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FREE SPEECH AND DEMOCRACY IN THE VIDEO AGE

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This Article examines constitutional theory and doctrine as applied to emerging government regulation of video image capture across a spectrum of regulatory regimes. It proposes a framework that promotes free speech to the fullest extent without presenting unnecessary intrusions into legitimate property or privacy interests. The Article first argues that video recording is a form of expression or at the very least, is conduct that serves as a necessary precursor of expression such that it counts as speech under the First Amendment. It continues with the novel argument that none of the features that make video recording a form of expression apply differently when the recording takes place on private property. Next, the Article examines under what circumstances video recording is constitutionally protected. It claims that video recording in public places or on private property with the consent of those recorded is presumptively protected speech under the First Amendment. But it also argues that the right to record attaches even when the recording is nonconsensual and occurs on private property, as long as the material recorded is a matter of public concern and is done by someone who is lawfully present on that private property. That is not to say that all regulation of such recordings violates the First Amendment, and the Article therefore addresses when countervailing governmental interests, including tangible property interests and reasonable privacy expectations, might justify limitations on the right to record.

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INTRODUCTION

"I said, 'Be careful, his bow tie is really a camera.'"[1]

The pervasiveness of digital video recording by large segments of the public has produced a wide range of interesting social challenges but also presents provocative new opportunities for free speech, transparency, and the promotion of democracy. The opportunity to gather and disseminate images, facilitated by easy access to inexpensive camera phones and other hand-held recording devices, decentralizes political power in transformative ways. At the same time, other uses of this technology represent potentially significant intrusions on property rights and personal privacy. This tension creates a substantial dilemma for policymakers and theorists who care about both free speech and privacy. This Article examines constitutional theory and doctrine as applied to emerging government regulations of video image capture and proposes a framework that will promote free speech to the fullest extent possible without facilitating unnecessary intrusions into legitimate privacy interests.

Laws governing video image capture are already commonplace in many contexts. The U.S. Supreme Court and state courts in many jurisdictions forbid video recording of court proceedings.[2] Restrictions on videotaping live artistic performances are widespread, whether by statute, contractual agreement, or federal copyright law.[3] Additionally, video recording bans are becoming more common across a number of different regulatory regimes. For example, the Federal Aviation Administration recently fined a documentary filmmaker for violating its regulations when he

1. Simon & Garfunkel, America, *on* Bookends (Columbia Records 1968).

2. See, e.g., Fed. R. Crim. P. 53; D.C.Colo.LCivR 83.1; Visitor's Guide to Oral Argument, U.S. Sup. Ct., http://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx [http://perma.cc/YG9D-B8ZF] (last visited Jan. 27, 2016); see also 1 Kevin F. O'Malley, Jay E. Grening & William C. Lee, Federal Jury Practice and Instructions 99 n.7 (6th ed. 2006) (detailing state practices allowing audiovisual recording of court proceedings).

3. See, e.g., 17 U.S.C. § 1101(a) (2012) (subjecting those who videotape artistic performances to same civil remedies as copyright infringers).

flew a drone from which he recorded and disseminated a video image.[4] Similarly, Idaho enacted a new law prohibiting any person from using drones "to intentionally conduct surveillance of, gather evidence or collect information about, or photographically or electronically record specifically targeted persons or specifically targeted private property."[5] Controversies also have arisen with regard to laws restricting citizens' ability to record law enforcement officers,[6] an issue that has gained particular salience with the viral dissemination of recordings of police officers' use of force on Eric Garner in Staten Island, New York,[7] Walter Scott in North Charleston, South Carolina,[8] and Sandra Bland in Waller County, Texas,[9] among many others. In a very different context, lawmakers have criminalized surreptitious, nonconsensual recording of another's private body parts and sexual conduct through video voyeurism laws.[10] And a federal court recently issued a temporary restraining order banning an anti-abortion group from circulating undercover videos it had recorded

4. Margot Kaminski, Drones and Newsgathering at the NTSB, Concurring Opinions (May 9, 2014), http://www.concurringopinions.com/archives/2014/05/drones-and-newsgathering-at-the-ntsb.html [http://perma.cc/LM76-2FCY].

5. Idaho Code Ann. § 21-213 (West 2014). For comprehensive treatment of the regulation of drone recordings, see generally Marc Jonathan Blitz et al., Regulating Drones Under the First and Fourth Amendments, 57 Wm. & Mary L. Rev. 49 (2015) [hereinafter Blitz et al., Regulating Drones] (discussing government's interest in regulating drones); Margot E. Kaminski, Regulating Real-World Surveillance, 90 Wash. L. Rev. 1113 (2015) [hereinafter Kaminski, Regulating Real-World Surveillance] (identifying government's interest in such regulations and providing guidelines for future legislation governing new surveillance technologies).

6. See ACLU v. Alvarez, 679 F.3d 583, 586–87 (7th Cir. 2012) (finding Illinois statute criminalizing recording police officers in public likely violates First Amendment).

7. N.Y. Daily News, Original Eric Garner Fatal Arrest Video, YouTube (Dec. 30, 2014), http://www.youtube.com/watch?v=LfXqYwyzQpM (providing video of Eric Garner's arrest). In the high profile case of Michael Brown in Ferguson, Missouri, there was no video recording of the shooting that led to this death. CNN, New Video from the Michael Brown Shooting Death, YouTube (Aug. 13, 2014), http://www.youtube.com/watch?v=advkpZIuq2U.

8. N.Y. Times, Walter Scott Death: Video Shows Fatal North Charleston Police Shooting, YouTube (Apr. 7, 2015), http://www.youtube.com/watch?v=XKQqgVlk0NQ (providing video of Walter Scott's death).

9. USA Today, New Dashcam Video Details Sandra Bland's Arrest, YouTube (July 21, 2015), http://www.youtube.com/watch?v=QwxHCVgyOjs (providing dashcam video of Sandra Bland's arrest).

10. Video Voyeurism Prevention Act of 2004, 18 U.S.C. § 1801 (2012). This Article distinguishes these laws, which directly regulate the act of recording, from so-called "revenge porn" laws, which regulate the distribution of sexually intimate video images that were recorded, but not disseminated, with the consent of the recorded parties. These laws raise important constitutional and public policy questions, but because they do not focus on the initial recording, this Article does not evaluate them as implicating the right to record. For a comprehensive examination of such laws, see generally Danielle Keats Citron & Mary Anne Franks, Criminalizing Revenge Porn, 49 Wake Forest L. Rev. 345 (2014) (advocating for criminalization of revenge porn and discussing potential First Amendment implications).

that purported to reveal misconduct by Planned Parenthood officials with regard to the sale of fetal tissue.[11] Even more recently, Planned Parenthood and the National Abortion Federation have filed lawsuits alleging a range of federal and state law violations against the organization that coordinated undercover video investigations of its officials.[12]

Another important context in which video image capture is being targeted as "wrongful" conduct[13] is so-called "ag-gag" laws,[14] which have become a leading legislative priority of commercial food producers across the country.[15] The model legislation drafted by the American Legislative Exchange Council (ALEC)[16] criminalizes the act of nonconsensual audio or video recording on the premises of slaughterhouses, factory farms, and other industrial meat operations, and state statutes tend to follow this template.[17] The first ag-gag laws were enacted in the

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11. Order Keeping Temp. Restraining Order in Effect Until Resolution of Request for Preliminary Injunction, Nat'l Abortion Fed'n v. Ctr. for Med. Progress, No. 3:15-cv-03522-WHO (N.D. Cal. Aug. 3, 2015). This Article briefly discusses the Planned Parenthood video dispute, which is still developing, below. See infra notes 53–56 and accompanying text.

12. Complaint ¶¶ 145–245, Planned Parenthood Fed'n v. Ctr. for Med. Progress, No. 3:16-cv-00236 (N.D. Cal. Jan. 14, 2016), 2016 WL 159573, at *41–62; Complaint for Injunctive Relief & Damages ¶¶ 94–197, Nat'l Abortion Fed'n v. Ctr. for Med. Progress, No. 3:15-cv-03552-WHO, (N.D. Cal. July 31, 2015), 2015 WL 4591870, at *36–58. See also Sandhya Somashekhar, Planned Parenthood Files Lawsuit over Antiabortion 'Sting' Videomaker, Wash. Post (Jan. 14, 2016), http://www.washingtonpost.com/national/planned-parenthood-files-lawsuit-against-antiabortion-sting-video-maker/2016/01/14/446d9206-baf5-11e5-829c-26ffb874a18d_story.html (on file with the *Columbia Law Review*) (linking to complaint).

13. Defendant Wasden's Response to Motion for Partial Summary Judgment Filed on November 18, 2014 at 15, Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2014) (No. 1:14-cv-00104-BLW), 2014 WL 7530410, at *15 ("The statute's objective is 'to protect agricultural production facilities from interference by wrongful conduct.'" (citing S. 66-1337, 2d Reg. Sess. (Idaho 2014))).

14. The term "ag-gag" was originated by food writer Mark Bittman. See Mark Bittman, Who Protects the Animals?, N.Y. Times: Opinionator (Apr. 26, 2011), http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/ (on file with the *Columbia Law Review*).

15. See Dan Flynn, Farm Protection Is Not "Ag-Gag," Says Animal Ag Spokeswoman, Food Safety News (Jan. 30, 2013), http://www.foodsafetynews.com/2013/01/call-it-farm-protection-not-ag-gag-says-animal-ags-spokeswoman/ [http://perma.cc/443M-SKHB] (explaining agricultural industry's push for ag-gag laws in various states); see also Debate: After Activists Covertly Expose Animal Cruelty, Should They Be Targeted with "Ag-Gag" Laws?, Democracy Now! (Apr. 9, 2013), http://www.democracynow.org/2013/4/9/debate_after_activists_covertly_expose_animal [http://perma.cc/4XX3-6FWK] (demonstrating agricultural sector's advocacy for ag-gag legislation).

16. It has been reported that ALEC was integrally involved in the drafting of model ag-gag legislation. See Will Potter, "Ag Gag" Bills and Supporters Have Close Ties to ALEC, Green Is the New Red (Apr. 26, 2012), http://www.greenisthenewred.com/blog/ag-gag-american-legislative-exchange-council/5947/ [http://perma.cc/7KS2-2RG2].

17. See, e.g., Idaho Code § 18-7042 (Supp. 2015) (criminalizing nonconsensual videotaping or sound-recording of agricultural operation); Utah Code Ann. § 7-6-112 (LexisNexis 2012) (same). Federal litigation challenging the laws in Idaho and Utah is

early 1990s by Kansas, Montana, and North Dakota.[18] Montana's law was largely limited to conduct that was already criminalized, but Kansas and North Dakota included precursors to more recent laws by prohibiting nonconsensual video recordings.[19] Since 2012, five other states have enacted new, much more restrictive ag-gag laws.[20] These ag-gag laws are striking in the scope of their recording prohibitions, which typically criminalize the act of recording conduct or activities that one is otherwise lawfully able to observe from a location he is otherwise lawfully permitted to

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currently pending. See Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009, 1014 (D. Idaho 2014), appeal filed, No. 15-35960 (9th Cir. 2015) (challenging Idaho law criminalizing undercover investigations and videography at "agricultural facilities" on First Amendment basis); Transcript of Motion Hearing at 89–90, 99, Animal Legal Def. Fund v. Herbert, No. 2:13-CV-00679 (D. Utah Sept. 8, 2014) (denying motion to dismiss in part on First Amendment basis). On August 3, 2015, the District Court of Idaho granted summary judgment to the plaintiffs in *Otter* and declared the Idaho ag-gag law to be unconstitutional. See *Otter*, 118 F. Supp. 3d at 1212. The authors disclose that they serve as plaintiffs' counsel in both of these cases.

Another common feature of these laws is the criminalization of misrepresentations as a means of gaining access to those places for the purpose of taking audio recordings or video images. See, e.g., Iowa Code Ann. § 717A.3A.1.b (West 2013). In a separate article, the authors argue that the misrepresentation provisions violate the First Amendment because lies used to facilitate the collection of information on matters of public concern have substantial speech value. See Alan K. Chen & Justin Marceau, High Value Lies, Ugly Truths, and the First Amendment, 68 Vand. L. Rev. 1435, 1447–51 (2015) (addressing when lies deserve First Amendment protection). A third common provision required in some states is that any videotape of unlawful activity recorded in these locations must be turned over to the state within twenty-four hours after it is obtained. See, e.g., Mo. Ann. Stat. § 578.013 (West Supp. 2015).

18. Kan. Stat. Ann. §§ 47-1825–1828 (Supp. 2014); Mont. Code Ann. §§ 81-30-101–105 (2015); N.D. Cent. Code Ann. §§ 12.1-21.1-01–05 (West 2015) (generally prohibiting nonconsensual entry to animal facilities).

