people's ability to avoid or be free from private speech); Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 910–12 (2017) (arguing that in certain contexts the involuntary hearer's interest should trump the rights of the speaker); Kaminski, *supra* note 10, at 231–32 (highlighting the Supreme Court's jurisprudence weighing the privacy harms to unwilling listeners in public spaces in First Amendment cases).

151. *See* Hill v. Colorado, 530 U.S. 703, 714–18 (2000) (holding that a prohibition on approaching—within eight feet—a person entering a health care facility for the purpose of leafletting, protesting, or counseling was justified by the state's interest in protecting unwilling listeners). *But see* McCullen v.

residences,[152] and the volume of musical expression in public parks.[153] As the Court has explained, the First Amendment's protections for freedom of speech do not always embrace speech "that is so intrusive that the unwilling audience cannot avoid it."[154] What the Court has explicitly labeled a "privacy interest in avoiding unwanted communication" extends to the home, of course, but can extend even into traditional public forums, including New York City's bustling Central Park.[155]

As these cases imply, people do not just seek the protection of privacy in their home—they erect privacy barriers while in public space as well.[156] Efforts to maintain privacy in public can take more apparent forms, such as wearing a mask, but also include subtle but urbane interventions, such as technology to frustrate facial-recognition software.[157] Millions of people exercise more quotidian and less sophisticated means of maintaining privacy every day.[158] Examples include averting one's face, speaking in hushed tones, or wearing headphones and keeping your head lowered on a subway. These privacy barriers can be important to people's efforts to seek refuge and find thinking space in public.

Recording of public space can infringe on the privacy refuges that people build while in public, burdening the intellectual privacy that helps incubate future speech.[159] Recording can capture the controversial book you are reading and identify you as the reader. It can disrupt you as you attempt to quietly develop your own thoughts while listening to a podcast, and it can deter you from attending an organizing meeting where you might wish to explore burgeoning ideas with like-minded individuals. And recording can cause these ambient or collateral privacy harms even if the privacy victim is not the principal target of the surveillance.[160]

Coakley, 134 S. Ct. 2518, 2437 (2014) (holding that a thirty-five-foot buffer zone outside of abortion clinics burdened "substantially more speech than necessary to achieve" any government interest).

152. Frisby v. Schultz, 487 U.S. 474, 488 (1988).

153. Ward v. Rock Against Racism, 491 U.S. 781, 784, 803 (1989); *see also* Kovacs v. Cooper, 336 U.S. 77, 87–89 (1949) (holding that it was permissible under the First Amendment to forbid use of sound amplification trucks on public streets).

154. *Hill*, 530 U.S. at 716.

155. *Id.*

156. Andrew Guthrie Ferguson, *Personal Curtilage: Fourth Amendment Security in Public*, 55 WM. & MARY L. REV. 1283, 1350–51 (2014) (cataloguing certain methods for maintaining privacy in public including masks, anti-face recognition technology, and anti-drone fashion).

157. *Id.*; Skinner-Thompson, *supra* note 22, at 1703–04.

158. Elizabeth E. Joh, *Privacy Protests: Surveillance Evasion and Fourth Amendment Suspicion*, 55 ARIZ. L. REV. 997, 1005–07 (2013) (explaining that efforts to resist surveillance can range from technological interventions to merely "speaking in secluded spaces").

159. *Cf.* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) (recognizing in the context of attorney-client solicitation, that "in-person solicitation may exert pressure" on a potential client).

160. *Cf.* BERNARD E. HARCOURT, EXPOSED 221 (2015) (explaining that video surveillance can create discomfort, "depriv[ing] us of a secure space of our own, a place to feel safe, protected").

2. Privacy as Enabling Simultaneous Speech

Privacy and anonymity also create the conditions that enable speech while that speech is occurring. Without anonymity while speaking, certain speakers would not express their ideas.[161] This is in contrast to the privacy-as-incubator concept discussed above, which focuses on how privacy insulates and protects space for the cultivation of ideas for *future* expression. The focus here is on privacy while engaged in the communicative act of speaking itself.

The importance of anonymous speech to a vibrant, functioning participatory democracy was clear from the outset of America's founding. As the Supreme Court noted when protecting the right to distribute anonymously authored handbills, "[a]nonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind."[162] Indeed, as the Court emphasized, anonymous literature played a critical role in fomenting the resistance that led to the Revolutionary War against England.[163] The Federalist Papers themselves, authored to build support for the ratification of the Constitution, were published under the pseudonym Publius.[164] The right to anonymous speech is critical, in part, because certain speech would not be uttered in the public square at all without the protection of anonymity.[165]

The right to anonymous speech is so critical that the Court has struck down laws that burden (as opposed to outright prohibit) the ability to remain anonymous, even if the speaker is not engaged in an activity during which they could reasonably expect perfect privacy or complete anonymity. For example, in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, the Supreme Court overturned a law requiring door-to-door canvassers to first register with the municipal government.[166] That registration resulted in the loss of anonymity.[167] That canvassers would reveal their identities and affiliation with a particular cause if they were known by a resident they solicited did not vitiate the canvasser's First Amendment interest in not having their identity disclosed by the registration requirement.[168] Similarly, the Court has invalidated a law requiring that petition circulators wear name badges while soliciting signatures because it forced individuals to "reveal their identities" while communicating—the moment at which anonymity is most crucial.[169] In other words, privacy and anonymity are

161. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995) (striking down Ohio's restriction on anonymous, election-related speech because, without anonymity, retaliation and social ostracism may deter that speech).

162. Talley v. California, 362 U.S. 60, 64 (1960).

163. *Id.* at 64–65.

164. *See id.* at 65; *see also McIntyre*, 514 U.S. at 343 n.6 (noting that in addition to the Federalist Papers, the Anti-Federalists also tended to publish anonymously, including under the pseudonym "Cato").

165. *See Talley*, 362 U.S. at 64 ("There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.").

166. 536 U.S. 150, 168–69 (2002).

167. *Id.* at 166.

168. *Id.* at 166–67.

169. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 198–99 (1999).

not all-or-nothing in the context of speech—even partial privacy can advance important speech values.

The right to record poses a meaningful threat to anonymous speech.[170] Take the *Village of Stratton* facts.[171] If citizens are able to freely record, broadcast, and identify canvassers for political or religious causes, the ability to engage in that kind of anonymous advocacy will be burdened, implicating important free expression values.

3. Privacy as Association

Democratic theory and Supreme Court jurisprudence have long recognized that privacy and anonymity serve as critical first-order rights that help make the freedoms to associate, organize, and speak meaningful.[172] For privacy of association to be effective, it must extend—to some degree—to privacy while navigating public space.[173]

Doctrinally, the First Amendment protects not just the freedom to speak, but also the freedom to assemble and to associate anonymously.[174] Although the freedom to associate is not explicitly mentioned in the First Amendment, the Supreme Court confirmed in *NAACP v. Alabama ex rel. Patterson* that the First Amendment's freedoms of speech and assembly include the "freedom to engage in association for the advancement of beliefs and ideas."[175] The court further held that compelled disclosure of an organization's membership list could "constitute as effective a restraint on freedom of association" as more obviously coercive forms of repression.[176] According to the Court, "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[177]

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170. Angela K. Evans, *Initiatives Canvassers Report Harassment*, BOULDER WKLY. (July 28, 2016), http://www.boulderweekly.com/news/initiatives-canvassers-report-harassment/ [https://perma.cc/5W5Q-B955] (documenting that anti-fracking canvassers reported that they had been subjected to intimidation tactics, including being video recorded, photographed, and attacked on social media).

171. *See supra* notes 166–68 and accompanying text.

172. *See, e.g.*, Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 456 (1980) ("A country might restrict certain activities, but it must allow some liberty of political action if it is to remain a democracy. This liberty requires privacy, for individuals must have the right to keep private their votes, their political discussions, and their associations if they are to be able to exercise their liberty to the fullest extent. Privacy is crucial to democracy in providing the opportunity for parties to work out their political positions, and to compromise with opposing factions, before subjecting their positions to public scrutiny.").

173. Paton-Simpson, *supra* note 127, at 342 (explaining that "there is a close connection between freedom of association and privacy in one's public movements").

174. *See* De Jonge v. Oregon, 299 U.S. 353, 364 (1937) (foregrounding the close relationship between the freedom of assembly and the freedom of speech, describing the two as "cognate" rights); *see also* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 17–20 (2015) (explaining that the subdivided First Amendment rights must be read collectively and that the freedom to associate is an implied component of the First Amendment).

175. 357 U.S. 449, 460 (1958).

176. *Id.* at 462.

177. *Id.* (citing United States v. Rumely, 345 U.S. 41, 56–58 (1953) (Douglas, J., concurring)); *see also* Bates v. City of Little Rock, 361 U.S. 516, 523 (1960) (holding that compulsory disclosure of the NAACP membership lists impairs the members' First Amendment freedom of association).

Consistent with this conclusion, the Court has suggested that requiring members of a political group to wear identifying armbands would be unconstitutional,[178] and that disclosure of the identities of those who sign electoral petitions must survive exacting scrutiny.[179] Moreover, in its recent decision in *Carpenter v. United States*, the Court concluded that warrantless collection of historical cell-site location information violated the Fourth Amendment.[180] Although not grounded in the First Amendment, the Court emphasized the constitutional importance of privacy over political and intimate associations.[181] Warrantless tracking of a person's location via their historical cell-site information was unconstitutional, at least in part, because it could expose their movements to places such as a political headquarters.[182] Although this Article is focused on the threats to association posed by recording in physical spaces, surveillance of data and networked spaces poses similar threats.[183]

In this way, just as privacy can, as discussed above, serve a critical role in the creation of individual identity,[184] it can also help develop collective or group identities.[185] And those identities can be critically constituted in resistance to the prevailing norms.[186] Theorist Nancy Fraser describes enclaves for marginalized groups as "subaltern counterpublics" serving dual functions: "they function as spaces of withdrawal and regroupment; on the other hand, they also function as bases and training grounds for agitational activities directed toward wider publics."[187] That is, private associations protect the group at issue, but also better enable the group to operate and influence the public at large.