19. Kan. Stat. Ann. § 47-1827(c)(4) (prohibiting nonconsensual entry to animal facility to take pictures by photograph or video camera); Mont. Code Ann. § 81-30-103(2)(e) (prohibiting nonconsensual entry to animal facility to take pictures "with the intent to commit criminal defamation"); N.D. Cent. Code § 12.1-21.1-02.6 (prohibiting nonconsensual entry to animal facility to use or attempt to use camera, video recorder, or other video or audio recording equipment).

20. See Idaho Code § 18-7042 (criminalizing misrepresentations made to gain entry to agricultural facility with intent to record facility operations); Iowa Code Ann. § 717A.3A (criminalizing use of false pretenses to obtain access to agricultural facilities with intent to commit act unauthorized by owner); Mo. Ann. Stat. § 578.013 (requiring those recording farm animal abuse to submit recordings to law enforcement within twenty-four hours); Utah Code Ann. § 76-6-112 (criminalizing obtaining access to agricultural facilities under false pretenses with intent to record facility's operations); Property Protection Act, ch. 99A, N.C. Sess. Laws 2015-50 (proposing authorization of civil remedies for those who sustain damages from use of unauthorized recordings on their premises); see also Sarah R. Haag, Note, FDA Industry Guidance Targeting Antibiotics Used in Livestock Will Not Result in Judicious Use or Reduction in Antibiotic-Resistant Bacteria, 26 Fordham Envtl. L. Rev. 313, 318 (2015) (listing eight states with ag-gag provisions); Sarah Evelynn, Does Ag-Gag Make You Gag?, Bill Track 50, http://www.billtrack50.com/blog/civil-rights/does-ag-gag-make-you-gag/ [http://perma.cc/QA9T-Q3GR] (last visited Jan. 27, 2016) (listing five states that proposed ag-gag bills).

be. They have arisen in direct response to the activities of animal rights activists who have surreptitiously recorded severe animal abuse at commercial agricultural operations and exposed numerous illegalities and atrocities at the hands of their employees.[21]

A number of important constitutional questions are implicated by the state regulation of video image capture. For example, if recording bans such as ag-gag laws are constitutionally permissible, it is foreseeable that any number of industries and business operations would seek similar government controls on surreptitious video recordings that might expose misconduct in other areas of the private sector, such as commercial child-care facilities, senior-care homes, hospitals, and industrial factories.[22] Such laws represent a unique incidence of legal regulation—private commercial interests coopting state legislatures to take sides in distorting discourse by chilling the speech on only one side of an important public debate.

Absent from the judicial and academic treatment of video recording regulations is any meaningful attempt to address the most pressing questions regarding application of the First Amendment. This Article tries to fill that gap by identifying and answering four primary questions. First, is the act of video image capture a form of speech or an intrinsic precursor to speech and thereby covered by the First Amendment?[23] Second, if video image capture is speech, does that include all such recordings or only those that occur in public or with the consent of the persons rec-

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21. See, e.g., Nicholas Kristof, Opinion, To Kill a Chicken, N.Y. Times (Mar. 14, 2015), http://www.nytimes.com/2015/03/15/opinion/sunday/nicholas-kristof-to-kill-a-chicken.html? (on file with the *Columbia Law Review*) (describing industrial chicken farming as torture).

22. One state has already legislated a prohibition on employment-based recording investigations in every industry: North Carolina recently enacted, over the governor's veto, a statute creating a sweeping civil tort claim for all employers who are the subjects of recording investigations by their employees. Property Protection Act, ch. 99A, N.C. Sess. Laws 2015-50. Among other things, the law permits an employer to sue

> [a]n employee who intentionally enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer's premises and uses the recording to breach the person's duty of loyalty to the employer.

Id. § 99A-2(b)(2). For now, this Article brackets regulations of recordings at public facilities, particularly ones in which there may be governmental security concerns, such as military bases and prisons, that may implicate different legal and policy issues.

23. See Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1768 (2004) [hereinafter Schauer, Boundaries of the First Amendment] (observing First Amendment coverage questions receive far less academic attention than issues about level of constitutional protection for expression). The courts have recognized in a number of contexts that regulation of conduct necessary to produce speech implicates the First Amendment. See infra section II.C (outlining cases in which courts have recognized First Amendment protection for conduct preparatory to speech).

orded?[24] Although the First Amendment does not ordinarily apply to expression occurring on private property, state laws that criminalize recording on private property based on the recording's content necessarily implicate constitutional concerns.[25] Third, if video recording is covered by the First Amendment, is its coverage limited to matters of public concern that facilitate public discourse? Fourth, and finally, if video image capture is speech, what standard of review ought to apply to its regulation? Are the default doctrinal First Amendment rules—including strict scrutiny of content-based limits—adequate to protect important speech while maintaining sensitivity to legitimate property and privacy concerns? Only by answering these open questions can lawyers and courts competently provide answers to some of the most vexing and undecided questions of free speech law, such as the constitutionality of laws banning drone recordings or criminalizing secret videos by undercover animal welfare investigators.

In examining these issues, this Article unfolds as follows. Part I argues that video recording is a form of expression covered by the First Amendment or alternatively, that it constitutes conduct so directly linked to expression that its regulation must comply with constitutional safeguards for speech and then examines existing case law and literature on this matter. This Part concludes with a novel discussion explaining that none of the features that make video recording a form of speech apply differently when the recording takes place on private property. Recording does not lose its speech characteristics depending on where it occurs—indeed, there is no form of speech that becomes *nonspeech* depending on its location.[26]

While Part I argues that video recording is *covered* by the First Amendment, Part II examines in what circumstances it is constitutionally *protected*. This Part identifies several factors that are important to defining a limited constitutional privilege to engage in audiovisual recording. First, it claims that video recording in public places or on private property with the consent of those recorded is presumptively protected speech under the First Amendment. Second, it argues that the right to record attaches even when the recording is nonconsensual and occurs on private property. While this Article acknowledges that the First Amendment does not limit the enforceability of generally applicable prohibitions on access to private property (at least so long as their application has only an incidental impact on speech), it nonetheless asserts that recording activity that is a matter of public concern by someone who has gained lawful access to

24. See Seth F. Kreimer, Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record, 159 U. Pa. L. Rev. 335, 366–67 (2011) (discussing tension between privacy and First Amendment protections for image capture).

25. See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 396 (1992) (striking down city ordinance forbidding placement of symbols or objects on private property).

26. Of course, the location or nature of the recording may have an impact on the relevant level of scrutiny applicable to the speech restriction.

private property is protected speech. That is not to say that all regulation of such recordings violates the First Amendment, and the Article therefore addresses when countervailing governmental interests might justify limitations on the right to record. Part II also considers, but ultimately dismisses, potential barriers to recognizing a right to record (particularly in private) under existing First Amendment doctrine. Throughout this Part, the Article draws on examples of laws regulating video recordings to suggest how its proposed model for a right to record would apply in context.

I. VIDEO RECORDING AS SPEECH

A fundamental element of speech theory involves determining what, beyond the obvious category of spoken or written words, "counts" as speech and therefore is potentially entitled to First Amendment protection.[27] The so-called "coverage problem" has recently intrigued many scholars who have explored which types of conduct are sufficiently related to the values underlying the First Amendment such that the free-speech implications of their regulation ought to be seriously considered.[28] Furthermore, the Supreme Court has confronted several coverage issues in its decisions over the past decades.[29]

This Part of the Article first explores the extent to which video recording may advance what are typically viewed as the primary free speech values under conventional First Amendment theory—promoting democratic self-governance and facilitating the broader search for truth. It then makes the case that under First Amendment doctrine, the act of

27. Schauer, Boundaries of the First Amendment, supra note 23, at 1767.

28. See, e.g., Jane Bambauer, Is Data Speech?, 66 Stan. L. Rev. 57, 63–64 (2014) (arguing data are form of protected speech as data serve purpose of knowledge creation); Ashutosh Bhagwat, Producing Speech, 56 Wm. & Mary L. Rev. 1029, 1035 (2015) [hereinafter Bhagwat, Producing Speech] (arguing conduct associated with producing speech should generally be protected by First Amendment); Joseph Blocher, Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment, 63 Duke L.J. 1423, 1441–53 (2014) (detailing First Amendment protection for nonsense, or meaningless words); Alan K. Chen, Instrumental Music and the First Amendment, 66 Hastings L.J. 381, 385 (2015) [hereinafter Chen, Instrumental Music] ("[I]nstrumental musical expression is constitutionally equivalent to speech."); John Greenman, On Communication, 106 Mich. L. Rev. 1337, 1345 (2008) (defining communication under free-will theory from viewpoint of listener); Genevieve Lakier, Sport as Speech, 16 U. Pa. J. Const. L. 1109, 1134 (2014) (arguing sports are speech and thus covered by First Amendment); Mark Tushnet, Art and the First Amendment, 35 Colum. J.L. & Arts 169, 216 (2012) (exploring First Amendment doctrine as applied to artwork); R. George Wright, What Counts as "Speech" in the First Place?: Determining the Scope of the Free Speech Clause, 37 Pepp. L. Rev. 1217, 1218 (2010) (exploring boundaries of scope of First Amendment protections). See also Kent Greenawalt, Speech, Crime, and the Uses of Language 54 (1989) (distinguishing speech from conduct conveying no message).

29. See, e.g., Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729 (2011) (video games); Virginia v. Black, 538 U.S. 343 (2003) (cross burning); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp., 515 U.S. 557 (1995) (parades); Texas v. Johnson, 491 U.S. 397 (1989) (flag burning).

video recording constitutes a form of expression covered by the Constitution. Next, it makes the alternative claim that if video image capture is not speech, it is nevertheless covered by the First Amendment because it is conduct preparatory to speech. Finally, this Part argues that the characteristics that make video recording a form of speech or conduct preparatory to speech do not change when the recording is made on private, as opposed to public, property. Together, these arguments lead to the conclusion that video recording on private or public property is a form of expression covered by the First Amendment.

A. *The First Amendment Values of Video Recording*

First Amendment theory strongly supports the notion that video recording is a form of expression or conduct preparatory to speech. The most common justifications for protecting expression under free-speech law typically turn on three major instrumental claims. First, it has long been argued that speech is an important means for promoting democratic self-governance.[30] A second and related rationale for speech protection is that unfettered discourse facilitates the search for broader truths beyond the political world.[31] Finally, some have argued that protection of speech advances important interests in individual self-realization and autonomy.[32]

This Article argues that not only does video recording count as a form of expression from a doctrinal perspective but also First Amendment theory supports its inclusion as speech because such recording may advance at least two of these interests—democratic self-governance and the search for truth—in critical ways.[33]

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30. See Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 75 (1948) (describing importance of free speech to self-governing community); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 26 (1971) (arguing democratic principles and First Amendment are inextricably intertwined, regardless of Framers' specific intent).

31. See John Stuart Mill, On Liberty 42 (1859) (arguing robust discussion and argument leads to fuller perception of truth); see also Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

32. See Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591, 593 (1982) (arguing main value of free-speech protection is "individual self-realization"); Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 217–18 (1972) [hereinafter Scanlon, Theory] (arguing self-autonomy can only be realized through dissemination of information fostering unencumbered debate). Other theorists have been critical of utilitarian speech theories. See, e.g., Larry Alexander, Is There a Right of Freedom of Expression? 131 (2005) (criticizing autonomy maximization theories for failing to account for government's interest in balancing protected rights against each other); Andrew Koppelman, Veil of Ignorance: Tunnel Constructivism in Free Speech Theory, 107 Nw. U. L. Rev. 647, 690–91 (2013) (rejecting free-speech scholars' focus on self-realization and democracy as too narrowly drawn).

33. While not discussing it at length, this Article does not completely discount the possibility that there is also an autonomy-based rationale for treating video recording as

The capacity for individual citizens to make audiovisual recordings has been around since at least the latter part of the twentieth century.[34] But the advancement of digital technology and the relative ease with which one can acquire a recording device has now made video recordings so widely available as to be virtually ubiquitous.[35] Coupled with the advent of the Internet, the expansion of video recording technology has made it possible to broadcast images widely, inexpensively, and instantaneously.[36] This creates transformative ways for individuals to participate in democracy and inform public discourse about not only political and social issues but also broader understandings about the truths of the universe, including complex moral questions. From abortion[37] to food safety and animal welfare[38] to police misconduct and racism,[39] surreptitious video recording adds to the body of knowledge about the most controversial aspects of contemporary society.

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speech. It could be argued that the freedom to engage in video recording in many settings allows individuals to express themselves and develop their thoughts, ideas, and other mental faculties in a manner that helps them evolve as autonomous human beings. The problem with this argument, as with other autonomy justifications, is that it is difficult to draw the line between video recording and other forms of conduct that advance autonomy but are more clearly not speech. But see Chen, Instrumental Music, supra note 28, at 411–12 (explaining First Amendment serves as limiting principle to autonomy-based theories of free speech).

34. Kreimer, supra note 24, at 339–40 (discussing emergence of digital and cellphone cameras).

35. See id. at 337 (discussing pervasiveness of image capture).

36. Id.

37. See, e.g., Krishnadev Calamur, A New Planned Parenthood Video and More Outrage, Atlantic (Aug. 4, 2015, 5:54 PM), http://www.theatlantic.com/national/archive/2015/08/planned-parenthood-video/400472/ [http://perma.cc/2DTC-FFK9] (discussing controversy arising from release of Planned Parenthood videos about fetal tissue donation); Christine Mai-Duc, Planned Parenthood Videos Highlight Questions About Fetal Tissue Research, L.A. Times (Aug. 5, 2015, 4:34 PM), http://www.latimes.com/nation/nationnow/la-na-nn-planned-parenthood-20150716-htmlstory.html [http://perma.cc/RGK5-EN7B] (reporting on release of surreptitiously recorded videos of Planned Parenthood executives discussing fetal tissue donation).

38. See, e.g., Wayne Pacelle, HSUS Undercover Investigation Shutters NJ Slaughter Plant, Huffington Post (Jan. 27, 2014 9:57 AM), http://www.huffingtonpost.com/wayne-pacelle/hsus-undercover-investiga_b_4674009.html [http://perma.cc/MF47-3HLM] (discussing closure of Catelli Bros. slaughter plant in light of surreptitiously recorded footage by Humane Society of United States).

39. See, e.g., Kim Bellware, Cop Placed on Leave After Video Emerges of Brutal Arrests at Teen Pool Party, Huffington Post (June 8, 2015, 3:00 PM), http://www.huffingtonpost.com/2015/06/07/mckinney-police-pool-party_n_7530164.html [http://perma.cc/FWB6-59F6] (reporting Texas police officer was placed on administrative leave after release of video showing officer aggressively arresting and pointing his weapon at teens at pool party); CNN, New Video Shows Arrest of Freddie Gray in Baltimore, YouTube (Apr. 21, 2015), http://www.youtube.com/watch?v=7YV0EtkWyno (showing video of twenty-five-year-old Freddie Gray's arrest that allegedly led to his death); Eliott C. McLaughlin, Orlando Police Chief: No Reason to Suspend Officers Who Kicked Man, CNN (June 11, 2015), http://www.cnn.com/2015/06/10/us/orlando-police-kick-man-video/ [http://perma.cc/L6AW-AYSD] (showing video of police kicking and tasing man sitting on curb).

And in the post–*Citizens United* era during which the First Amendment has been interpreted to unleash unprecedented levels of corporate political power in the form of campaign spending and contributions,[40] a compelling argument could be made that video-image-capture whistleblowing may offer a powerful counterbalance. Offsetting corporate spending sanctioned by the First Amendment in ways that enhance the universe of speech and information available to the public about such corporations ensures that the First Amendment provides opportunities for a well-rounded public discourse.

1. *Recording Serves Self-Governance.* — In Professor Seth Kreimer's recent, path-marking work comprehensively examining the regulation of image capture as a free-speech problem, he accurately describes several of the possibilities that recording has for both public official accountability and effective citizen participation "in public dialogue."[41] Official campaign videos, of course, now play a prominent and central role in electoral politics, whether they are broadcast on television or over the Internet.[42] But with the proliferation of image-capture technology, unofficial videos, too, have entered the scene. One of the biggest stories of the 2012 U.S. presidential campaign emerged when Scott Prouty, a catering company waiter, secretly video recorded a speech by Republican candidate Mitt Romney at a private fundraising event.[43] The nonconsensually recorded video shows Romney talking to wealthy donors about what he characterized as the forty-seven percent of Americans who believe they are "victims" and "believe the government has a responsibility to take care of them."[44] Not surprisingly, President Barack Obama later used these remarks to argue that Romney was out of touch with mainstream, average Americans.[45] Of course, the revelations of video recordings are

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40. See McCutcheon v. FEC, 134 S. Ct. 1434, 1442 (2014) (holding aggregate limits placed on donors' campaign contributions violate First Amendment); Citizens United v. FEC, 558 U.S. 310, 316 (2010) (holding congressional ban on independent corporate expenditures for electioneering communications unconstitutional under First Amendment).

41. Kreimer, supra note 24, at 341.

42. See, e.g., Hillary Clinton, Getting Started, YouTube (Apr. 12, 2015), http://www.youtube.com/watch?v=0uY7gLZDmn4 (showing Democratic presidential candidate Hillary Clinton's campaign video); Ted Cruz, Ted Cruz for President, YouTube (Mar. 23, 2015), http://www.youtube.com/watch?v=cEOKJRkhpxg (showing Republican presidential candidate Ted Cruz's campaign video).

43. See David Corn, Meet Scott Prouty, the 47 Percent Video Source, Mother Jones (Mar. 13, 2013, 7:01 PM), http://www.motherjones.com/politics/2013/03/scott-prouty-47-percent-video [http://perma.cc/5CFX-P6JN] ("For nearly two weeks [Prouty's video] dominated the presidential race.").

44. Jim Rutenberg & Ashley Parker, Romney Says Remarks on Voters Help Clarify Position, N.Y. Times (Sept. 18, 2012), http://www.nytimes.com/2012/09/19/us/politics/in-leaked-video-romney-says-middle-east-peace-process-likely-to-remain-unsolved-problem.html (on file with the *Columbia Law Review*).

45. See Mark Landler, Obama Hits Romney over 47 Percent Remark, N.Y. Times: Caucus (Sept. 20, 2012), http://thecaucus.blogs.nytimes.com/2012/09/20/obama-hits-back-at-romney-on-47-percent-remark/ [http://perma.cc/B4V5-63ND] (explaining President

bipartisan. As Professor Kreimer noted, President Obama himself was captured on video talking about "bitter" Pennsylvanians at a private fundraising meeting during his first presidential campaign.[46]

Aside from political groups or candidates, video recordings may be valuable and effective tools that can provide information to the public eye and be persuasive on a wide range of issues from all points on the political spectrum:

> Image capture can document activities that are proper subjects of public deliberation but which the protagonists would prefer to keep hidden and deniable. Animal rights activists regularly seek to record and publicize what they regard as graphic examples of animal abuse. Conservative activists seek to capture and publish images of their opponents engaged in activities that the activists believe the public would oppose. Human rights campaigners document violations of humanitarian norms. News organizations place dubious police tactics on the public record.[47]

These investigations can have enormous impact on social consciousness and public policy. For example, in 2008 the Humane Society of the United States released video footage from the Hallmark slaughterhouse in Chino, California that showed workers "kicking cows, ramming them with the blades of a forklift, jabbing them in the eyes, applying painful electrical shocks and even torturing them with a hose and water in attempts to force sick or injured animals to walk to slaughter."[48] Reaction to the video's public disclosure of this abusive conduct was so strong that it produced four significant, concrete results: criminal charges against a slaughterhouse manager, the largest beef recall in U.S. history, a $500 million False Claims Act judgment,[49] and state legislation mandating better treatment of injured animals.[50]

Video image capture can also be an important tool for union activists, who may wish to document employers' violations of federal labor laws. As the National Labor Relations Board (NLRB) reported in a recent ruling against the Whole Foods grocery chain, employees might legitimately use video devices for "recording images of protected picketing,

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Obama's comments regarding Romney's "closed-door observation" as "his most extensive, and barbed").

46. Kreimer, supra note 24, at 345 n.27.

47. Id. at 345.

48. Rampant Animal Cruelty at California Slaughter Plant, Humane Soc'y of the U.S. (Jan. 30, 2008), http://www.humanesociety.org/news/news/2008/01/undercover_investigation_013008.html (on file with the *Columbia Law Review*).

49. Linda Chiem, Slaughterhouse Owners Hit with $500M Judgment in FCA Case, Law360 (Nov. 16, 2012, 9:35 PM), http://www.law360.com/articles/394827/slaughterhouse-owners-hit-with-500m-judgment-in-fca-case [http://perma.cc/PET8-RH6Z].

50. Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 969 (2012) ("[T]he video also prompted the California legislature to strengthen a pre-existing statute governing the treatment of nonambulatory animals . . . ."). The Court, however, held federal law preempted the legislation. Id.

documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, documenting inconsistent application of employer rules, or recording evidence to preserve it for later use in administrative or judicial forums in employment-related actions."[51] Such recordings can be valuable in facilitating enforcement of the law and generating political support and sympathy for union activities. Thus, even a private company's ban on recording by its employees implicates federal concerns—concerns that led the NLRB to strike down Whole Foods's categorical ban on nonconsensual recordings by its workers.[52]

At the other end of the political spectrum, conservative activists have successfully used such techniques to unveil what they claim to be hypocrisy in liberal organizations. Very recently, representatives of an anti-abortion activist group called the Center for Medical Progress (CMP) posed as potential purchasers of tissue from aborted fetuses and secretly recorded a doctor affiliated with Planned Parenthood.[53] The group claims that the doctor's statements suggest that Planned Parenthood is violating the law by selling such tissue.[54] The reports of the video have prompted some elected officials to call for an investigation of Planned Parenthood.[55] In response, the National Abortion Federation recently secured a temporary restraining order barring release of CMP's recordings.[56]

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51. Whole Foods Mkt., Inc., 205 L.R.R.M. (BNA) 1153 (Dec. 24, 2015).

52. Id.

53. Jackie Calmes, Video Accuses Planned Parenthood of Crime, N.Y. Times (July 15, 2015), http://www.nytimes.com/2015/07/15/us/video-accuses-planned-parenthood-of-crime.html (on file with the *Columbia Law Review*).

54. Id. Federal law prohibits such sales for profit. See 42 U.S.C. § 289g-2(a) (2012) ("It shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human fetal tissue for valuable consideration if the transfer affects interstate commerce."); 42 U.S.C. § 289g-2(e)(3) (defining term "valuable consideration" so as not to include "reasonable payments associated with the transportation, implantation, processing, preservation, quality control, or storage of human fetal tissue"). It appears that the group actually edited the interview in a way that misrepresents the doctor's statements—leaving out a portion of the interview in which the doctor reiterated that the fees cover only the clinic's actual expenses. See Editorial, The Campaign of Deception Against Planned Parenthood, N.Y. Times (July 22, 2015), http://www.nytimes.com/2015/07/22/opinion/the-campaign-of-deception-against-planned-parenthood.html (on file with the *Columbia Law Review*) ("The full video of the lunch meeting . . . shows something very different from what these critics claim."). Abortion rights advocacy groups have argued that the CMP video was edited in a manner that falsely depicted what truly transpired. See, e.g., Complaint for Injunctive Relief & Damages ¶¶ 31, 33, 36, Nat'l Abortion Fed'n v. Ctr. for Med. Progress, No. 3:15-cv-03552-WHO (N.D. Cal. July 31, 2015), 2015 WL 4591870 at *13–15.

55. See Calmes, supra note 53 (noting Louisiana governor Bobby Jindal "asked the state's health department to investigate Planned Parenthood and 'this alleged evil and illegal activity'").

56. Alan Zarembo, U.S. Judge Halts Release of Secretly Recorded Videos of Abortion Providers, L.A. Times (Aug. 1, 2015, 7:37 PM), http://www.latimes.com/local/california/la-me-0802-court-order-20150802-story.html [http://perma.cc/4ZMN-P2YA]. The order

Another high-profile example is conservative activist James O'Keefe's investigation of the progressive organization ACORN in 2009.[57] O'Keefe and another activist visited an ACORN office and secretly recorded a conversation in which they pretended to be seeking help to facilitate a plan to smuggle underage girls into the United States for the purposes of prostitution.[58] Although the ACORN employee immediately reported the "plan" to law enforcement authorities, O'Keefe released an edited version of the video that was broadcast publicly and appeared to show the ACORN employee offering support for parts of the plan.[59] This led to an investigation of ACORN and its eventual demise.[60] While this example may give some observers pause, particularly when they are sympathetic to the persons or organizations who are targeted for investigation, it is difficult to dispute that these recordings potentially contributed to public discourse.[61]

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was lifted and the permanent injunction denied about a month later. See Order to Show Cause Re Preliminary Injunction (Aug. 21, 2015), http://media.bizj.us/view/img/6787472/21-order-denying-preliminary-injunction.pdf [http://perma.cc/7YBU-8QJG].

57. ACORN Workers Caught on Tape Allegedly Advising on Prostitution, CNN (Sept. 11, 2009, 10:21 AM), http://www.cnn.com/2009/POLITICS/09/10/acorn.prostitution/ [http://perma.cc/2LHY-XT8Y]. To be sure, O'Keefe, the producer of the ACORN investigation, has been accused of unsavory practices. See Catherine Thompson, Ex-Staffer Slams James O'Keefe: He Crossed a Line with Vile "Kill Cops" Stunt, Talking Points Memo: Muckraker (Mar. 20, 2015, 6:00 AM), http://talkingpointsmemo.com/muckraker/james-okeefe-kill-cops-script [http://perma.cc/YM3J-4TAZ] (referencing suit brought against O'Keefe for wrongful termination and defamation). O'Keefe has even been convicted of breaking into a U.S. Senator's office. Christina Wilkie, ACORN Filmmaker James O'Keefe Sentenced in Sen. Mary Landrieu Break-In, Hill (May 26, 2010, 11:15 PM), http://thehill.com/capital-living/in-the-know/100105-filmmaker-okeefe-sentenced-in-sen-mary-landrieu-break-in [http://perma.cc/9R2Y-7TCF]. But the basic point remains—his video recordings constituted profoundly powerful political speech.