178. Am. Commc'n Ass'n, C.I.O. v. Douds, 339 U.S. 382, 402 (1950).

179. Doe v. Reed, 561 U.S. 186, 196 (2010).

180. 138 S. Ct. 2206, 2217 (2018).

181. *Id.*

182. *See id.* at 2218; *see also* United States v. Jones, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations."); Joel R. Reidenberg, *Privacy in Public*, 69 U. MIAMI L. REV. 141, 158 (2014) (arguing that private-regarding acts in public should be protected under the freedom of association from government surveillance).

183. *See generally* Deven R. Desai, *Constitutional Limits on Surveillance: Associational Freedom in the Age of Data Hoarding*, 90 NOTRE DAME L. REV. 579 (2014) (arguing that data aggravates the threats to associational freedoms); *see also, e.g.*, Katherine J. Strandburg, *Membership Lists, Metadata, and Freedom of Association's Specificity Requirement*, 10 I/S: J.L. & POL'Y FOR INFO. SOC'Y 327, 356–65 (2014) (arguing that the freedom of association's protections extend to the NSA's telephony metadata program); Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 747–49 (2008) (explaining that surveillance of networked communications implicates the freedom to associate).

184. *See supra* Section II.A.1.

185. *See* Gavison, *supra* note 172, at 455–56; *cf.* JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 129–30 (2012).

186. *See* JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 111 (1990); Fraser, *supra* note 105, at 67 (explaining that in stratified societies members of marginalized groups often form "subaltern counterpublics" where they "invent and circulate counterdiscourses, which in turn permit them to formulate oppositional interpretations of their identities, interests, and needs").

187. Fraser, *supra* note 105, at 67–68.

Just like government disclosure of membership lists or tracking via cell-site location, citizen recording of public space can burden and infringe on the ability to organize and associate privately. Recordings of abortion clinics are a good example. Whereas surreptitious recordings of National Abortion Federation conference meetings and recordings within abortion clinics have received more attention,[188] citizen surveillance, observation, and public shaming of those who enter and exit an abortion facility burdens those who wish to gather to obtain services, provide services, or strategize on how to preserve them.[189] In addition to burdening the right to reproductive choice (which is grounded in the right to privacy),[190] the burgeoning right to record anything that occurs in public space has the potential to infringe on people's ability to associate for the purpose of abortion procedures or abortion advocacy.[191] The same would hold true of recordings outside the NAACP headquarters, an Alcoholics Anonymous meeting, or a gay club.[192] Given that associating often requires going into public in the first instance, the right to record any and all things in public potentially eviscerates the right to associate privately.

B. PRIVACY'S INHERENT FIRST AMENDMENT BENEFITS

1. Privacy as Expressive Resistance

Although privacy in public plays an important role in facilitating future or simultaneous speech, sometimes efforts to maintain privacy are directly expressive in and of themselves. As I have articulated at greater length elsewhere,[193] in a social context of widespread surveillance where exposure is the norm rather than the exception,[194] functional efforts to maintain privacy while in public are not

188. *See, e.g.*, Richard Pérez-Peña, *Anti-Abortion Activists Charged in Planned Parenthood Video Case*, N.Y. TIMES (Mar. 29, 2017), https://www.nytimes.com/2017/03/29/us/planned-parenthood-video-charges.html.

189. *See, e.g.*, Rachel L. Braunstein, Note, *A Remedy for Abortion Seekers Under the Invasion of Privacy Tort*, 68 BROOK. L. REV. 309, 309 (2002) (documenting use of film and publicity to harass abortion patients and providers); Alice Chapman, Note, *Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts to Protect Abortion Patients and Staff*, 112 YALE L.J. 1545, 1545–46 (2003) (same); Yochi J. Dreazen, *In the Shadows: Photos of Women Who Get Abortions Go Up on Internet — Activist-Photographers Prowl Clinics, Feed Web Masters Like Georgia's Mr. Horsley — 'A Bull's-Eye on Their Backs*,' WALL ST. J., May 28, 2002, at A1; *cf.* McCullen v. Coakley, 134 S. Ct. 2518, 2525–26 (2014) (discussing clashes between abortion opponents and abortion rights advocates outside of reproductive health clinics).

190. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (protecting women's ability to choose as part of the privacy rights guaranteed by substantive due process); *see also* Scott Skinner-Thompson et al., *Marriage, Abortion, and Coming Out*, 116 COLUM. L. REV. ONLINE 126, 138–42 (2016) (chronicling the Court's treatment of abortion rights under the right to privacy).

191. *See, e.g.*, United States v. Vazquez, 31 F. Supp. 2d 85, 90–91 (D. Conn. 1998) (concluding that women had no claim to privacy over videotapes of them entering clinic because individuals have no claim to privacy when walking down public streets).

192. *Cf.* Sipple v. Chronicle Publ'g Co., 154 Cal. App. 3d 1040, 1047–48 (1984) (finding no privacy violation for publishing the fact that a person was gay because he had been seen at gay bars).

193. *See* Skinner-Thompson, *supra* note 22.

194. HARCOURT, *supra* note 160, at 15 (explaining that we now live in an "expository society" where we are expected wittingly and unwittingly to provide our information to the public).

merely a utilitarian tool for safeguarding information, but are performative, expressive statements of resistance and critique against the surveillance society. When people wear hoodies or head veils in public to hide their identities, they may be engaged in active, expressive opposition to the surveillance regime.[195] They are signaling a refusal to be surveilled.[196] The same holds true in the digital world when people use obfuscation technologies to cloak their online movements. Individuals often self-identify their privacy-maintenance efforts as expressive forms of resistance,[197] but even when they do not, the government often reads efforts to maintain privacy as a form of expression—and uses that expression to target the individual for additional surveillance.[198] For example, police in England recently detained people who covered their faces while in public to avoid being scanned by facial-recognition technology, deeming their behavior "suspicious."[199]

The idea that social performances—how we choose to appear in public—can have an expressive, transformative effect on society has strong roots in both social theory and First Amendment jurisprudence. As put by sociologist Erving Goffman, social performances involve the deployment of "expressive equipment," including clothing, that help give contour to an individual's identity and shape the environment—or stage—upon which the individual is performing.[200] Just as important as what someone projects to the outside world is what they choose to conceal—concealment is as central to identity construction as outward expression.[201] Put differently, the observed can, and often do, communicate.[202]

195. 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) (documenting British students' statements that they wear hoodies up as form of resistance).

196. To the extent that men of color are subject to disproportionate surveillance, policing, and violence, the hoodie has taken on heightened symbolic meaning, particularly following the tragic killing of Trayvon Martin. *See* TA-NEHISI COATES, BETWEEN THE WORLD AND ME 113 (2015); Mimi Thi Nguyen, *The Hoodie as Sign, Screen, Expectation, and Force*, 40 SIGNS 791, 791 (2015).

197. MONAHAN, *supra* note 81, at 132 (explaining that although countersurveillance practitioners may seek to achieve short-term practical goals, they are foremost engaged in acts of symbolic resistance).

198. Bruce Schneier, *Attacking Tor: How the NSA Targets Users' Online Anonymity*, GUARDIAN (Oct. 4, 2013, 10:50 AM), http://www.theguardian.com/world/2013/oct/04/tor-attacks-nsa-users-online-anonymity [https://perma.cc/6ZLC-8ZPF] (explaining that those who use Tor are targeted for additional government surveillance).

199. Lizzie Dearden, *Police Stop People for Covering Their Faces from Facial Recognition Camera Then Fine Man £90 After He Protested*, INDEPENDENT (Jan. 31, 2019, 10:19 PM), https://www.independent.co.uk/news/uk/crime/facial-recognition-cameras-technology-london-trial-met-police-face-cover-man-fined-a8756936.html [https://perma.cc/MG6W-H4K8].

200. GOFFMAN, *supra* note 148, at 22–24; *see also id.* at 1, 13 (highlighting that appearance is an important form of expression, and is often not normatively neutral, but instead asserts moral demands).

201. *Id.* at 43.

202. *Id.* at 250–51 ("Instead of allowing an impression of their activity to arise as an incidental by-product of their activity, they can reorient their frame of reference and devote their efforts to the creation of desired impressions . . . . The observer's need to rely on representations of things itself creates the possibility of misrepresentation.").

The fact that an effort to maintain privacy may serve a practical, material purpose—keeping information secret—does not detract from, but rather enhances, its expressive values.[203] As James Scott has explained, acts of material resistance often double as forms of symbolic, ideological resistance.[204] In other words, "the two forms of resistance are, of course, inextricably joined."[205]

Indeed, part of the political power of efforts to maintain privacy in public is derived from their fidelity and integrity to the values they espouse—acts of performative privacy live the value being preached.[206] A great deal can be learned about the values of any subordinate group by looking at the forms of resistance they deploy—the form of resistance can be expressive of the values embodied by the resisters.[207] And these deviant actions all have the power to erode, dismantle, or recraft social structures, in this case helping reinstitute the social value of privacy.

Finally, it is important to emphasize that acts of resistance are not just a nihilistic statement of "no," but instead affirmative, ideological expressions. As Erich Fromm has articulated, disobedience "is an act of the affirmation of reason and will. It is not primarily an attitude directed *against* something, but *for* something: for [a person's] capacity to see, to say what [they] see[], and to refuse to say what [they] do[] not see."[208]

In this way, expressive efforts to maintain privacy in public serve important autonomy interests that underlie the First Amendment,[209] and, like recording, form part of a long line of expressive conduct entitled to First Amendment coverage.[210] Citizen recording of public space can trample, pierce, and burden individual efforts to maintain privacy in public, making it more difficult and costly to maintain effective privacy shields, which are necessary in order for performative

203. *See* ERICH FROMM, ON DISOBEDIENCE AND OTHER ESSAYS 16–17 (1981) (explaining that acts of disobedience are key to the establishment of freedom and humanity, and that several origin stories, whether they be Biblical (Adam and Eve) or Greek (Prometheus), center acts of disobedience as critical to the establishment of humanity as such).

204. *See* SCOTT, *supra* note 7, at 304.

205. *Id*.

206. *See* FROMM, *supra* note 203, at 42 (explaining that ideas have greater impact or effect "if the idea is lived by the one who teaches it; if it is personified by the teacher"); *see also* JOHN W. BOWERS ET AL., THE RHETORIC OF AGITATION AND CONTROL 120 (2d ed. 1993) (documenting the rhetorical impact of nonviolent resistance during the Civil Rights Movement); *cf*. SAUL D. ALINSKY, RULES FOR RADICALS: A PRACTICAL PRIMER FOR REALISTIC RADICALS 128 (1971) (explaining that one of the key tactics for undermining prevailing regimes is to "[m]ake the enemy live up to their own book of rules," exposing their hypocrisy).

207. *Cf*. SCOTT, *supra* note 7, at 277 ("Routine repression does its work unobtrusively . . . .").

208. FROMM, *supra* note 203, at 48 (emphasis omitted) (gendered language revised).

209. Post, *supra* note 90, at 1122 (foregrounding the First Amendment's protections for individual autonomy).

210. *E.g*., R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992); Texas v. Johnson, 491 U.S. 397, 405–06 (1989); Schad v. Borough of Mount Ephraim, 452 U.S. 61, 66 (1981); *cf*. SCHLAG, *supra* note 47, at 117 (highlighting as facile some of the distinctions animating First Amendment jurisprudence, including the speech-conduct distinction).

privacy efforts to communicate and express resistance.[211]

2. Privacy as Reclaiming the Public Square

Although policing is the most visible form of control over the public square, surveillance laws and technologies amplify that control.[212] Just as citizen recording can help push back on policing, privacy can help push back on government and private-party surveillance, reclaiming space for individuals within the public square.[213]

Increasingly, in order for people to enter into and engage with the public square, they are forced to reveal their identities or intimate information about their identities. For example, in the past few years, Congress has introduced bills targeting protestors who wear masks,[214] states have attempted to forbid people from using bathrooms consistent with their gender identity,[215] and Muslim women have been targeted with laws requiring them to remove their head veils.[216]

Different motivations exist for each of these laws and each law imposes unique threats: suppression of political speech, sex discrimination, racial animus, and religious bias. But these seemingly disparate laws also have a common effect—they invade privacy in order to impose barriers to the public square, and, therefore, participation in a democratic society. Each law concerns who can access public space and

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211. *Cf.* SCOTT, *supra* note 7, at 36 (explaining that "everyday forms of resistance" rely, in part, on the ability to remain anonymous for their success and existence).

212. *See* LYON, *supra* note 81, at 52–55; MONAHAN, *supra* note 81, at 8; Kreimer, *supra* note 24, at 5 ("The expansion of government knowledge translates into an increase in the effective power of government.").

213. Part of this subsection draws from a short, popular-press piece. *See* Skinner-Thompson, *supra* note 6.

214. *See, e.g.*, Unmasking Antifa Act of 2018, H.R. 6054, 115th Cong. (proposing to criminalize with up to fifteen years imprisonment the wearing of a mask while "intimidat[ing] any person"); *see also* Alexandra Hutzler, *Masked Protestors Can Face 15 Years in Prison as Republican Congressmen Push Anti-Antifa Bill*, NEWSWEEK (July 11, 2018, 1:30 PM), https://www.newsweek.com/antifa-masking-house-bill-introduced-penalty-fifteen-years-prison-1019082 [https://perma.cc/98FY-JDKR].

215. *See, e.g.*, Scott Skinner-Thompson, *North Carolina's Catch-22*, SLATE (May 16, 2016, 8:45 AM), http://www.slate.com/blogs/outward/2016/05/16/north_carolina_s_hb2_puts_transgender_people_in_an_impossible_catch_22.html [https://perma.cc/UG2S-Y5BE] (detailing how North Carolina's HB2 not only forbids trans people from using the restroom that comports with their sex assigned at birth, but may coerce some trans people into unneeded surgery); *see also* Chase Strangio, *Don't Be Fooled by North Carolina, There is No Repeal of the Anti-Trans HB2, Only More Discrimination*, ACLU (Mar. 30, 2017, 9:45 AM), https://www.aclu.org/blog/lgbt-rights/transgender-rights/dont-be-fooled-north-carolina-there-no-repeal-anti-trans-hb2 [https://perma.cc/9NVA-FHPM] (explaining that the HB2 replacement legislation sought to enshrine "a right to expel [transgender people] from society" by forbidding state agencies and localities from protecting transgender peoples' ability to use the bathroom).

216. Rebecca Tan, *From France to Denmark, Bans on Full-Face Muslim Veils Are Spreading Across Europe*, WASH. POST. (Aug. 16, 2018), https://www.washingtonpost.com/world/2018/08/16/france-denmark-bans-full-face-muslim-veils-are-spreading-across-europe/?utm_term=.6d7ecd41013d. In 2018, Denmark became the latest European country to ban certain Muslim head and face coverings from being worn in public. *Denmark Passes Law Banning Burqa and Niqab*, GUARDIAN (May 31, 2018, 9:44 AM), https://www.theguardian.com/world/2018/may/31/denmark-passes-law-banning-burqa-and-niqab [https://perma.cc/6L8A-TXXE].

on what terms. The laws threaten to disenfranchise people from forms of embodied democracy even more fundamental and cherished than the voting booth.[217]

Many jurisdictions have laws that prohibit wearing a mask in public, including while engaged in other core First Amendment activity such as a public protest.[218] Some of these laws date to efforts to regulate the Ku Klux Klan,[219] but others are more recent and are designed to target protestors associated with the Occupy Wall Street movement, the Standing Rock protests of the Dakota Access Pipeline,[220] anti-racist movements,[221] or anti-fascist movements.[222] Moreover, the older statutes have been enforced against contemporary, progressive activists.[223]

Other jurisdictions have passed or regularly consider bills forbidding people from using bathrooms consistent with their gender identity.[224] And the Trump Administration is considering passing regulations that would define sex under federal law narrowly as an immutable condition determined by external genitalia at birth—restricting transgender people's ability to be themselves and to navigate a host of societal settings beyond bathrooms, including dormitories, homeless shelters, and prisons.[225] By dictating that people use the bathroom (or any other sex-segregated space) corresponding to their so-called "biological sex," often

217. *Cf.* Bernard E. Harcourt, *Political Disobedience*, *in* OCCUPY: THREE INQUIRES IN DISOBEDIENCE 45, 46–47 (W.J.T. Mitchell et al. eds., 2013) (explaining that embodied political movements, such as Occupy Wall Street, that reclaim public space are a form of political disobedience more radical than civil disobedience in that they challenge and reject accepted forms of democratic governance); CHANTAL MOUFFE, FOR A LEFT POPULISM 40–41 (2018) (explaining that with the collapse of any meaningful difference between political parties and the embrace of "common sense" neoliberal norms, participatory democracy remains critical, as embodied in the political motto of the indignados in Spain: "We have a vote but we do not have a voice").

218. 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, 848–50 (2013) (cataloguing the different varieties of state anti-mask laws).

219. *Id.* at 848.

220. Noah Feldman, *The Constitution Has Masked Protestors Covered*, BLOOMBERG (Mar. 2, 2017, 2:47 PM), https://www.bloomberg.com/view/articles/2017-03-02/the-constitution-has-masked-protesters-covered (arguing that North Dakota's new anti-mask law targeted at Dakota Access Pipeline protestors violates the freedom of expression).

221. *See, e.g.*, Mark Joseph Stern, *Oklahoma Republican Proposes Bill Banning Hoodies in Public*, SLATE (Jan. 12, 2015, 2:53 PM), https://slate.com/news-and-politics/2015/01/hoodie-ban-oklahoma-republican-proposes-bill-to-outlaw-wearing-hoods-in-public.html [https://perma.cc/6RQU-F6X2].

222. *See, e.g.*, Unmasking Antifa Act of 2018, H.R. 6054, 115th Cong.

223. *See, e.g.*, Matthew Haag, *Is It Illegal to Wear Masks at a Protest? It Depends on the Place*, N.Y. TIMES (Apr. 26, 2017), https://www.nytimes.com/2017/04/26/us/protests-masks-laws.html (observing that New York's 1845 anti-mask law was cited against Occupy Wall Street protestors in 2011 and 2012); Meagan Flynn, *Georgia Police Invoke Law Made for KKK to Arrest Anti-Racism Protestors*, WASH. POST (Apr. 23, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/04/23/georgia-police-invoke-anti-mask-law-made-for-kkk-to-arrest-racism-protesters/?utm_term=.93a5cdf4e298 (documenting the use of Georgia's KKK-inspired anti-mask law against anti-racism protestors).