58. Vera v. O'Keefe, No. 10-CV-1422-L(MDD), 2012 WL 3263930, at *1 (S.D. Cal. Aug. 9, 2012).

59. Id. at *2.

60. See id. ("Plaintiff claims that his reputation is 'in the garbage' since the release of the videotape and he has been unsuccessful finding employment after the ACORN incident.").

61. In O'Keefe's case, as with the CMP, note that there were claims that the video recordings were edited in ways that might have actually misrepresented the interactions he recorded. See Conor Friedersdorf, Still Making an Innocent Man Look Bad, Atlantic (Dec. 29, 2010), http://www.theatlantic.com/daily-dish/archive/2010/12/still-making-an-innocent-man-look-bad/177964/ [http://perma.cc/JAV4-GNC4] (emphasizing "misleading" nature of videos, making "innocent man look as if he was complicit in a plot to traffic underage girls across the border"). To the extent that this was the case, while this Article would still regard the recording as speech and therefore *covered* by the First Amendment, the recording's exhibition might not be *protected* to the extent that it conveyed false or defamatory information. Indeed, independent investigations have concluded that the video was edited in a way that created a misleading view of the ACORN employees' actions. See Cal. Dep't of Justice, Office of Attorney Gen., Report of the Attorney General on the Activities of ACORN in California 14–17 (Apr. 1, 2010), http://ag.ca.gov/cms_attachments/press/pdfs/n1888_acorn_report.pdf [http://perma.cc/AMD8-V6UK] (noting "facts . . . strongly suggest[] O'Keefe and Giles[] violated state privacy laws").

The utility of video recordings may also manifest itself through spontaneous, rather than deliberate, acts of recording. One example that has recently received great attention is citizens' efforts to record police officers' conduct as they carry out their official duties.[62] One of the most well-known instances of this was when a bystander video recorded police officers beating Rodney King in Los Angeles in the early 1990s.[63] More recently, of course, the police's use of deadly force on Eric Garner and Walter Scott was captured on video, though the two deaths resulted in different legal outcomes.[64] Video recording's unique ability to accurately document interactions can provide individuals with evidence that may contradict official accounts of an event or perhaps deter ex ante any official misconduct from occurring simply by its availability. On the other side, some police departments and policymakers have advocated requiring officers and their vehicles to be equipped with mounted video cameras to protect themselves from inaccurate or fabricated allegations of their own conduct.[65] The recent dispute over the disclosure of police camera videos

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62. See, e.g., David Murphy, Comment, "V.I.P." Videographer Intimidation Protection: How the Government Should Protect Citizens Who Videotape the Police, 43 Seton Hall L. Rev. 319, 350–56 (2013) (providing "model legislative framework for protecting videographers against police harassment"); Andrea Peterson, Yes, You Can Record the Police. And Maybe the Police Should Be Recording the Police., Wash. Post (Aug. 14, 2014), http://www.washingtonpost.com/news/the-switch/wp/2014/08/14/yes-you-can-record-the-police-and-maybe-the-police-should-be-recording-the-police/ [http://perma.cc/4VLW-YR7B] (discussing legality and benefits of recording police actions).

63. See Sa'id Wekili & Hyacinth E. Leus, Police Brutality: Problems of Excessive Force Litigation, 25 Pac. L.J. 171, 181–82 (1994) ("Had it not been for the secretly taped video evidence, the case of Rodney King may never have found its way to the media or the courtroom."); Jim Kavanagh, Rodney King, 20 Years Later, CNN (Mar. 3, 2011, 8:56 AM), http://www.cnn.com/2011/US/03/03/rodney.king.20.years.later/ [http://perma.cc/FDN5-5N2G] (describing King case and its aftermath).

64. Compare Aaron Paxton Arnold, The Real Whistle-Blower in Police Brutality, CNN (Aug. 7, 2015, 3:35 PM), http://www.cnn.com/2015/08/07/opinions/arnold-police-shootings/ [http://perma.cc/Q7J9-BPAD] (arguing camera phones are largely responsible for indictment of police officer who shot and killed Walter Scott), with David A. Graham, A Year After Eric Garner's Death, Has Anything Changed?, Atlantic (July 17, 2015), http://www.theatlantic.com/politics/archive/2015/07/eric-garner-anniversary/398837/ [http://perma.cc/TT75-LVUR] (noting officers who killed Eric Garner, whose death was caught on camera, and Michael Brown were not indicted for murder).

65. See, e.g., Mark Potter & Tim Stelloh, Michael Brown's Death in Ferguson Renews Calls for Body Cameras, NBC News (Aug. 17, 2014, 5:54 PM), http://www.nbcnews.com/storyline/michael-brown-shooting/michael-browns-death-ferguson-renews-calls-body-cameras-n182751 [http://perma.cc/E6LF-4QQM] (discussing police use of body cameras). For similar reasons, there have been increasing calls from both the law enforcement community and the criminal defense bar to videotape police interrogations. See Thomas P. Sullivan, The Police Experience Recording Custodial Interrogations, Champion Mag., Dec. 2004, at 24 (noting support for videotaped interrogations across spectrum of interest groups). See generally Thomas P. Sullivan, Recent Developments, Electronic Recording of Custodial Interrogations: Everybody Wins, 95 J. Crim. L. & Criminology 1127, 1129 (2005) (arguing benefits of video-recorded interrogations include deterring police misconduct and either confirming or rebutting suspects' claims that officers used coercive interrogation techniques).

of the shooting of Laquan McDonald has underscored the urgency of this debate.[66]

Yet another context in which images inform public discourse is when they are leaked. That is, even when the act of image capture is not part of a deliberate political or social movement or a reaction to a spontaneous event, the disclosure of recorded images can lead to public debate and reforms in the law. Particularly powerful examples of this are the public outrage caused by leaked video and photographic evidence of members of the U.S. military mistreating prisoners of war at Abu Ghraib prison in Iraq[67] and the similar reaction to some of the video recordings of U.S. combat operations released by WikiLeaks.[68]

2. *Recording Serves the Broader Search for Truth.* — The expressive value of recording is not limited to partisan politics or public policy controversies. Video recording also functions as a manner of revealing broader truths, ranging from the pragmatic—such as law enforcement and journalistic investigations—to the aesthetic and moral—such as promoting discourse about the manner in which our society treats animals.

Law enforcement and other government investigators often incorporate video recordings into their investigations of criminal and other unlawful private conduct.[69] Of course, when government agents use secret video recordings, they typically must comply with constitutional and statutory limits on their investigation derived from the Fourth Amendment.[70]

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66. See Sam Levine, Here's How the Laquan McDonald Shooting Differs from What Police Said Happened, Huffington Post (Nov. 25, 2015, 10:56 AM), http://www.huffingtonpost.com/entry/laquan-mcdonald-shooting-video_us_5655ca26e4b08e945fea9488 [http://perma.cc/3BV6-P2XD] (last updated Nov. 27, 2015) (comparing police accounts of incident with newly available video). To view this video, see Video Shows Cop Shoot Teen, CNN (Nov. 25, 2015, 3:35 PM), http://www.cnn.com/videos/us/2015/11/25/laquan-mcdonald-chicago-shooting-dashcam-video-orig-mg.cnn/video/playlists/shooting-death-of-laquan-mcdonald/ [http://perma.cc/26NP-UMGR].

67. See Seymour M. Hersh, Torture at Abu Ghraib, New Yorker (May 10, 2004), http://www.newyorker.com/magazine/2004/05/10/torture-at-abu-ghraib [http://perma.cc/89YH-UPHL] (referring to fact that government report of abuse at Abu Ghraib prison did not include photographs and videos taken by soldiers because of their sensitive nature).

68. See Collateral Murder, WikiLeaks, http://collateralmurder.wikileaks.org [http://perma.cc/S7G8-3PLK] (last visited Jan. 27, 2016) (providing video of U.S. military troops killing reporters and civilians); see also Noam Cohen & Brian Stelter, Iraq Video Brings Notice to a Web Site, N.Y. Times (Apr. 6, 2010), http://www.nytimes.com/2010/04/07/world/07wikileaks.html (on file with the *Columbia Law Review*) (describing news coverage and media attention given to WikiLeaks and Collateral Murder video).

69. See infra notes 70–76 and accompanying text (discussing cases that illustrate this practice).

70. See, e.g., United States v. Mesa-Rincon, 911 F.2d 1433, 1442–43 (10th Cir. 1990) (holding video surveillance must be "least intrusive [method] available to obtain the needed information" to comply with Fourth Amendment); United States v. Torres, 751 F.2d 875, 882 (7th Cir. 1984) (holding video surveillance must comply with Fourth Amendment).

When an undercover officer makes a video recording of a suspect who permits her to be present, it is not considered to be a search or seizure subject to Fourth Amendment restrictions because the suspect does not have a reasonable expectation of privacy in the recorded acts.[71] The lower federal courts have applied a more stringent standard, however, when government officials seek a warrant under Rule 41 of the Federal Rules of Criminal Procedure to plant a surveillance video camera at the location of suspected criminal activity.[72] There, courts have suggested that in order to balance the need for video recording with the intrusiveness of the search, those officials must show that all other "reasonable" investigatory methods would not suffice in a particular investigation.[73]

Nonetheless, courts have recognized that in many types of investigations, video recording is a superior tool for fact-finding than conventional methods. For example, the Tenth Circuit held that video recording was a necessary tactic for investigating a counterfeiting operation because the machinery used would drown out a mere audio recording and counterfeiting is a form of criminal activity that can take place without any verbal communication.[74] Similarly, a decision by the Second Circuit noted that videos were an essential investigative method to uncover illegal loan sharking because "[l]ike much of organized crime, [loan sharking] operated behind an enforced wall of secrecy."[75] Moreover, "[f]rom a law enforcement perspective, video surveillance not only enhances investigative capabilities, but also prompts a sharp decrease in the strain on investigative resources."[76]

Investigative journalists, too, have used video recordings, often surreptitiously obtained, to inform the public about issues of grave public concern.[77] An example that has received great attention from legal scholars is the work of two reporters from the ABC News program *Primetime Live* to investigate the grocery store chain Food Lion.[78] The reporters obtained jobs with two different Food Lion stores and thereafter used

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71. See United States v. White, 401 U.S. 745, 751 (1971) (concluding undercover agent's act of recording did "not invade the defendant's constitutionally justifiable expectations of privacy").

72. See *Mesa-Rincon*, 911 F.2d at 1443–44 (announcing standard for review of video surveillance authorization and comparing with precedent).

73. Id.

74. Id. at 1444–45.

75. United States v. Biasucci, 786 F.2d 504, 511 (2d Cir. 1986).

76. Mona R. Shokrai, Double-Trouble: The Underregulation of Surreptitious Video Surveillance in Conjunction with the Use of Snitches in Domestic Government Investigations, 13 Rich. J.L. & Tech. 1, 8 (2006).

77. See, e.g., Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1347–48 (7th Cir. 1995) (arising from news station's uncovering ophthalmic clinic's overuse of cataract surgery for guaranteed Medicare payment); Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., 30 F. Supp. 2d 1182, 1185 (D. Ariz. 1998), aff'd, 306 F.3d 806 (9th Cir. 2002) (discussing undercover investigation into medical laboratory's errors in pap smear readings).

78. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 510 (4th Cir. 1999).

hidden video cameras to document and confirm what sources had initially reported—that Food Lion's food-handling practices were highly unsanitary and probably illegal.[79] The Fourth Circuit noted:

> The broadcast included, for example, videotape that appeared to show Food Lion employees repackaging and redating fish that had passed the expiration date, grinding expired beef with fresh beef, and applying barbeque sauce to chicken past its expiration date in order to mask the smell and sell it as fresh in the gourmet food section. The program included statements by former Food Lion employees alleging even more serious mishandling of meat at Food Lion stores across several states.[80]

Though investigations such as this may lead to concrete policy debates and therefore also support democratic self-governance, they may also provoke thought and expression about larger moral questions, such as business ethics.

Perhaps a clearer example of this arises in the context of undercover investigations by animal-rights activists. As already discussed, some of the videos produced by such activists have been critical to advancing public discourse and influencing policy reforms.[81] Additionally, the widespread dissemination of these and other similar videos importantly informs moral debates about the manner in which we relate to nonhuman animals, including whether people should reduce or eliminate animal products from their diets. Indeed, according to one report, most Americans who are converting to veganism and vegetarianism have been influenced by "how much we have learned about commercial farming and animal treatment over the last five years."[82]

3. *The Unique Contributions of Recording to Enhancing Truth and Promoting Public Discourse.* — "Photography is truth. The cinema is truth 24 times per second."[83]

In terms of informing public discourse and enhancing debate over political, social, moral, and philosophical issues, video recording has at least two particular advantages over other communication media—availa-

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79. Id.