224. *See, e.g.*, S.B. 6, 85 Reg. Leg. Sess. (Tex. 2017) (proposing to require students to use only the bathrooms and locker rooms corresponding to their so-called "biological sex"); H.B. 663, 2016 Gen. Assemb., Reg. Sess. (Va. 2016) (proposing to require schools to force students to use bathrooms and locker rooms corresponding to their so-called "anatomical sex").

225. Erica L. Green et al., *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html.

defined as the sex listed on one's birth certificate, such laws discriminate against transgender people on the basis of their sex and gender identity.[226] But they also potentially out intimate information about trans people every time they are forced to use public restrooms or sex-segregated spaces that do not correspond to the individual's gender identity, subjecting them to ridicule and violence.[227] By invading their privacy, this type of legislation deters transgender people from entering the public square in the first instance and suggests that to do so they must accede to the state's arbitrary and inaccurate determination of who they are.[228] These laws deny trans people agency over their own identities and foreclose access to the very venues where they could contest the state's determination, burdening their ability to participate in public life and denying their existence.[229]

There are also laws, particularly prevalent in Europe, that prevent Muslim women from wearing headscarves in public.[230] Even in the United States, there are instances in which government actors have targeted those wearing Muslim clothing for discriminatory treatment.[231] And certain law enforcement practices within the United States have focused surveillance on those that do wear a veil.[232] Such policies impose obstacles on Muslim women's ability to be seen and heard in the public square. Veil restrictions "condition the entrance to the public sphere" on compulsory rejection of one's religion.[233] Rather than representing a purported feminist liberation of Muslim women, veil restrictions force women out of public space and into the home[234] while ignoring the veil's potential as a

226. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1039 (7th Cir. 2017) (holding that the school district's policy refusing to permit a transgender student from using bathroom consistent with their gender identity likely discriminated under both Title IX and the Equal Protection Clause); Scott Skinner-Thompson & Ilona M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC. 271, 273–74 (2013) (explaining that Title IX protects transgender people from discrimination).

227. Skinner-Thompson, *supra* note 13, at 192.

228. Chase Strangio, *Trump's Attack on Transgender Health Care Is an Attack on Trans People's Existence*, SLATE (May 9, 2018, 12:08 PM), https://slate.com/human-interest/2018/05/trumps-attack-on-transgender-health-care-is-an-attack-on-trans-peoples-existence.html [https://perma.cc/P4EM-SSJ6] (explaining that laws targeting transgender people are "part of a coordinated effort at all levels of government to challenge trans existence, criminalize our bodies, and push us into the shadows").

229. *Id.*

230. *The Islamic Veil Across Europe*, BBC (May 31, 2018), https://www.bbc.com/news/world-europe-13038095 [https://perma.cc/S2BJ-2TDL] (documenting current status of headscarf restrictions in Europe).

231. *See, e.g.*, Melissa Gomez, *Muslims Describe Being Confronted at Pool: 'We're Portrayed as Troublemakers*,' N.Y. TIMES (July 26, 2018), https://www.nytimes.com/2018/07/26/us/muslim-children-pool-wilmington.html (describing alleged discrimination against Muslim youth who wore headscarves and other modest clothing to city pool).

232. MUSLIM AM. CIVIL LIBERTIES COAL. ET AL., MAPPING MUSLIMS: NYPD SPYING AND ITS IMPACT ON AMERICAN MUSLIMS 15–17 (2013) (detailing how surveillance of Muslim communities chills and burdens the choice to wear head coverings).

233. BUTLER, *supra* note 101, at 82.

234. *Cf.* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 100–02 (1987) (foregrounding how privacy of the home—and of the bedroom—has often been a place of a

liberating, empowering symbol.[235]

These laws (and many others) are all a form of surveillance that transform the public square from a place where diverse people can express divergent ideas to a homogenous zone where only those who look, act, and believe the same thing can participate. If access to the square is limited or lost in this way, it will be harder still to change these discriminatory laws at the ballot box or in the courts.

Widespread citizen recording—particularly if aimed at those engaged in embodied forms of participatory democracy—works in tandem with these surveillance laws to intensify the privacy burdens on entering the public square and participating in society.[236] Historically, public assembly has provided "each participant with a measure of anonymity or disguise, thereby lowering the risk of being identified personally."[237] And that anonymity helps embolden people to assemble, allowing them to communicate power to their adversaries through their numbers and presence.[238]

Recording's negative impact on public privacy is being intensified with the spread of doxing[239]—the posting of personally identifiable information about a person—of protestors as a means of galvanizing harassment toward them.[240] The increased availability of facial-recognition software makes identifying the protestor, and subjecting them to doxing and harassment, all the easier.[241] Indeed, surveillance firms and startup companies are developing technology that would allow real-time facial-recognition analysis of live video.[242] As civil liberty organizations have highlighted in the context of opposing the incorporation of such technology with police body-worn cameras, "[r]eal-time face recognition would chill the constitutional freedoms of speech and association, especially at political

repression for women, and arguing therefore that framing women's rights in terms of a right to privacy "looks like an injury got up as a gift").

235. FADWA EL GUINDI, VEIL: MODESTY, PRIVACY AND RESISTANCE xvii (1999) ("Veiling also symbolizes an element of power and autonomy and functions as a vehicle for resistance.").

236. *See, e.g.*, Flynn, *supra* note 223 (explaining that anti-racist counter-protestors wore masks "to hide their identities to avoid being targeted by the white-power groups").

237. SCOTT, *supra* note 186, at 65–66.

238. *Id.*

239. Colin J.A. Oldberg, Note, *Organizational Doxing: Disaster on the Doorstep*, 15 COLO. TECH. L. J. 181, 183 (2016) (defining doxing as "the process of using the Internet to research and publish (without authorization) an individual's [personally identifiable information]").

240. Maha Ahmed & Madison Pauly, *Wearing Masks at Protests Didn't Start with the Far Left*, MOTHER JONES (Sept. 29, 2017, 6:00 AM), https://www.motherjones.com/politics/2017/09/masks-protests-antifa-black-bloc-explainer/ [https://perma.cc/PT4A-RTAB] (explaining that the threat of doxing or police harassment motivates some protestors to wear masks).

241. Charles Costa, *The Future of Doxing in a World of Facial Recognition*, SITEPOINT (Sept. 7, 2016), https://www.sitepoint.com/the-future-of-doxing-in-a-world-of-facial-recognition/ [https://perma.cc/2NPW-M7PW] (highlighting that the FindFace facial-recognition website has been used to dox people on Russian social media).

242. Drew Harwell, *Facial Recognition May Be Coming to a Police Body Camera Near You*, WASH. POST (Apr. 26, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/26/facial-recognition-may-be-coming-to-a-police-body-camera-near-you/?utm_term=.c6f7bea6c833 (explaining that a "growing number of surveillance firms and tech start-ups are racing to integrate face recognition and other AI capabilities into real-time video").

protests."[243] But facial-recognition technology's power is not, and cannot, be limited to police body-worn cameras; it has become widely available in the private sphere.[244] As described by one commentator, for-purchase facial-recognition tools, such as Amazon's Rekognition product, indicate that "[t]he democratization of mass surveillance is upon us"—anyone can be empowered to be a surveiller.[245]

Critically, both the surveillance laws discussed above and the act of citizen recording often target embodied political action. Embodied political action—for example, showing up to a protest, wearing a headscarf when it is frowned upon, visiting the bathroom consistent with one's gender identity, or using encryption technology, such as Signal, to communicate and avoid surveillance—is powerful, in part, because it is performative. In other words, in addition to verbal critiques of the hegemonic laws at issue, embodied political acts themselves directly communicate, signal opprobrium of the laws or government practices, and offer reimagined methods of social organization.[246] They are quintessential First Amendment activities.

To the extent that unchecked citizen recording of those who have been stripped of their privacy shields by the law magnifies the harm, citizen recording operates as an additional obstacle to the public square and embodied democratic participation. As outlined in Part III, that threat to First Amendment activity must be considered and weighed when determining whether citizen recording can be regulated by the government.

3. Privacy as Preventing Homogenization

As the old adage goes, sunlight is the best disinfectant.[247] But sunlight—transparency—can also damage and destroy.[248] It can homogenize and force to conform.[249] That conformity has dramatic costs to individual freedom and human flourishing.[250] As Seth Kreimer has explained, "exposure to public view

243. Letter from 18MillionRising.org et al. to Axon AI Ethics Board, The Leadership Conference on Civil & Human Rights (Apr. 26, 2018), http://civilrightsdocs.info/pdf/policy/letters/2018/Axon%20AI%20Ethics%20Board%20Letter%20FINAL.pdf [https://perma.cc/HXQ2-8Q9G].

244. Thomas Brewster, *We Built a Powerful Amazon Facial Recognition Tool for Under $10*, FORBES (June 6, 2018, 11:00 AM), https://www.forbes.com/sites/thomasbrewster/2018/06/06/amazon-facial-recognition-cost-just-10-and-was-worryingly-good/#56e6372f51db [https://perma.cc/KYQ5-357S] (explaining that with the advent of facial-recognition tools such as Amazon's Rekognition, "[i]nsanely cheap tools with the power to track individuals en masse are now available for anyone to use").

245. *Id.*

246. BUTLER, *supra* note 101, at 8–11.

247. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT 92 (2d prtg., Frederick A. Stokes Co. 1914) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

248. Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV. 1373, 1426 (2000) (explaining that surveillance and pervasive monitoring "incline choices towards the bland and the mainstream").

249. Kreimer, *supra* note 24, at 69 ("Unorthodox but protected activities are less likely to be undertaken when subject to public examination.").