80. Id. at 511.

81. See supra notes 48–50 and accompanying text (discussing public and legislative response to undercover videos of animal abuses at slaughterhouse in Chino, California).

82. Nadine Watters, 16 Million People in the US Are Now Vegan or Vegetarian!, Raw Food World, http://news.therawfoodworld.com/16-million-people-us-now-vegan-vegetarian [http://perma.cc/6E5P-6HNR] (last visited Jan. 27, 2016) (explaining impact undercover videos of animal abuse at slaughterhouses have had on America's trend toward veganism and vegetarianism).

83. La Petit Soldat (Les Productions Georges de Beauregard 1963) (translated by authors) ("*La photographie, c'est la vérité et le cinéma, c'est vingt-quatre fois la vérité par seconde.*").

bility and accuracy.[84] In terms of the former, as this Article has already argued, technological advances have made video recording accessible to a broader range of people than conventional forms of expression and at a relatively low cost.[85] Understanding video image capture as a form of expression covered by the First Amendment embraces a populist understanding of the value of expression. As Professor Kreimer argues, the advent of video recording means that "the marginal cost of the physical composition and transmission of speech has dropped to close to zero."[86]

From a First Amendment theory perspective, this may be all the more important since this is an era when the Supreme Court has recognized broad free speech rights for large corporations.[87] It seems particularly critical, then, to ensure that the marketplace of ideas is open to those with fewer resources and opportunities to occupy the public space of expression.[88] The confluence of expanding corporate speech rights and the wielding of corporate power to persuade government officials to "protect" businesses from speech antithetical to their political and commercial interests has produced an acute opportunity to focus on the right to record.[89] As Professor Jane Bambauer notes, "As smart phones and other recording devices become ubiquitous, corporations have come to the well, too, pressing legislators to create or strengthen laws that protect their interests in secrecy."[90]

The second advantage of recording is that video records of events and behavior are likely to be much more accurate than other means of conveying information. Not only do these speech acts inform public discourse, but they do so in an unusually effective way.[91] It is not uncommon for interactions between government officials and private citizens to result in disputes over what actually occurred, generating conflicting testi-

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84. Professor Kreimer also embraces these considerations as factors that should weigh in favor of considering image capture to be covered by the First Amendment. Kreimer, supra note 24, at 386.

85. See supra text accompanying notes 34–36 (describing wide availability of video cameras and their impact on modern democracy).

86. Kreimer, supra note 24, at 386.

87. See Citizens United v. FEC, 558 U.S. 310, 365 (2010) ("No sufficient governmental interest justifies limits on the political speech of non-profit or for-profit corporations.").

88. See Jeffrey M. Blum, The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending, 58 N.Y.U. L. Rev. 1273, 1323–24 (1983) (discussing Court's historical emphasis on low-cost forms of speech such as leafleting in order to protect "'poorly financed causes of little people'" (quoting Martin v. City of Struthers, 319 U.S. 141, 146 (1943))).

89. See Bambauer, supra note 28, at 60 (discussing business efforts to secure data protections from government).

90. Id.

91. Professor Kreimer makes the point in this way: "[I]mages are often more salient than verbal descriptions. Their apparently self-authenticating character gives them disparate authority, and their rhetorical impact encompasses the proverbial 'thousand words.'" Kreimer, supra note 24, at 386.

mony from differing eyewitness accounts.[92] Video recordings can validate or undermine these accounts and help resolve the conflict not only for the parties immediately involved but also in the interests of the broader community. They are like instant-replay review for real-world events. The Supreme Court has even relied on a video recording to decide that an officer's behavior during a high-speed chase was not unreasonable.[93]

The point is not only that the accuracy of video increases the credibility and reliability of expression but also that it may allow more information to be translated quickly and in a manner unfiltered by a third-party account. To illustrate this benefit, this Article draws on one of the most well-known examples of an undercover investigation by Upton Sinclair, who gained access to meatpacking facilities by disguising himself as a worker to gather information that he hoped would expose the many unfortunate ways in which meatpacking companies treated their employees; this information later became the focus of his path-breaking novel, *The Jungle*.[94] To protect his cover, Sinclair could not be seen taking notes of his observations. Rather, he walked through the meatpacking plant, "memorizing details of what he saw, then rushing back to his room to write everything down."[95] Had Sinclair lived in this era, his accounts of the events would have not only been easier to obtain; they would have also essentially been self-authenticating.[96] Thus, as with the police investigations discussed earlier, secret video recordings have the advantage of helping to acquire accurate and useful information and protecting the identity of undercover investigators.

B. *Video Recording as a Component of Expression*

From a doctrinal standpoint, understanding video recording as speech must begin with a look at the manner in which the exhibition and viewing of such recordings communicates. While the First Amendment protects the freedom of "speech," the concept of speech is not self-defining. Ra-

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92. See, e.g., Dueling Narratives in Michael Brown Shooting, CNN (Sept. 16, 2014, 6:19 AM), http://www.cnn.com/2014/08/19/us/ferguson-michael-brown-dueling-narratives/ [http://perma.cc/5YVZ-KM9P] (discussing disputed witness accounts to incident that was not caught on camera); Levine, supra note 66 (comparing police accounts of incident with video footage).

93. Scott v. Harris, 550 U.S. 372, 386 (2007) (discussing importance of videotape of incident and holding "[Deputy] Scott's attempt to terminate the chase by forcing respondent off the road was reasonable, and Scott is entitled to summary judgment").

94. Upton Sinclair, The Jungle (James R. Barrett ed., Univ. of Ill. Press 1988) (1906); see generally Arthur Weinberg & Lila Weinberg, The Muckrakers 205–06 (1961) (describing how Sinclair gathered access to information). Although *The Jungle* became more famous for exposing the unsanitary practices of the meatpacking industry, Sinclair's objective was to investigate and write about the plight of mistreated workers. Leon Harris, Upton Sinclair: American Rebel 70–71 (1975) (emphasizing Sinclair dedicated book to "Workingmen of America").

95. Anthony Arthur, Radical Innocent: Upton Sinclair 49 (2006).

96. Kreimer, supra note 24, at 386 (characterizing images as "self-authenticating").

ther, the Supreme Court has struggled for decades to provide a sound analytical framework for determining which activities count as speech and which do not. In some cases, the status of conduct as expression is undisputed, as in the case of giving a speech or publishing and distributing a pamphlet bearing a printed message.[97] In cases involving the application of the First Amendment to nontraditional forms of expression, the inquiry is more complex. Typically, though not always, the Court focuses on whether a speaker is engaged in conduct that demonstrates that she has the intent to convey a specific message that is likely to be understood by listeners.[98] The focal point of the doctrinal coverage analysis is the communicative nature of the conduct. The following discussion breaks video recording down into the distinct elements involved in the acts of making and watching the recordings and explains the communicative aspects of each. It then analyzes how, under current First Amendment doctrine, video recording is more like speech than it is like conduct.

1. *Recording Videos as Expression.* — Some videos depict a classic form of recognized expression, such as a speech by a political candidate. Such videos are tantamount to a pamphlet, a flyer, or perhaps just a more transferable version of presenting a speech; the video conveys a message from the speaker in a form that would be widely acknowledged as speech. But of course, a video can also display images that do not involve verbal communication. Imagine, for example, a store's security camera, which records the comings and goings of customers over the course of an ordinary business day. The images exhibited provide information about what actually occurred during that day but are not expressive in the ordinary sense. Perhaps, the camera might catch a conversation or two between clerk and customer, but even then, the spoken words are likely to be incidental, rather than central, to whatever viewers interpret the video to communicate. Videos can also exhibit art in concrete or abstract forms. Commercially produced movies, for example, may convey a story, including a plot, dialogue, musical score, and perhaps other types of implicit messages or symbolism.[99] Documentaries often both convey factual information and expose their audiences to social issues that might valuably

97. See NAACP v. Claiborne Hardware Co., 458 U.S. 886, 933–34 (1982) (holding giving speeches is protected by First Amendment); Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) ("This Court has often recognized that the activity of peaceful pamphleteering is a form of communication protected by the First Amendment.").

98. See infra notes 119–122 and accompanying text.

99. See, e.g., Jason Johnson, Zootopia: Yes, Disney Made a Movie About White Supremacy and the War on Drugs, The Root (Mar. 11, 2016, 1:12 PM), http://www.theroot.com/articles/culture/2016/03/zootopia_yes_disney_made_a_movie_about_racism_but_with_talking_animals.html [http://perma.cc/TE25-NUY8] (asserting *Zootopia* reflects deeper message about race, Drug War, and discrimination).

contribute to public discourse. Abstract forms of cinematic art may convey something or nothing at all.[100]

Several Supreme Court cases have expressly or implicitly recognized that the exhibition of video recordings is a form of speech covered by the First Amendment. In *Joseph Burstyn, Inc. v. Wilson*, the Court reviewed a commercial film distributor's constitutional challenge to a state agency's revocation of its license to exhibit a controversial motion picture on the ground that the film was sacrilegious.[101] Rejecting earlier decisions in which it had suggested that commercial film exhibitions were not on par with speech by the press or concerning public opinion, the Court held that movies are covered by the First Amendment. As it observed, "[M]otion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression."[102]

In short, "[t]he importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform."[103] Such reasoning forecloses any argument that either the commercial or entertainment aspect of a movie's exhibition dilutes its expressive value or claim to First Amendment protection.

2. *Watching Videos as a Component of Speech.* — Moreover, government restrictions of video recordings implicate the First Amendment rights of their audiences no less than those of filmmakers. In *Stanley v. Georgia*, the Court invalidated the conviction of a man for the possession of obscene films in his home.[104] Although the films were conceded to be obscene and therefore otherwise censorable under the law, the Court noted that the government cannot legitimately reach into the privacy of one's home to control what people choose to watch.[105] It viewed this as not only a re-

100. See Museum of Modern Art, Gallery Label for Andy Warhol, Empire (1964), http://www.moma.org/collection/works/89507 [http://perma.cc/BWF5-LKR6] (last visited Jan. 27, 2016) (noting point of Andy Warhol's film *Empire* was to "see time go by"); Erin Whitney, 17 Andy Warhol Films You Probably Haven't Heard of but Should Know, Huffington Post (Aug. 6, 2015, 11:08 AM), http://www.huffingtonpost.com/2014/08/06/andy-warhol-films_n_5652672.html [http://perma.cc/BFE2-L4EM] (providing brief summaries of seventeen Andy Warhol films that are all abstract or symbolic artistic representations); cf. Blocher, supra note 28, at 1433–56 (describing First Amendment protections given to meaningless or abstract works); Tushnet, supra note 28 (exploring First Amendment protections given to artwork).

101. 343 U.S. 495 (1952).

102. Id. at 501.

103. Id.

104. 394 U.S. 557, 568 (1969) ("We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.").

105. Id. at 565 ("Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home.").

striction on speech but on the autonomy of thought.[106] "If the First Amendment means anything," the Court explained, "it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch."[107] Indeed, to the extent that the Court's cases have consciously and categorically excluded legally obscene movies from constitutional protection, its decisions imply that movies are speech.[108] That is, there is no dispute that even obscene films have a communicative element.[109]

These examples illustrate that video recordings express content in ways that are communicative and that watching, listening to, and consuming video recordings is covered by the First Amendment such that government regulation of their exhibition or viewing implicates free-speech concerns.[110]

3. *Recording Video as Fully Protected Speech—Not Mere Conduct.* — To say that the production, exhibition, and viewing of video recordings is covered by the First Amendment does not necessarily lead to the conclusion that the regulation of the act of video recording also implicates constitutional free-speech concerns. Indeed, the argument that video recording is a form of speech is not entirely intuitive, as this conduct involves receiving or gathering—rather than producing, editing, or disseminating—the recording's content.[111] Yet a number of lower federal courts have concluded that state interference with the capturing of video or still images raises First Amendment issues, at least in certain circumstances.

Some federal courts, for example, have concluded that the act of recording the conduct of public officials, including law enforcement offic-

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106. Id. at 566 ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.").

107. Id. at 565. But see Osborne v. Ohio, 495 U.S. 103, 111 (1990) (upholding law criminalizing mere possession of child pornography).

108. See, e.g., Jacobellis v. Ohio, 378 U.S. 184, 187 (1964) (noting although "[m]otion pictures are within the ambit of the constitutional guarantees of freedom of speech and of the press[,] . . . obscenity is not subject to those guarantees").

109. See, e.g., Paris Adult Theatre I v. Slaton, 413 U.S. 49, 59–60 & n.10 (1973) (arguing obscene material creates indecent society); Margo Kaplan, Sex-Positive Law, 89 N.Y.U. L. Rev. 89, 102–06 (2014) (outlining arguments that obscenity promotes criminal activity and encourages unwanted beliefs, thoughts, and emotions); see also Miller v. California, 413 U.S. 15, 23–24 (1973) ("We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited.").