250. *See* FROMM, *supra* note 203, at 52 (emphasizing that although the conforming person may share a sense of community with others that conform, the person "does not experience [their self] as the active bearer of [their] own powers and inner richness, but as an impoverished 'thing'").

encourages individuals to engage in actions that society desires."[251] Privacy, on the other hand, can serve important diversity functions.

As noted above, state-sanctioned surveillance is often targeted at marginalized communities, pushing them from the public square. But surveillance generally—including surveillance through citizen recording—has profound conforming effects. Public socialization processes tend to "fix" identities through social discipline that encourages individuals to cultivate consistent, legible identities.[252] For example, although certain individuals may put up a hoodie as a form of resistance to surveillance, others will take down their hoodie so as to conform and not stand out.[253] As Mitu Gulati and Devon Carbado have underscored, "as a matter of both socialization and formal and informal political advice, African Americans are encouraged to signal cooperation by giving up their privacy."[254] Removing hoodies is one prime example they emphasize.[255] Surveillance exacerbates conforming tendencies and puts people under a microscope.[256]

Recognizing that exposure of someone's identity can deter them and their views from entering the public sphere in the first instance, the Supreme Court has, on numerous occasions discussed above, protected the right to engage in anonymous speech.[257] Exposure's threat to diversity is highlighted by the facts of many of these cases—those targeted for exposure are often marginalized groups: people of color or those advocating for racial justice,[258] religious minorities,[259] or those with unpopular political opinions.[260]

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251. Kreimer, *supra* note 24, at 69.

252. *See* GOFFMAN, *supra* note 148, at 36–37.

253. McCahill & Finn, *supra* note 195, at 284 (documenting that in study of British students subject to CCTV surveillance, "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)).

254. DEVON W. CARBADO & MITU GULATI, ACTING WHITE? RETHINKING RACE IN "POST-RACIAL" AMERICA 102 (2013).

255. *Id*. at 18.

256. *See generally* Margot E. Kaminski & Shane Witnov, *The Conforming Effect: First Amendment Implications of Surveillance, Beyond Chilling Speech*, 49 U. RICH. L. REV. 465 (2015) (explaining how surveillance of readers and Internet viewers can lead to conforming effects); *see also* SHOSHANA ZUBOFF, IN THE AGE OF THE SMART MACHINE: THE FUTURE OF WORK AND POWER 356 (1988) ("Techniques of universal transparency, even if their goal is to elicit anticipatory conformity, do not benignly serve the interests of authority."); *cf*. Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 153 (2007) (explaining that government surveillance has chilling effects that implicate the First Amendment).

257. *See supra* notes 162–69 and accompanying text.

258. Talley v. California, 362 U.S. 60, 61, 65 (1960) (protecting the right to anonymously pamphlet against businesses that were discriminating against racial minorities); *cf*. NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 449–50 (1958) (protecting from disclosure the membership lists of the NAACP).

259. Watchtower Bible & Tract Soc'y, Inc. v. Village of Stratton, 536 U.S. 150, 166–67 (2002) (protecting Jehovah's Witnesses from the loss of anonymity that would result from an ordinance requiring registration with city government before engaging in door-to-door advocacy).

260. *Talley*, 362 U.S. at 65 (emphasizing that the Federalist Papers themselves were published using pseudonyms); c*f*. Hollingsworth v. Perry, 558 U.S. 183, 189 (2010) (forbidding limited broadcast of the Proposition 8 marriage equality trial because witnesses' politically-charged views would be

In each of these cases, either explicit or implicit in the Court's decision is the belief that privacy over someone's identity can serve important heterogeneity interests. As the Court explained in *Talley*, anonymity in speech is of acute importance for "[p]ersecuted groups and sects" that "from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[261] Put differently in *McIntyre v. Ohio Elections Commission*, "[t]he decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible."[262]

Therefore, to the extent that efforts to maintain privacy in public themselves represent a deviation from the transparency norm and permit people who otherwise may feel stigmatized to appear in public on their own terms and as they desire to appear, protecting privacy and anonymity in public helps push back on the conforming effects of surveillance and citizen recording.

* * *

Neither efforts to resist surveillance nor citizen recording are panacea solutions to the multitude of threats to public participation and social marginalization. But as Parts I & II have described, both operate in distinct but often complementary ways as forms of harm reduction—mitigating affronts to democracy—and as forms of symbolic confrontation to prevailing regimes.[263] Part III explains how First Amendment doctrine can keep these different forms of democratic expression from eroding each other.

III. THE HECKLER'S SHIFT

Once the competing First Amendment values of recording and privacy are fully understood, the ultimate question of how these competing speech claims ought to be mediated can be more thoroughly and comprehensively answered. Although in many contexts the First Amendment only protects speakers from suppression by state actors (so-called "vertical violations"[264]), heckler's veto cases provide the clearest insight into how courts adjudicate and resolve competing private speech claims occurring in real time and provide guidance for how courts—and society—could more appropriately navigate the expressive interests of privacy and recording. These cases suggest that when expression by a heckling speaker (Speaker B) inflicts harm upon another speaker's (Speaker A) free expression

disseminated); Watkins v. United States, 354 U.S. 178, 198–99 (1957) (concluding that there are limits on the Committee on Un-American Activities' ability to invade individual privacy).

261. 362 U.S. at 64.

262. 514 U.S. 334, 341–42 (1995).

263. *See, e.g.*, *About*, DEFEND OUR MOVEMENTS, https://defendourmovements.org/about/ [https://perma.cc/G8BU-9GJJ] (conceptualizing efforts to resist surveillance as a form of self-defense or harm reduction).

264. Jeremy Waldron, *Heckle: To Disconcert with Questions, Challenges or Gibes*, 2017 SUP. CT. REV. 1, 1; *see also* Erica Goldberg, *Competing Free Speech Values in an Age of Protest*, 39 CARDOZO L. REV. 2163, 2169 (2018) (explaining the "general rule that the First Amendment protects speech only against government abridgement").

interests (a "horizontal violation"[265]), government regulation of Speaker B's heckling speech may be constitutionally permissible under the First Amendment.

In other words, a horizontal violation between private citizens may, in certain instances, justify a vertical intervention by the government,[266] helping the government regulation survive First Amendment scrutiny (either strict scrutiny if the regulation is a content-based or intermediate scrutiny if it is a neutral time, place, manner restriction). Conversely, when the harm from Speaker B's speech is not itself a speech harm, overcoming the First Amendment coverage provided to Speaker B's speech is more difficult, largely preventing state regulation of that speech.[267] That is, when the harm from a speaker is a speech harm to another speaker, the First Amendment protection traditionally provided to a speaker, in a sense, partially shifts to and is shared with the speaker whose voice is being diminished.[268]

The analogy of "recording" to "heckling" underscores that sometimes expression is itself expression-reducing, helping us more nimbly weigh the sometimes competing expressive interests served by recording and privacy. It provides the most concrete context of permissible government regulation of competing private speech. This Part expands on these themes by first explaining in further detail the concept of the heckler's veto and how it would transform privacy from a First Amendment antagonist to First Amendment coverage (section III.A), and then applies the heckler's framework to some real-world examples in which privacy is threatened by citizen recording or photography (section III.B). Finally, section III.C concludes with a comparison of the heckling framework to other proposed conceptualizations of how recording and privacy could be balanced.[269]

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265. Waldron, *supra* note 264, at 1.

266. Gregory P. Magarian, *When Audiences Object: Free Speech and Campus Speaker Protests*, 90 U. COLO. L. REV. 551, 572 (2019) ("Shouting down [a speaker] presumptively offends free speech principles for the obvious reason that it disrupts speech.").

267. *Cf. id.* at 572–73 ("When dissenting speech disrupts private expression rather than action or government speech, the dissent transgresses the boundaries within which we ordinarily value the contribution civil disobedience makes to the system of free expression. We want civil disobedience to expand public discourse by expressing and embodying opposition to the status quo, not to contract public discourse by turning disagreements into shouting matches.").

268. *Cf.* Brett G. Johnson, *The Heckler's Veto: Using First Amendment Theory and Jurisprudence to Understand Current Audience Reactions Against Controversial Speech*, 21 COMM. L. & POL'Y 175, 178–79 (2016) (suggesting that "the heckler's veto represents an example of affirmative state intervention to secure a fair functioning of the marketplace of ideas").

269. Expanding the heckler's veto concept—where the government is lawfully mediating competing private speakers—also helps break down the widely critiqued, general First Amendment rule that there is no affirmative right to access a particular speech platform, but only a requirement that the government remain neutral as to private speakers' competing free-speech interests. J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 378–79 (foregrounding critiques of First Amendment law's failure to account for inequitable ability to access speech platforms); *see generally* Gregory P. Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185 (2007) (critiquing First Amendment doctrine's reliance on government neutrality and advocating an approach that guarantees a level of expressive, participatory access).

A. FROM FIRST AMENDMENT ANTAGONIST TO FIRST AMENDMENT COVERAGE

As documented in section I.C, in the majority of right-to-record cases and privacy-tort cases involving intrusions in "public," the expressive dimension of recording is given weight, while the expressive dimension of privacy is often discounted or put on the back burner. As a result, once either the First Amendment's onerous strict scrutiny test or the still robust intermediate scrutiny time, place, and manner test is applied to any restriction on recording, the regulation is struck down as unconstitutional because recording's expressive interests dominate. Similarly, tort suits against those recording or documenting private dimensions marginally exposed to the public are routinely dismissed, in part based on First Amendment principles protecting access to "public" information.

Appreciating the expressive dimensions of privacy as outlined in Part II militates toward a different First Amendment analysis—derived in part from heckler's veto law—when the recording at issue implicates the privacy of other citizens. This framework provides the asserted privacy right a more meaningful prospect of overcoming either strict or intermediate scrutiny. Again, admittedly, the facts of many of the right to record cases involving recordings of police have not squarely implicated the privacy interests of others caught in the camera—enabling courts to more easily dismiss or ignore potential privacy problems.[270] Unfortunately, that is leading to growing momentum suggesting a largely unfettered right to record.[271] But, as noted, even outside the police context, privacy tort law itself (a form of state regulation) has been overwhelmingly structured to emphasize the First Amendment rights of those invading privacy, while ignoring the First Amendment rights of those seeking to maintain privacy.[272]

The heckler's veto line of cases suggests an altered landscape for analyzing the right to record when it implicates citizen privacy. There are two related conceptions of the heckler's veto in American law.[273] The first provides that, absent state intervention regulating a heckler, a heckler's disruptive speech would silence another speaker, thereby justifying government regulation of the heckler's speech under the First Amendment notwithstanding that it is government silencing of a person's speech.[274] In other words, the law recognizes that, in certain instances, facilitating the speech of Speaker A may justify limiting Speaker B's disruptive

270. Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1055 (2016) ("[T]he privacy intrusion narrative is oftentimes a canard.").

271. Although some proponents of the right to record have openly embraced limits on that right, see, for example, Kreimer, *supra* note 31, at 392–93, others seem to take a much more capacious review of the right, see, for example Marceau & Chen, *supra* note 270, at 1023–24 (suggesting that the First Amendment right to record also extends to private property).

272. *See supra* Section I.C.; RESTATEMENT (SECOND) OF TORTS §§ 652B cmt. c, 652D cmt. b (AM. LAW. INST. 1977).

273. Waldron, *supra* note 264, at 6–7 (describing the two variations of a heckler's veto).

274. John J. McGuire, Comment, *The Sword of Damocles Is Not Narrow Tailoring: The First Amendment's Victory in* Reno v. ACLU, 48 CASE W. RES. L. REV. 413, 417 n.16 (1998) (observing that "[c]ourts are loathe to allow one person (the 'heckler') in the audience who objects to the speaker's words to silence a speaker").

speech.[275] This framing of the heckler's veto is often used to defend shutting down protests of a public speaker when those protests begin to prevent or disrupt the public speaker from continuing.[276] As Erwin Chemerinsky and Howard Gilman have explained, "[c]ampuses can and should prevent or punish disruptive efforts designed to deny others their free speech rights."[277] This conception of the heckler's veto also finds parallels in law recognizing that students have a right to free speech at school until their speech becomes disruptive to other students' educational attainment (another First Amendment interest).[278]

The second conception of the heckler's veto found in American law is that a heckler's disruptive, protesting speech or reaction to another's speech cannot be used to justify *government* regulation or silencing directed toward Speaker A—the non-heckler.[279] In other words, the state cannot "silence a speaker to appease the crowd."[280] Here, the heckler's veto operates on the other speaker indirectly through the government. For example, in the recent case *Bible Believers v. Wayne County*, the Sixth Circuit sitting en banc held that so long as the non-heckler's speech does not fall into a category of less-protected speech, such as fighting

275. *See, e.g.*, Carlson v. City of Tallahassee, 240 So.2d 866, 868 (Fla. Dist. Ct. App. 1970) ("Petitioner's contention that he can speak while another citizen already has the floor can only serve to diminish the right of both to the unfettered exercise of constitutional freedoms."); *cf.* Dempsey v. People, 117 P.3d 800, 805–06 (Colo. 2005) (explaining that the government has a legitimate interest in ensuring that individuals' free speech rights do not encroach on others' free speech rights); *In re* Kay, 464 P.2d 142, 149 (Cal. 1970) ("[T]he state retains a legitimate concern in ensuring that some individuals' unruly assertion of their rights of free expression does not imperil other citizens' rights of free association and discussion. Freedom of everyone to talk at once can destroy the right of anyone effectively to talk at all. Free expression can expire as tragically in the tumult of license as in the silence of censorship." (citation omitted)).

276. *See* Erwin Chemerinsky, *UC Irvine's Free Speech Debate*, L.A. TIMES (Feb. 18, 2010), http://articles.latimes.com/2010/feb/18/opinion/la-oe-chemerinsky18-2010feb18 ("The law is well established that the government can act to prevent a heckler's veto – to prevent the reaction of the audience from silencing the speaker. There is simply no 1st Amendment right to go into an auditorium and prevent a speaker from being heard, no matter who the speaker is or how strongly one disagrees with his or her message.")

277. ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 124–25 (2017) ("Although faculty, students and staff are free to criticize, contest and condemn the views expressed on campus, they may not obstruct, disrupt, or otherwise interfere with the freedom of others to express views they reject or even loathe." (quoting Geoffrey R. Stone et. al, *Statement of the Committee on Freedom of Expression at the University of Chicago*, UCHICAGONEWS (July 2012), https://cpb-us-w2.wpmucdn.com/voices.uchicago.edu/dist/3/337/files/2019/01/Statement-on-principles-of-free-inquiry-by-Prof.-Geoffrey-Stone-University-of-Chicago-News-1f1jp6l.pdf [https://perma.cc/66C7-AKA3])).

278. *Cf.* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512–13 (1969) (requiring evidence that student speech would constitute a substantial disruption with schoolwork or discipline in order to silence that speech consistent with the First Amendment).

279. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 302–03, 311 (1940) (explaining that the reaction of audience cannot be used to justify suppression of speech); Munroe v. Central Bucks Sch. Dist., 805 F.3d 454, 475 (3d Cir. 2015) ("The First Amendment generally does not permit the so-called 'heckler's veto,' i.e., 'allowing the public, with the government's help, to shout down unpopular ideas that stir anger.'" (citation omitted)); Startzell v. City of Phila., 533 F.3d 183, 200 (3d Cir. 2008) ("A heckler's veto is an impermissible content-based restriction on speech where the speech is prohibited due to an anticipated disorderly or violent reaction of the audience." (citations omitted)).

280. Bible Believers v. Wayne Cty., 805 F.3d 228, 234 (6th Cir. 2015) (en banc); *cf.* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) ("In the realm of private speech or expression, government regulation may not favor one speaker over another.").

words or incitement of violence, the government cannot silence the speech based on the negative reactions of other speakers.[281] According to the court, "[w]hen a peaceful speaker, whose message is constitutionally protected, is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior of the rioting individuals."[282] The court held that the police violated the First Amendment when they silenced a group of evangelical Christians spreading anti-Islamic speech at the Arab International Festival in Dearborn, Michigan.[283] This second conception of the heckler's veto is less relevant to the battle between recording and privacy because the government is not directly infringing on privacy (a form of speech) in order to facilitate other citizens' recording. But this strand of law nevertheless confirms the broader principle that hecklers should not—directly or indirectly—be permitted to silence other speakers.

The heckler's veto cases are supplemented by other First Amendment contexts in which courts evaluate competing speech claims, often concluding that regulating expression is justified in the name of preserving other forms of expression. In other words, courts have been much less reluctant to protect asserted First Amendment interests from regulation when the regulation itself is justified by other First Amendment values.

For example, in *Silberberg v. Board of Elections of New York*, strict scrutiny was applied to a New York state law that prohibited anyone from showing their completed ballot to another person, including through a ballot "selfie"—a self-portrait photograph taken by the voter with their completed ballot—posted on social media.[284] The court seemingly acknowledged that ballot selfies were core political speech at the heart of First Amendment protection.[285] Yet, the court nevertheless upheld the prohibition on this form of political speech because of competing democratic interests.[286] According to the court, the restriction was narrowly tailored to achieve the state's compelling interest in protecting the freedom to vote because it prevented a means of verifying that a voter had complied with any attempt to buy, intimidate, or coerce the voter's vote.[287] In other words, although the restriction targeted core political speech, it was justified by the competing need to ensure a critical form of freedom of democratic expression—the free exercise of franchise.

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281. 805 F.3d at 243–46; *cf.* Feiner v. New York, 340 U.S. 315, 320 (1951) ("[T]he ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker.").

282. *Bible Believers*, 805 F.3d at 252; *cf.* Watson v. City of Memphis, 373 U.S. 526, 534–35 (1963) (rebuffing the city's contention that desegregation of city parks would lead to disturbances and turmoil by explaining that "constitutional rights may not be denied simply because of hostility to their assertion or exercise").

283. *Bible Believers*, 805 F.3d at 238, 261–62.

284. 272 F. Supp. 3d 454, 472–73 (S.D.N.Y. 2017).

285. *See id.* at 469 ("The First Amendment's protection is at its apex with respect to political speech, and 'has its fullest and most urgent application' to speech uttered during a campaign for political office." (citations omitted)).

286. *Id.* at 469–73.

287. *Id.* at 472–73.

The *Silberberg* court also upheld a New York City policy prohibiting photography in polling sites.[288] Here, too, the court recognized that photography was entitled to First Amendment coverage, but, in applying intermediate scrutiny, found that the significant government interests of ensuring the integrity of the election process and protecting voter privacy justified the limitation.[289] That is, when competing democratic values were burdened by the freedom to record, the court accepted sanctions on recording and photography.

The holding in *Silberberg* that restrictions on efforts to document voting activity were constitutionally permissible was based, in large part, on the Supreme Court's prior recognition that even orally expressive political speech could be restricted in and around a polling site. In *Burson v. Freeman*, the Supreme Court upheld a state law that prohibited the distribution of campaign materials or solicitation of votes within one hundred feet of polling locations.[290] According to the Court, the law implicated three central concerns of the First Amendment because it targeted (1) political speech (2) in a public forum (3) based on the content of the speech.[291] But despite implicating these three talismans of First Amendment coverage, the Court upheld the speech restriction because of the competing democratic concerns over the freedom to vote without undue influence from candidates or special interests.[292]

Finally, in addition to suggesting that the government has the ability, consistent with the First Amendment, to regulate speech in order to protect the speech as well as fundamental democratic interests of others, there is also a vein within heckler's veto law suggesting that the government may have a duty or affirmative obligation to do so.[293] That is, the government may have a duty to maintain the conditions under which expression can continue.[294] For example, in *Bible*

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288. *Id*. at 480.