110. The same arguments would attach to the argument that other forms of recording, as well as their later display, implicate free speech concerns. So for example, this Article's arguments would extend to characterizing still photography, audio recording, drawings of sketches, and taking of notes as forms of expression covered by the First Amendment.

111. Just a few years ago, Professor Kreimer seemed to recognize his assertion that the First Amendment included some protections for recording as somewhat radical. See Kreimer, supra note 24, at 369 ("Even proponents of the virtues of image capture tend to be tentative in asserting its protected status in First Amendment theory and doctrine.").

ers performing their duties[112] and officials conducting public meetings,[113] is covered by the First Amendment. At the same time, however, other federal courts have rejected claims that government interference with video recordings and other types of image capture raises concerns about free expression. The principal objection to the claim that recording is a type of constitutionally protected expression is that the act of capturing images is a form of conduct rather than speech.[114] Still other courts have limited governmental liability for interference with recording of the acts of police officers not on the merits but on the grounds that the law establishing a First Amendment right to record is not yet clearly established.[115] But Professor Kreimer has observed that while numerous courts and commentators have suggested that image capture is a type of speech implicating the First Amendment, they have largely done so through assertion rather than comprehensive analysis.[116] The same could be said for those courts that have rejected such claims.

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112. See, e.g., Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) ("The First Amendment issue here is, as the parties frame it, fairly narrow: is there a constitutionally protected right to videotape police carrying out their duties in public? Basic First Amendment principles, along with case law from this and other circuits, answer that question unambiguously in the affirmative.").

113. See, e.g., Iacobucci v. Boulter, 193 F.3d 14, 25 (1st Cir. 1999) (explaining plaintiff journalist did nothing wrong when he filmed public meeting: "[H]e was in a public area of a public building; he had a right to be there; he filmed the group from a comfortable remove; and he neither spoke to nor molested them in any way"); Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (finding plaintiffs stated claim that prohibition of filming public committee was First Amendment violation).

114. See, e.g., D'Amario v. Providence Civic Ctr. Auth., 639 F. Supp. 1538, 1541 (D.R.I. 1986) (stating plaintiff's desire to film did not implicate First Amendment because it was "conduct, pure and simple").

115. These cases have been dismissed on the affirmative defense of qualified immunity. See, e.g., Lawson v. Hilderbrand, No. 3:13-CV-00206(JAM), 2015 WL 753708, at *13 (D. Conn. Feb. 23, 2015) ("As of November 2010, the law of the Second Circuit was not clearly established to recognize a right under the First Amendment to record police conduct."); Ortiz v. City of New York, No. 11 Civ. 7919(JMF), 2013 WL 5339156, at *3–4 (S.D.N.Y. Sept. 24, 2013) (explaining police officers were entitled to qualified immunity on interference claim "because neither the Supreme Court nor the Second Circuit has addressed the right" to record police conduct); Mesa v. City of New York, No. 09 Civ. 10464(JPO), 2013 WL 31002, at *25 (S.D.N.Y. Jan. 3, 2013) ("[T]he right to photograph and record police is not clearly established as a matter of constitutional law in this Circuit . . . . [N]o Second Circuit case has directly addressed the constitutionality of the recording of officers engaged in official conduct."). But see *Glik*, 655 F.3d at 84–85 (finding First Circuit had conclusively decided citizens have protected First Amendment right to film government officials in public spaces); Gaymon v. Borough of Collingdale, No. 14–5454, 2015 WL 4389585, at *9 (E.D. Pa. July 17, 2015) (comparing plaintiff's act of recording police officer on own property to "voicing disagreement about the officers' actions," which Supreme Court has held is protected by First Amendment).

116. Kreimer, supra note 24, at 368 (arguing cases recognizing image capture as speech implicated by First Amendment "assert, rather than argue for, First Amendment protection").

The notion that recording is conduct and not speech is at the very least overstated.[117] As many First Amendment theorists have observed, all speech is conduct—whether it involves writing words on a page, carrying a picket sign, shouting a protest chant, or burning a flag.[118] Determining First Amendment coverage, therefore, requires a more precise analysis about the values underlying the protection of speech and the function of the particular conduct. One approach that the Court has sometimes used to identify what forms of conduct count as speech is the test from *Spence v. Washington*, a case challenging a person's conviction for placing peace signs made out of black tape on an American flag and displaying it publicly.[119] In concluding that Spence's conduct was speech, the Court suggested that nonverbal conduct is protected by the First Amendment when the speaker has "[a]n *intent to convey a particularized message* . . . and in the surrounding circumstances the likelihood was great that the *message would be understood* by those who viewed it."[120] As applied to video recording, it is not clear how recording (again, as distinguished from displaying that recording) conveys any message, much less a particularized one.

While the *Spence* test has played an important role in First Amendment jurisprudence, it seems most unlikely that the Court will decide the question of a video recording's status under the First Amendment based on its holding. The Court's reliance on *Spence* has been inconsistent and selective.[121] Moreover, as Professor Kreimer points out, the Court has typically applied the requirement that the action must convey a message in order to count as speech only to conduct that is not inherently expressive.[122]

Another argument for counting video recording as speech is that, in nearly all circumstances, the government's only conceivable reason for regulating such recording must necessarily be to prevent the recording's contents from being viewed, either by the recorder or by third parties. As

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117. But see Bhagwat, Producing Speech, supra note 28, at 1035 (arguing conduct-producing speech must receive First Amendment protection but such protection should not be as strong as those for "actual communication").

118. See, e.g., Edward J. Eberle, Cross Burning, Hate Speech, and Free Speech in America, 36 Ariz. St. L.J. 953, 964 (2004) ("[Q]uintessential speech actions like reading and writing, speaking and listening involve certain physical motor conduct.").

119. 418 U.S. 405, 405 (1974).

120. Id. at 410–11 (emphasis added).

121. Chen, Instrumental Music, supra note 28, at 389–90 ("But the Court has not rigidly adhered to the *Spence* test.").

122. Kreimer, supra note 24, at 372 ("[T]he requirement of identifying a 'message conveyed' is generally applied by the Court only to conduct that is not considered 'inherently expressive.'"). That is not an entire answer to those who do not regard recording as speech, however, as they have made the claim that image capture, as distinguished from the broadcasting of images, involves the collection of data or information rather than the communication of ideas. Thus, they might regard the *Spence* test as wholly applicable precisely because recording is not inherently expressive.

some First Amendment theorists have argued, the freedom of expression can best be understood by examining the government's reasons for regulation.[123] Professor Larry Alexander suggests, for example, that "[f]reedom of expression is implicated whenever an activity is suppressed or penalized for the purpose of preventing a message from being received."[124]

To be sure, there may be limited circumstances in which the government might have a nonspeech-related interest in banning some forms of recording. For instance, suppose that the government prohibited flash photography at a publicly owned theater, not to protect the property rights in the performance (which would be speech),[125] but to prevent the performers from being injured because they were distracted by the light. Or suppose a wildlife agency prohibited any visual recording of an endangered bird species because the disruption caused by video or still cameras would in itself be upsetting to the birds in ways that caused them harm. Some groups hold the religious belief that having one's photograph taken can steal one's soul.[126] If the state were to prohibit taking photographs or videos of someone who held such beliefs without regard to whether the photograph would be viewed or exhibited, it would not necessarily implicate the First Amendment because the government interest can be completely separated from the communicative element of the image capture.

In any of these instances, though they may be relatively rare, the First Amendment is not necessarily (though in certain applications might be) invoked. The reasoning for this is rooted in the Court's symbolic expression cases. In *United States v. O'Brien*, the Court held that nonverbal conduct may not be covered by the First Amendment when "the governmental interest [in regulating that conduct] is unrelated to the suppression of free expression."[127] In the previous examples, the government is regulating image capture not because of its communicative element, but

123. See, e.g., Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. Chi. L. Rev. 413, 443–505 (1996) (noting true purpose of content-based inquiry is to discern improper, speech-suppressing motives); see also Alan K. Chen, Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose, 38 Harv. C.R.-C.L. L. Rev. 31, 85–87 (2003) [hereinafter Chen, Statutory Speech Bubbles] (urging courts to utilize First Amendment overbreadth analysis to determine government's motive for regulations).

124. Alexander, supra note 32, at 9; see also Koppelman, supra note 32, at 722 (describing purpose of consumer protection laws as limiting effect of message and not dependent on subjective intent of producer).

125. It is axiomatic that a live performance is a form of speech. See, e.g., Schact v. United States, 398 U.S. 58, 62–63 (1970) (holding live theatrical performance is speech); see also infra section II.C.1 (describing potential private property interests in regulating video recording).

126. See Nadine Strossen, Freedom and Fear Post-9/11: Are We Again Fearing Witches and Burning Women?, 31 Nova L. Rev. 279, 310 (2007) ("[S]ome Christians believe that photographs violate the Second Commandment's prohibition on graven images, and some Native Americans believe that photographs steal their souls.").

127. 391 U.S. 367, 377 (1968).

because of the impact of the very act of recording, regardless of its communicative aspects. Removing the expressive element of recording, the conduct is the distraction of performers, scaring of birds, or interference with religious belief. But as this Article argues, in most instances the government's reasons for banning or limiting recording, however tangible, have to do with its concerns about the content and communication of the video recordings. When the government penalizes or prevents the creation or dissemination of a message, the First Amendment is implicated.

C. *Video Recording as Conduct Essentially Preparatory to Speech*

The previous argument centers on video recording as a species of expression itself. But even if one were to reject that claim, there is support for the argument that image capture is conduct that is essential to speech and is therefore covered by the First Amendment. If the exhibition and viewing of video recordings are speech, then the recordings' creation and production are surely also components of that speech, in the same way that writing, speaking, or other types of conduct used for expression are speech even before they are consumed. It has long been understood that government-imposed burdens on the means of producing speech implicate important First Amendment concerns. The obliteration of the means of producing expression endangers free expression no less than the censorship of the speech itself. In prior centuries, this might have involved destruction of printing presses;[128] today, it might involve smashing video recorders.[129]

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128. As Justice Scalia has remarked:

> In any economy operated on even the most rudimentary principles of division of labor, effective public communication requires the speaker to make use of the services of others. An author may write a novel, but he will seldom publish and distribute it himself. A freelance reporter may write a story, but he will rarely edit, print, and deliver it to subscribers. To a government bent on suppressing speech, this mode of organization presents opportunities: Control any cog in the machine, and you can halt the whole apparatus. License printers, and it matters little whether authors are still free to write. Restrict the sale of books, and it matters little who prints them. Predictably, repressive regimes have exploited these principles by attacking all levels of the production and dissemination of ideas.

McConnell v. FEC, 540 U.S. 93, 251 (2003) (Scalia, J., concurring in part and dissenting in part), overruled in part by Citizens United v. FEC, 558 U.S. 310 (2010).

129. As Jack Balkin has observed:

> Old-school speech regulation is normally directed at (1) people, (2) spaces, and (3) predigital technologies of mass distribution. The state arrests, detains, or deports people; it controls access to public spaces for assembly and protest; and it monopolizes, regulates, seizes, or destroys capacities and technologies for publication and transmission like printing presses, broadcast facilities, movie projectors, videotapes, handbills, and books.

On numerous occasions, the Supreme Court has recognized that certain types of conduct that are necessarily connected to advancing more traditional forms of expression must be covered by the First Amendment, lest the state use the regulation of such conduct as a hidden way of cutting off speech.[130] Indeed, the Court has recognized that conduct preparatory to speech is often deserving of full-dress First Amendment protection. This means that even conduct that is not itself speech—such as spending money to purchase ink and paper[131]or spray paint,[132] or to support a political candidate[133]—is itself treated as speech. For example, in *Citizens United v. FEC*, the Court observed that "[l]aws enacted to control or suppress speech may operate at different points in the speech process."[134] The spending of money is a precursor to political speech. Indeed, the Court's campaign-spending cases are all predicated to some degree on the notion that restrictions on fundraising and spending are limited by the First Amendment because they facilitate subsequent political speech.[135] While the bare act of passing money to another is not in itself expressive, the Court has recognized that by protecting the nonspeech *means*, the political speech *ends* are also safeguarded.[136] Whatever one might think about the application of this notion to the campaign finance context, the central logic behind the principle is sound: The protection of acts that are the necessary antecedents to speech is essential to the protection of the speech itself.

Jack M. Balkin, Old-School/New-School Speech Regulation, 127 Harv. L. Rev. 2296, 2306 (2014).

130. This is different from the idea that symbolic conduct that expresses a message, such as cross burning, see R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992), flag burning, see United States v. Eichman, 496 U.S. 310, 312 (1990); Texas v. Johnson, 491 U.S. 397, 399 (1989), draft-card burning, see United States v. O'Brien, 391 U.S. 367, 377 (1968), or the wearing of a black armband, see Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505–06 (1969), is covered by the First Amendment. That line of jurisprudence allows the government to regulate nonverbal conduct in content-neutral ways if "the governmental interest [in regulating that conduct] is unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377.