289. *Id*. at 479–80.

290. 504 U.S. 191, 193, 216 (1992).

291. *Id*. at 196.

292. *Id*. at 199; *see also* Citizens United v. FEC, 558 U.S. 310, 473 (2010) (Stevens, J., dissenting) (suggesting that corporate campaign speech could be limited because of the competing First Amendment need to facilitate and preserve breathing room for other speech within the marketplace of ideas); Turner Broad. Sys., Inc., v. FCC, 512 U.S. 622, 661–63 (1994) (observing that although the FCC's must-carry rules requiring cable companies to include local television stations implicated the cable companies' First Amendment rights, the government's competing First Amendment concerns in "promoting the widespread dissemination of information from a multiplicity of sources" was an important government interest).

293. *See, e.g*., Hague v. Comm. For Indus. Org., 307 U.S. 496, 516 (1939) ("[U]ncontrolled official suppression of the privilege [of free expression] cannot be made a substitute for the duty to maintain order in connection with the exercise of the right."); Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1299 (7th Cir. 1999) ("[T]he police are supposed to preserve order, which unpopular speech may endanger. Does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto."); Glasson v. City of Louisville, 518 F.2d 899, 906 (6th Cir. 1975) ("A police officer has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas.").

294. Johnson, *supra* note 268, at 206–07 (concluding that the state arguably has a duty to protect speakers from each other and facilitate the conditions of speech); *cf*. PHILIP PETTIT, ON THE PEOPLE'S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY 5 (2012) (explaining that one of the core

Believers (discussed above), the Sixth Circuit suggested that when mediating conflicts between speakers and hecklers, officers cannot "sit idly on the sidelines—watching as the crowd imposes, through violence, a tyrannical majoritarian rule—only later to claim that the speaker's removal was necessary for his or her own protection."[295] According to the court, when confronted with competing speech claims, where one speaker risks drowning out or infringing on the other speaker, the state has a handful of options: "The police may go against the hecklers, cordon off the speakers, or attempt to disperse the entire crowd if that becomes necessary."[296] As explained by the Sixth Circuit in an earlier case, "Ideally, police officers will always protect to the extent of their ability the rights of persons to engage in First Amendment activity."[297]

Importantly, concluding that the government does have a duty to protect speakers from hecklers is not at all necessary to justify such government regulation—what is clear is that the government is empowered, consistent with the First Amendment, to regulate the hecklers *qua* recorders if and when the government chooses to do so to facilitate the competing speech of non-hecklers.[298]

In sum, this line of cases suggests that when regulation of expressive activity, including expressive documentation such as photography, is contraposed to other forms of democratic expression, the regulation is likely to be justified by a compelling or legitimate government interest and thus upheld. As applied to the tension between the right to record and the right to privacy, the authority suggests that if the expressive dimensions of privacy are emphasized to justify regulation of recording, the regulation may stand a stronger chance of being upheld.

Put differently, the Supreme Court has recognized that a cable operator's power to "silence the voice of competing speakers with a mere flick of the switch" justifies government regulation of the cable company's speech so as to require it to carry local television stations, ensuring a broader diversity of voices.[299] So too does the flick of the camera phone's switch silence others, invade their expressive privacy, and encourage public conformity—justifying government regulation of recording.

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ideas of republican theory of government is that the state will work to prevent domination of one citizen over another).

295. 805 F.3d 228, 253 (6th Cir. 2015) (en banc).

296. *Id.*

297. *Glasson*, 518 F.2d at 909.

298. Of course, the Supreme Court is reticent to recognize that the Constitution imposes affirmative duties on the government or entitles citizens to so-called positive rights. *See, e.g.*, DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 195–96 (1989) (explaining that the Due Process Clause is designed to protect people from the state, not to ensure that the government protects people from each other).

299. Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 655–56 (1994); *see also* Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 190 (1997) (reiterating that the government has a compelling interest in ensuring that a multiplicity of voices can be heard).

B. THE HECKLER'S FRAMEWORK APPLIED

As observed at the outset, calibrating the appropriate solution for conflicts between privacy and recording is a delicate task, one that will often depend on the specific, highly contextual facts of a given case. But having now fully identified the expressive interests of privacy and recording and having documented doctrine's approach to resolving expressive conflicts, we can apply the heckler's veto framework to some examples where the right to record (or photograph) is in tension with the right to privacy to determine if government regulation of the recording (including through tort causes of action) is consistent with First Amendment principles. These examples are taken from actual controversies.

1. Recording of Bystanders & Police

In the context of citizen recordings of police that also have collateral privacy harms on bystanders, the heckler's veto line of cases suggests that the government is empowered (potentially through privacy torts) to impose tailored restrictions on those recordings, including limits on dissemination, such as requiring the recorder to redact or blur the identities of other citizens and bystanders captured in the recording before disseminating. The law could also encourage recorders to respect the privacy of bystanders when making the actual recording by taking steps to avoid recording the bystanders or notifying the bystanders that they are being filmed. Protecting an individual's expressive interest in privacy is a compelling government interest, justifying modest, narrowly tailored regulations that still preserve the right of individuals to record police activity.

Take the facts of *Fordyce v. City of Seattle*, for example.[300] In that case, Fordyce, who was participating in a protest and filming activity around the protest, filmed not just police officers but, subsequently, allegedly attempted to film some bystanders against their wishes.[301] Specifically, Fordyce allegedly "refused to stop videotaping two boys after an adult relative supervising them asked him to stop and complained to the police."[302] When the police asked Fordyce to stop, he allegedly refused and was arrested for violating Washington's state law prohibiting the recording of conversations without first obtaining the consent of all parties.[303]

Fordyce sued the officers for violating his First Amendment rights.[304] Neither the district court nor the Ninth Circuit ultimately addressed the First Amendment issue. Instead, the appellate court affirmed the district court's determination that the officers were entitled to qualified immunity with regard to their decision to arrest Fordyce for filming the bystanders because it was unclear whether recording conversations on public streets fell within the ambit of the Washington statute.[305]

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300. 55 F.3d 436 (9th Cir. 1995).
301. *Id.* at 438.
302. *Id.* at 439.
303. *Id.*
304. *Id.* at 438.
305. *Id.* at 439–40.

But more importantly, the facts of this case illustrate the ambient or collateral privacy harms that can come with the specific right to record the police, or, more generally, public space. If we understand the bystanders' assertion of their right to be left alone—their right to privacy—as triggering their expressive interests in solitude and perhaps resistance, and we understand Fordyce's actions as heckling those expressive interests, then enforcement of the Washington statute against Fordyce—even though he was recording activity in public space—is perfectly consistent with the First Amendment. It furthers the government's significant interest in protecting the bystanders' expressive interest in privacy. In the same vein, a privacy tort suit by the bystanders against Fordyce for intruding on their seclusion or, if he broadcast the video, public disclosure would also be perfectly consistent with the First Amendment because the recording is infringing on the bystanders' First Amendment privacy interests.

Moreover, once we acknowledge that the First Amendment interests served by recording and privacy are nuanced, we can also imagine taking advantage of technological advances to inject nuance into the law and individuals' obligations. As Seth Kreimer has emphasized, because the "predictable impacts on constitutional rights are intensely sensitive to empirical conditions," legal doctrine "must leave open an opportunity for citizens to focus the attention of courts on the real and concrete coercion of compelled disclosure."[306] The law must be responsive to the empirical condition of technological advancement, including by taking advantage of technology's flexibility and adaptability to give effect to more bespoke legal obligations.

For example, in situations in which a citizen recorder may have a First Amendment interest in recording the police, to the extent that bystanders—potentially including victims of police abuse—have a First Amendment privacy interest in not having their identities recorded and broadcast, the law could, consistent with the First Amendment, require the recorder to redact or blur the identity of the bystander. Indeed, Witness, one of the leading civil society groups providing training on how to effectively film law enforcement and protests for the purposes of accountability, nevertheless cautions that, where possible, filmers should preserve crowd anonymity through, for example, only filming the back of people's heads or their feet,[307] or using YouTube's custom blur tool.[308]

At first blush, any such requirement might appear onerous or difficult to enforce. But the law—particularly common law—routinely imposes context-

306. Kreimer, *supra* note 24, at 107–08.

307. *See* WITNESS, *supra* note 12 (providing ten suggestions for recording "protests, demonstrations, & police conduct").

308. *See* WITNESS, BEST PRACTICES FOR UPLOADING HUMAN RIGHTS VIDEO, http://www.mediafire.com/download/a7v3t7k2b3z6la9/BestPractices_UploadingHRVideo_20160407_v2_0.pdf [https://perma.cc/5NNQ-23A7]; *see also* POLICING PROJECT, FILMING THE POLICE: TIPS FOR POLICE OFFICERS AND THOSE WHO FILM THEM (2019), https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5c6c25b8ee6eb079bf3967be/1550591417017/Filiming+Police+-+Double+sided+card+%281%29.pdf [https://perma.cc/66MV-AMWV] (suggesting that people should not secretly record the police's interactions with others).

specific, highly nuanced obligations or restrictions on individuals vis-à-vis other individuals. One need not look further than tort law's general negligence "reasonableness" standard as an example.[309] As privacy-invading technology continues to develop, the law can and should evolve too, helping to reflect and shape changing norms regarding appropriate limits on the use of such privacy-invading technology.

2. Recording of Private Intimate Activity

Sometimes recording or photographing people in public, or people who are viewable from public space, will capture and expose intimate activity intended to remain obscure and private. Understanding the First Amendment interests served by keeping such activity private can help lead to an appropriate evaluation of the competing expressive interests, whereas current law often protects the recording at the expense of privacy. For example, in *Foster v. Svenson*, a New York appellate court narrowly interpreted the state's invasion of privacy statute so as to exclude from coverage artist Arne Svenson's photographs of his neighbors in their homes with a telephoto camera.[310] Despite that some of the photos were of young children, the court concluded that the informational value of Svenson's expressive photographs rendered them exempt from coverage under the statute's judicially created newsworthiness and public interest exceptions.[311]

But if the First Amendment privacy interests of those being photographed had been acknowledged, perhaps the court would have reached a different result. Although the neighbors were photographed through their un-shuttered windows,[312] it was clear that many had not forfeited an expectation of privacy and that many viewed themselves as protected by the curtilage of their home (and, in fact, some of the photos were of people through their shades).[313] They were ensconced inside their homes and, indeed, the artist surreptitiously hid himself within his own apartment so that the neighbors could not see him—suggesting that they did not expect to be photographed and that, but for his efforts to hide himself, they would have taken additional efforts to protect their privacy.[314] In other words, privacy was critical to Svenson's own expression. Some of the images captured by Svenson literally showed children engaged in the kind of creative, expressive play that privacy affords—Svenson captured a young girl dancing, partially undressed in her tiara.[315] The child was ostensibly engaged in some of the identity exploration provided by privacy, literally incubating and

309. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 7(a) (AM. LAW. INST. 2010) ("An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm.").

310. 7 N.Y.S.3d 96, 105–06 (N.Y. App. Div. 2015).

311. *Id.* at 98–99, 102.

312. *See id.* at 98.

313. *See id.* at 98–99.

314. *Id.* at 98.

315. *Id.*

developing her identity in the protection of her home. Svenson also photographed people engaged in First Amendment-protected intimate associations or activities in bathrobes or taking naps.[316] And his photographs disrupted and infringed on the First Amendment interests of the neighbors, prompting some of them to seek legal redress once they learned of Svenson's actions.

As discussed in section I.C, in part as a result of the First Amendment's protections for newsworthy information or information regarding public affairs, privacy tort law (and constitutional informational privacy law) has been shaped so as to foreclose liability for intrusions into or dissemination of information that is left open—even marginally—to the public view.[317] As a consequence, lawsuits seeking to recover for photographs taken of people in compromising or embarrassing positions have often met little success under privacy tort law or constitutional privacy law.[318] But if we recognized privacy's corollary First Amendment values, the draconian privacy torts rule that information—however slightly—exposed to the public negates any privacy claim might be made more nuanced and contextual, creating space for privacy claims that serve First Amendment interests. The expressive dimensions of privacy could be used to alter privacy tort law so as to not render public access the only underlying protected First Amendment interest.

3. Recording that Pierces Political Privacy

Finally, consider examples in which recording is used to burden or infringe on the political rights of assembly and association. Recording people entering abortion clinics or attending political protests, sometimes accompanied by subsequent doxing or online harassment of those recorded, are examples of weaponizing recording to burden others' expressive choices, over which some modicum of privacy is needed. In failing to recognize the expressive, First Amendment value of the recorded activities, courts have sometimes rejected attempts to regulate or impose limits on recording people entering abortion clinics, whether they be patients or physicians.[319] Often these decisions rest on the belief that there cannot be restrictions on information exposed to the public, a premise which, as discussed, is based on the First Amendment value of public information.[320] But if we admitted that people's desire to maintain privacy over certain, sometimes unpopular political and personal activities served expressive interests, then the First Amendment analysis would not be one-sided, and modest regulations of recordings outside abortion clinics or other centers of controversial association could be

316. *The Neighbors*, ARNE SVENSON, http://arnesvenson.com/theneighbors.html [https://perma.cc/K96Q-AGC3] (last visited Oct. 1, 2019).

317. RESTATEMENT (SECOND) OF TORTS §§ 652B cmt. c, 652D cmt. b (AM. LAW. INST. 1977).

318. *Cf.* Chaney v. Fayette Cty. Pub. Sch. Dist., 977 F. Supp. 2d 1308, 1318 (N.D. Ga. 2013) (holding that there was no cognizable constitutional privacy claim where a teacher used a picture of a student in a bikini that he found on her Facebook page in a classroom PowerPoint presentation because the information was already public); *see also generally* Skinner-Thompson, *supra* note 123 (documenting the rigid application of the complete secrecy requirement in public disclosure tort cases).

319. *Cf.* United States v. Vasquez, 31 F. Supp. 2d 85, 90–91 (D. Conn. 1998); Valenzuela v. Aquino, 853 S.W.2d 512, 513–14 (Tex. 1993).

320. *See Vasquez*, 31 F. Supp. 2d at 90; *Valenzuela*, 853 S.W.2d at 513.

legitimately defended consistent with the First Amendment because they serve a compelling government interest.

C. WEAKENING CLAIM THAT RECORDING INTERFERES WITH POLICE

Before closing, it is worth emphasizing that an additional benefit to foregrounding recording's First Amendment privacy harms as opposed to its situated, physical privacy harms, is that it avoids the risk of bolstering police departments' arguments that recording is tantamount to tangible, physical interference with an officer's duties. Though not terribly successful to date, police departments often claim that citizen recording of the police interferes with their duties.[321] And some courts have explicitly held that if the recording interferes with an officer's performance of her duties, the recording may be limited.[322] If, in an effort to protect citizen privacy, litigants and lawmakers emphasize the situated, physical harms of recording *to citizens*, the same kinds of harms would presumably be applicable to police, playing into police efforts to legally resist recording.

Margot Kaminski's detailed work attempting to delineate the limits of a right to record have emphasized that recording inflicts a physical, situated privacy harm on those subject to the recording.[323] According to Kaminski, "[r]ecording disrupts the nature of a physical space,"[324] often causes individuals to change their behavior,[325] and, therefore may be subject to regulation because "[c]ourts have been willing to recognize legitimate government interests in regulating . . . speech . . . [that] extensively disrupts the ability of other people to enjoy a rivalrous physical space."[326] The existence of this situated, physical harm, Kaminski argues, will, in certain instances, serve a sufficient "valid and substantial government interest" to justify regulations of recording.[327] Kaminski's analysis regarding the physical privacy costs of recording is compelling. But to the extent that recording is directed at the police (the principal context in which advocates are interested in preserving the right to record), the emphasis on recording's physically intrusive nature could amplify police departments' arguments that recording

321. INT'L ASS'N OF CHIEFS OF POLICE, PUBLIC RECORDING OF POLICE ACTIVITIES: INSTRUCTOR'S GUIDE 14 (2017), https://www.theiacp.org/sites/default/files/pdf/PROP%20Instructor%27s%20Guide.pdf [https://perma.cc/CMV9-AWQU] (noting that some law enforcement agencies have wrongly but broadly interpreted what it means to materially interfere with police operations).

322. *See* Fields v. City of Phila., 862 F.3d 353, 360 (3d Cir. 2017) ("If a person's recording interferes with police activity, that activity might not be protected."); Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014) ("[A] police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties."); State v. Russo, 407 P.3d 137, 149 (Haw. 2017) (holding that if "a reasonable officer would conclude that the individual's [recording] action is interfering or about to interfere with the officer's performance of his or her duties," then the recording may be limited by time, place, and manner restrictions).

323. Kaminski, *supra* note 10, at 203.

324. *Id*. at 208.

325. *Id*. at 202.

326. *Id*. at 214.

327. *Id*. at 213.

impermissibly interferes with their duties and therefore can be permissibly prohibited under the First Amendment.

Conversely, as explained above, emphasizing recording's expressive costs provides a more compelling interest justifying regulation, but with diminished attendant risk of justifying limits on the recording of police. In fact, the Supreme Court has struck down regulations aiming to protect police from mere verbal interruptions as unconstitutionally overbroad.[328] So, to the extent that the recording-as-heckling framework permits regulation of recording targeted at private citizens due to its harms to the speech of those private citizens, recording vis-à-vis the police would still be protected as a form of constitutionally protected speech.

CONCLUSION

There are both analytical and doctrinal benefits to understanding contests between those who want to record public activity with those who want to maintain privacy as contests over expression—as battles between a heckler and another speaker. On an analytical level, the framework helps us appreciate that expressive values are implicated on both sides of the debate. Currently, the expressive value of privacy plays a less prominent role in the discussions, with the expressive importance of recording taking precedent. But the heckling frame also foregrounds that democratic governance plus liberated and vibrant public space is contingent on a balance between the ability to maintain privacy in public and the ability to information gather in public.

On a doctrinal level, the heckling frame makes it easier to strike that balance in courts of law. Otherwise, if the right to record is viewed only in light of its expressive values, that right will likely continue to supersede any efforts to maintain privacy. The analogy to the heckler's veto helps augment and enhance arguments that recording infringes on situated and physical harms to privacy and, therefore, that recording can be regulated pursuant to time, place, and manner restrictions, by highlighting the expressive harms to recording. As the above discussion of heckler's veto law makes clear, the government has a freer hand in regulating speech (recording) when that speech infringes on other people's expressive rights. Recognizing the expressive value of privacy helps justify regulation of recording and helps highlight how recording may be disruptive to other speech *qua* privacy.

328. *See* City of Houston v. Hill, 482 U.S. 451, 471–72 (1987).