131. Kreimer, supra note 24, at 381.

132. Id. (noting lower courts have also invalidated ordinances criminalizing purchase or possession of spray paint on First Amendment grounds). See, e.g., Vincenty v. Bloomberg, 476 F.3d 74, 78 (2d Cir. 2007) (affirming district court's grant of preliminary injunction finding statute criminalizing possession of spray paint, even for legitimate purposes, violates First Amendment).

133. Citizens United v. FEC, 558 U.S. 310, 365 (2010) (finding corporate expenditures are entitled to First Amendment protection).

134. Id. at 336. Campaign expenditures are protected and are analyzed under strict scrutiny because "[a]ll speakers, including individuals and the media, use money amassed from the economic marketplace to fund their speech. The First Amendment protects the resulting speech . . . ." Id. at 351.

135. See, e.g., Buckley v. Valeo, 424 U.S. 1, 19 (1976) ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.").

136. Id.

Moreover, concerns regarding state-imposed impediments on the production of speech are not alleviated simply because another alternative form of expression is left open. State-sponsored burnings of all pens and paper would implicate the First Amendment even if the state permitted the foreclosed messages to be communicated orally. Here, too, the Supreme Court has offered indirect support for the notion that restrictions on video recordings might infringe on free speech. In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, it struck down a state law imposing a use tax on ink and paper because it not only was applicable specially to the press but also because even within the press, the law targeted a small group of newspapers.[137] Obviously a tax on ink or paper does not prohibit newspapers from publishing, but such burdens on acts that precede the speech itself implicate the First Amendment.[138]

The analytical premise of these decisions is that expressive activity typically takes place along a continuum of actions that include not only direct expression but also much of the conduct that is a necessary precursor to speech. At one end of the continuum or spectrum lie the most basic elements of conduct that are necessary to engage in communication—the purchase of paper, ink, paint, etc. At this end, many things will fall completely off the speech spectrum and will not be covered by the First Amendment. For example, buying clothes to participate in a rally or buying gasoline for the vehicle that a protestor drives to that rally are both antecedent to speech yet are too attenuated from the actual expressive activity to implicate the First Amendment. At the other end of the spectrum is the directly communicative element of the expressive process—shouting through a megaphone, exhibiting a painting, displaying a video.

In her important work focusing on whether data is speech, Professor Bambauer has written persuasively to debunk the distinction between conveyance and collection of information, explaining that "[i]f the dissemination of mechanical recordings receives First Amendment protection (which it does), then the creation of those same recordings must have First Amendment significance, too."[139] Indeed, rather than framing the

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137. 460 U.S. 575, 581 (1983).

138. See id. (noting while "[s]tates and the Federal Government can subject newspapers to generally applicable economic regulations," provision in question "is facially discriminatory, singling out publications for treatment that is . . . unique in Minnesota tax law"); see also Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2818 (2011) (invalidating Arizona law forcing "privately financed candidate to 'shoulder a special and potentially significant burden' when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy" (quoting Davis v. FEC, 554 U.S. 724, 739 (2008))); Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2663 (2011) (invalidating statute that "on its face burdens disfavored speech by disfavored speakers").

139. Bambauer, supra note 28, at 61 (footnote omitted). To the extent that the collection of data through recording is speech, as this Article argues, one has to identify a limiting principle. Is all data collection speech? Is all data collection done for the purpose of communicating (or communicating on a matter of public concern) speech? These issues

conduct in question as the collection of data, Professor Bambauer recognizes that the First Amendment should be properly understood to protect the *creation of knowledge*.[140] Similarly, Professor Kreimer has correctly pointed out the flaw in viewing only the final step of communicating information or ideas as speech and has emphasized instead that expression involves many steps, frequently beginning with the processing of information, the formation of ideas, and then the translation of those ideas and information into a form that can be understood by others.[141] More recently, Professor Ashutosh Bhagwat has cogently observed that the conduct of "producing speech," as distinct from actual communication, falls within the penumbral protection of the First Amendment's Press Clause.[142] As he explains, "Regulation of the press is thus regulation of the production of communication rather than of communication itself, and so the Press Clause by its terms protects the production of written speech."[143] The scholarly commentary is increasingly clear that the protection of the essential precursors of expression is necessary to the protection of expression itself.

Lower federal courts, too, have recognized that First Amendment protections must attach to government actions restricting recording because that conduct is necessarily preparatory to speech. In *ACLU v. Alvarez*, the Seventh Circuit reversed the denial of a preliminary injunction against Illinois's eavesdropping law, which made it a felony to record a conversation without the consent of all parties to the conversation.[144] In

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are not of merely idle interest. The state of Wyoming passed civil and criminal laws prohibiting the "collection of resource data" such as soil samples or water samples from public as well as private land. Wyo. Stat. Ann. § 6-3-414 (2015); id. § 40-27-101. Although that question is beyond the scope of this project because this Article argues that recording is clearly on the expressive side of that line, there is need for additional research and thought on this point. Bambauer, supra note 28, at 61.

140. See Bambauer, supra note 28, at 63 ("[This] Article highlights and strengthens the strands of First Amendment theory that protect the creation of knowledge.").

141. Kreimer, supra note 24, at 381–82; see also Robert Post, Encryption Source Code and the First Amendment, 15 Berkeley Tech. L.J. 713, 717 (2000) ("The genre of the cinema . . . encompasses far more than speech acts. It includes materials . . . like projectors . . . . If the state were to prohibit the use of projectors without a license, First Amendment coverage would undoubtedly be triggered."). Professor Bambauer refers to Professor Kreimer's contribution as "call[ing] attention to the unsound distinction" between recording and speech. Bambauer, supra note 28, at 63; see also Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009, 1023 (D. Idaho 2014) (accepting without controversy that recording is speech).

142. See Bhagwat, Producing Speech, supra note 28, at 1054–58 ("There is . . . doctrinal and logical support in the Supreme Court's jurisprudence for the proposition that the First Amendment extends some protection to conduct associated with the production of speech. The Press Clause of the First Amendment provides a textual foundation for such a protection.").

143. Id. at 1057. This Article focuses its analysis on the Speech Clause, but as Professor Bhagwat's insightful analysis demonstrates, similarly forceful claims might be leveled against recording restrictions under the Press Clause.

144. 679 F.3d 583, 586 (7th Cir. 2012).

doing so, the court held 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."[145] The Seventh Circuit also weighed in on this issue in *Desnick v. American Broadcasting Cos.*, where it examined tort claims brought against a national television program for its investigation of a commercial ophthalmological surgery center that allegedly encouraged and conducted unnecessary cataract surgeries.[146] In addressing the plaintiffs' claims, the court recognized that both the "broadcast" and the "production of the broadcast" are protected by the First Amendment.[147] The logic of *Desnick* is that there can be no meaningful distinction between the recording, editing, and ultimate dissemination of a video recording. Similarly, in *Animal Legal Defense Fund v. Otter*, thus far the only reported decision addressing the constitutionality of ag-gag laws, a federal district court concluded that state action that directly restricts nonconsensual investigative video recordings implicates First Amendment speech concerns.[148] As the court found,

> In fact, an undercover investigator who never publishes a video after surreptitiously filming a facility's operations will likely never be punished for the filming because, in most cases, authorities will not become aware of a violation of the statute until a video is published. Authorities will therefore only enforce the statute against investigators who choose to publish their videos. A law that expressly punished activists for publishing videos of agricultural operations would be considered a regulation of speech. As enforcement of [the ag-gag law] will likely have the same effect, it too should be considered a regulation of speech. The Court therefore finds that the ban on unauthorized audiovisual recording restricts speech and is subject to First Amendment scrutiny.[149]

Such reasoning is in accord with Professor Kreimer's central premise:

> One might try to dissect the medium into its component acts of image acquisition, recording, and dissemination and conclude that recording is an unprotected "act" without an audience. But this maneuver is as inappropriate as maintaining that the purchase of stationery or the application of ink to paper are "acts" and therefore outside of the aegis of the First Amendment.[150]

Essentially, the point is that protecting speech at the point it is communicated is worthless if the state can prevent its creation.

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145. Id. at 595.

146. 44 F.3d 1345 (7th Cir. 1995).

147. Id. at 1355.

148. 44 F. Supp. 3d 1009, 1020 (D. Idaho 2014) (noting Idaho ag-gag law's criminalization of "audiovisual recordings . . . is a ban on conduct preparatory to speech").

149. Id. at 1023.

150. Kreimer, supra note 24, at 381.

A somewhat analogous conclusion comes from the Supreme Court's decision in *Bartnicki v. Vopper*.[151] In *Bartnicki*, the Court held that the media's publication of the contents of a cellphone conversation regarding a highly contentious union negotiation was protected by the First Amendment, even where the media had reason to believe that the conversation was illegally intercepted and recorded.[152] The Court rejected an argument that the underlying conduct did not implicate the First Amendment. As it said,

> It is true that the delivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of "speech" that the First Amendment protects.[153]

It is also important to note that the argument that video recording is speech does not founder on the claim that there can be no speech without an audience. As Professor Kreimer observes, such an argument would mean that the government seizure of drafts of manuscripts that had not yet been published or disseminated would not implicate the First Amendment simply because they had not yet been read.[154] This would also be an overly simplistic understanding of what the First Amendment covers, which is not only expression per se but the autonomy to formulate one's ideas and beliefs without government control.[155] Imposing an audience as a precondition for defining speech would mean that diaries, journals, and other writings not intended to be read by others would not be speech.[156]

Moreover, the expansion of the medium and technological developments also break down the distinction between recording and speech. As Professor Kreimer wrote:

> In the emerging environment of pervasive image capture, the difference between capturing images and disseminating images erodes rapidly. Even for skeptics who insist on an audience as a condition of First Amendment protection, images which are immediately disseminated upon capture (as in live video broadcasting) constitute "speech." The same would presumably be

151. 532 U.S. 514 (2001).

152. See id. at 533–34 (noting to hold otherwise would violate "core purposes of the First Amendment because it [would] impose[] sanctions on the publication of truthful information of public concern").

153. Id. at 527.

154. See Kreimer, supra note 24, at 377 ("It is simply not the case . . . that an external audience is or should be a necessary condition of First Amendment protection.").

155. Id.

156. See id. at 378–81 (discussing Supreme Court's extension of First Amendment to freedom of thought and expression). But see Bhagwat, Producing Speech, supra note 28, at 1040 (noting "peeping tom or a stalker might make a recording of private or public conduct, without having any intention of later disseminating it" and concluding "[s]peech requires an audience").

> true in the case of an image immediately conveyed to a single recipient.[157]

For instance, imagine an activist or journalist equipped with the now-defunct Google Glass, which among other things had the capacity to record video.[158] The proposition that recording for later broadcast or consumption is not covered by the First Amendment, whereas recording and simultaneously broadcasting that recording to even a single viewer *is* covered cannot seriously be defended. The distinction between recording and broadcast is also blurred with the development of new apps that permit citizens to easily make videos available for wide viewing. For instance, activists have developed apps such as Cop Watch, which uploads videos to YouTube immediately upon the completion of the recording, and Mobile Justice Colorado, which similarly emails videos to the ACLU of Colorado.[159]

To the extent that this Article has made the case that video recording is a form of speech or conduct preparatory to speech that is covered by the First Amendment, it has established only part of the premise of the thesis. In the next section, this Article argues that such image capture is speech whether it takes place in public or in private and whether it is done with or without the consent of the recorded party.

D. *Video Recording Counts as Speech Whether It Occurs in Public or Private*

None of the elements that support the claim that video image capture is either speech or conduct preparatory to speech, actually differ depending on the location of the recording. That is, the coverage claim remains intact. First, recording images on private property, just as recordings made in public, advance the fundamental free speech values of promoting democracy and facilitating the search for truth. Notably, most of the examples drawn upon above involve recordings on private property—the Romney forty-seven percent video, the recordings of abuse at agricultural facilities, the leaked Abu Ghraib videos and photos, the video recordings of undercover law-enforcement investigators, and the events

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157. Kreimer, supra note 24, at 376.

158. See Anjali Athavaley, Google Glass Goes Dark on Its Social Media Accounts, Reuters (Jan. 26, 2016), http://www.reuters.com/article/us-alphabet-glass-idUSKCN0V42GM [http://perma.cc/5Y4Y-UU98] (noting Google Glass video recording capability and shutdown of its social media accounts).

159. See Farhad Manjoo & Mike Isaac, Phone Cameras and Apps Help Speed Calls for Police Reform, N.Y. Times (Apr. 8, 2015), http://nytimes.com/2015/04/09/technology/phone-cameras-and-apps-help-speed-calls-for-police-reform.html (on file with the *Columbia Law Review*) (discussing Cop Watch and interviewing its creator); Tom McGhee, Witness Police Wrongdoing? There's an App for That, Denver Post (Oct. 29, 2015, 3:30 PM), http://www.denverpost.com/news/ci_29043137/witness-police-wrongdoing?-theres-an-app-for-that [http://perma.cc/M59X-LC5K] (describing Mobile Justice Colorado app).

captured by ABC television reporters in the Food Lion investigation.[160] In fact, the rationale courts use to uphold law enforcement officers' use of secretly recorded videos is that without such tactics, it would be impossible to investigate occurrences hidden behind an "enforced wall of secrecy."[161]

Moreover, nothing about the private setting fundamentally changes the conceptual understanding of the expressive nature of recording. Video image capture, whether done in public or private, still lies near the front end of the continuum of activity that inherently involves communication of information and ideas. It typically (though not always) results in the capturing of information. As such, shutting down its production interferes with expression and also impedes the creation of knowledge and information.[162] It simply cannot be the rule that the state may ban nondisruptive recording of nonintimate matters just because they occur on private property. For instance, it would implicate the First Amendment if the legislature were to enact a law barring the recording of videos criticizing one or both major political parties regardless of whether the ban applied to public or private recordings.

The same could be said of other laws that restrict some types of speech on private property. Imagine that a commercial dairy included a nondisparagement clause in its employment contract that barred employees from criticizing the dairy whether they were at work or away from work. Violation of such a provision could provide a basis for terminating an employee. But if the dairy successfully lobbied for the enactment of a state criminal law forbidding dairy industry employees from criticizing their employers, whether on the public sidewalk in front of the dairy's headquarters or to their closest friends over dinner in their own homes, strict constitutional scrutiny surely is warranted. The restriction on private speech, no less than the restriction on public speech, implicates the First Amendment. The disparagement of a company or a politician does not become less speech-like just because it occurs in private.[163]

Drawing a parallel to other types of speech-preparatory conduct also illustrates the thinness of the public–private distinction. It is certainly beyond question that a law could not constitutionally forbid a person from taking written notes about events she observed in a public place,

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160. See supra text accompanying notes 43–44, 67, 70–76, 78–80 (providing examples of recordings on private property).

161. United States v. Biasucci, 786 F.2d 504, 511 (2d Cir. 1986).

162. See Bambauer, supra note 28, at 63 ("Expanded knowledge is an end goal of American speech rights, and accurate information . . . provides the fuel.").

163. The dairy has a right to restrict workplace speech that interferes with its business, but a law that criminalizes such speech is not a protection of privacy or a forum-selection limitation; instead, it is a content-based law targeting speech activities. This reasoning is at least as true for recording bans. A company also has a right to be free from untruthful and harm-causing disparagement, but this is already protected by defamation law, subject to the constraints of the First Amendment.

such as a park, sidewalk, or city council meeting. A law that forbade individuals to take notes about observations they make when they are lawfully present on private property might also violate the First Amendment, but in the situations where it did not, it would not be because the act of taking notes is not speech or conduct preparatory to speech. It would be because the government might have sufficiently powerful interests to override the speech right, as in the case of industrial espionage, when a person takes notes about a competitor's manufacturing processes.

If video recording on private property is not speech, it is at least conduct preparatory to speech whose regulation therefore implicates the First Amendment. Here, again, there is no material difference between recording in public and recording on private property for purposes of determining whether the activity counts as speech. An activity does not lose its speech characteristics depending on where the speech occurs, though it may lose its First Amendment protection under the relevant scrutiny.

* * *

Part I established the bedrock of this Article's thesis. First, it demonstrated how video recording advances free speech values in a manner consistent with First Amendment theory because it both promotes democratic self-governance and facilitates the search for broader moral and ethical truths. Second, it showed that the act of video recording is a form of expression or in the alternative, is a form of conduct preparatory to speech that is so strongly connected to pure speech that it is covered by the First Amendment. Third, it illustrated how the communicative elements of video image capture are no less powerful when the recording is made on private, as opposed to public, property.

Critics of this Article's approach might suggest that, although video recording can often be used to advance the free speech interests discussed in this Part, it is conduct that more often has no political, social, or other expressive component. Accordingly, one might argue that the First Amendment is a poor fit for examining the limits on state power to control such conduct. Perhaps, then, such restrictions should simply be constrained by the Due Process Clause's liberty-protecting provisions, which offer much more deference to government power to regulate video image capture. This Article fully acknowledges, indeed emphasizes, that the constitutional dilemma associated with regulation of video recording presents unprecedented and distinct issues from other types of regulations targeting more conventionally accepted forms of communication. Nonetheless, it argues that First Amendment coverage is critical to constraining government power in this field. Because regulations of video recording can so strongly and closely affect pure political and social expression and advocacy, unfettered state power to regulate this con-

duct would endanger discourse and permit the state to impose its own orthodoxy on public deliberation by controlling access to information.[164]

Again, this is not to say that the government can never regulate such recording when it takes place on private property, but this Article is concerned at this stage only with coverage. As discussed below, certain tangible property interests, reputational interests, or privacy concerns might justify government recording prohibitions in certain instances, but recordings on private property cannot be construed as completely devoid of speech qualities and categorically inoculated from First Amendment scrutiny.

II. FROM COVERAGE TO RIGHT: THE CONTOURS OF A CONSTITUTIONAL RIGHT TO VIDEO IMAGE CAPTURE

Part I developed the argument that government restrictions on video image capture implicate the First Amendment. As this Article has explained, there is a range of conduct antecedent to speech, including taking handwritten notes and making audiovisual recordings, that allows one to memorialize her observations—either for her own use, thought, and contemplation or for exhibition to an audience—that all falls on a spectrum of expressive activity covered by the First Amendment. Certain conduct preparatory to speech—violating speeding laws to get to a political speech on time, for example—is too far along the spectrum to warrant First Amendment protection. But audiovisual recording is the pen and paper for twenty-first century Upton Sinclairs. Recording observations, no less than (and maybe even more than) taking notes about observations, preserves facts and information for engagement in political, social, or moral discourse and informing the public. Government bans on recording interfere with one's ability to create a record of otherwise lawful observations, and when such restrictions impede the creation of a self-authenticating communication, they must be carefully scrutinized.

But First Amendment coverage is not tantamount to protection. As Professor Frederick Schauer has noted, "when we say that certain acts, or a certain class of acts, are covered by a right, we are not necessarily saying that those acts will always be protected."[165] That is, activity such as obscenity is not even covered by the First Amendment, and because it simply does not "count" as speech, no further analysis is warranted.[166] But an activity that is covered, such as defamation of a public official, may or may not be

164. See Jed Rubenfeld, The First Amendment's Purpose, 53 Stan. L. Rev. 767, 817–22 (2001) (advancing notion that one principle purpose of First Amendment is to act as safeguard against government imposition of its own orthodoxy).

165. Frederick Schauer, Free Speech: A Philosophical Enquiry 90 (1982); see also Schauer, Boundaries of the First Amendment, supra note 23, at 1769–74 (discussing distinction between "*coverage* and the *protection* of the First Amendment").

166. See Miller v. California, 413 U.S. 15, 23 (1973) (holding obscenity is not covered by First Amendment).

protected, depending on whether the government's interests outweigh the speaker's rights.[167] Accordingly, if this Article has established that video recording is speech or conduct preparatory to speech, it must next make the case that state regulation of private individuals engaging in such activity may violate the First Amendment—that there is sometimes a constitutional right to record.

This Part maintains that the First Amendment will often, but not always, protect individuals from being criminally punished or civilly sanctioned for recording videos. But the protection of recording as speech activity, particularly on private property, is not self-evident as a doctrinal matter. This Part identifies the scope and key limits on the right to record and then articulates and responds to the main doctrinal challenges to recognizing a right to record on private property. Finally, this Article addresses potential government interests that might be invoked to justify regulating the act of making video recordings. Throughout this Part, examples of existing restrictions on video recordings are used to illustrate how the theory would apply to current controversies.

A. *Defining the Scope and Limits of a Constitutional Right to Record*

As a threshold matter, this Part argues that the right only attaches if the person making the recording has a legal right to be present at the location where the recording takes place. Moreover, this Article argues that the right to record is limited to just that—recording. It does not imply or contain within it a right to affirmatively speak or communicate. Together, these two threshold limitations serve to critically distinguish the right to record from a general *right of access*, and they clarify that a right to record one's surroundings does not include a right to disrupt or communicate in every setting. Thus, this Article suggests that there is a spatial and a functional limit on the right to record, both of which are considered and discussed below.

1. *Preconditions of the Right to Record.* — This Part begins with a discussion of criteria that are essential preconditions of a constitutional right to video record. First, the person claiming the right must have lawful access where she is recording. Second, the right is limited to the act of recording and does not extend to actively speaking.

a. *Lawful Access.* — It is a canonical principle of First Amendment doctrine that there is no "right to use private property owned by others for speech."[168] Laws of general applicability that protect property interests are not typically understood to implicate free-speech interests. Thus, one cannot claim, for example, to be immunized from trespass laws out

167. See N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270–71 (1964) (imposing limitations, but not complete ban, on libel claims brought by public officials).

168. Erwin Chemerinsky, Constitutional Law: Principles and Policies § 11.4.3 (4th ed. 2011).

of an interest in gaining access to valuable recordings.[169] Moreover, it is accepted doctrine that the "First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally"[170] and there is "no basis for the claim that the First Amendment compels others . . . to supply information."[171]

An important caveat to any asserted right to record, then, is that the right is only applicable to persons who have lawful access to the place where the recording occurs. Although its holding ultimately rested on alternate grounds, the facts of the Sixth Circuit's decision in *S.H.A.R.K. v. Metro Parks Serving Summit County* provide an important illustration of this principle.[172] In *S.H.A.R.K.*, the court addressed plaintiffs' claims that the removal of cameras they had placed in a public park to detect and expose mistreatment of wildlife, and the subsequent deletion of the recordings from those cameras, violated the First Amendment.[173] Ultimately, the court found Metro Parks's prohibition on disturbing trees and its policy for handling found property each provided a basis justifying its removal of the plaintiffs' cameras and thus, found no First Amendment violation.[174] An alternative basis for the decision could have been for the court to recognize that the city's actions did not violate the First Amendment because the cameras were left at the park to record activities during hours when the park was closed and thus there was no public access to the images captured by the recording devices.[175] After all, as the court did emphasize, there is no general right of access to private areas, and the court noted that when an area is closed off to the public by a governmental action, such action, unless driven by an improper, content-based motive, generally will not offend the First Amendment.[176] To the extent there was no right of access to the park to make the observations in question or for

169. See Zemel v. Rusk, 381 U.S. 1, 16 (1965) (holding First Amendment is not violated even where "refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country"); id. at 3 ("Department of State eliminated Cuba from the area for which passports were not required, and declared all outstanding United States passports . . . to be invalid for travel to or in Cuba unless specifically endorsed for such travel under the authority of the Secretary of State." (internal quotation marks omitted)). If one could assert immunity from trespass law in order to engage in important speech activities, then the laws of private property would mean very little. As the Court explained in rejecting a right of access claim, "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." Id. at 16–17.

170. Branzburg v. Hayes, 408 U.S. 665, 684 (1972); see also D'Amario v. Providence Civic Ctr. Auth., 639 F. Supp. 1538, 1542 (D.R.I. 1986), aff'd, 815 F.2d 692 (1st Cir. 1987) (quoting *Branzburg*, 408 U.S. at 684).

171. Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978).

172. 499 F.3d 553 (6th Cir. 2007).

173. Id. at 561.

174. Id. at 562–63.

175. Id. at 561.

176. See id. at 560–61 (recognizing government's right to block access to information so long as it does not "selectively delimit the audience").

any other reason, *S.H.A.R.K.* is best viewed as a case about *access* to areas closed to the public and is correctly decided.[177]

On the other hand, if a person engaged in recording is lawfully present, video recording can be understood as little more than the technological enhancement of her individual powers of observation. The right to record is essentially a right to memorialize or enshrine one's interactions or observations. Surely it would be unconstitutional for the government to punish someone who was in a place where she had a lawful right to be present for observing something and committing it to memory or to handwritten descriptions in a notebook. The state could not require such a person to take steps, perhaps through hypnosis or drugs, to forget what she has seen or to require the destruction of her notes. This is no less true with acts of audiovisual recording. A recording provides a self-authenticating and easily reproduced memorialization of one's encounters or experiences.

As the right to record is conceived, as long as persons engaged in recording have a right to be in the place where they record, the state cannot categorically prohibit the conduct of recording.[178] The access may be the result of a variety of different legal statuses, including an employment relationship, another type of contractual agreement, or a guest or invitee relationship. Access may even be the result of subterfuge, as long as the person engaged in the recording has permission to be on the property.[179] At least on this criterion, then, the right to record would extend to video recording in a public park; at a parade; in a store, restaurant, or other place of public accommodation; at one's place of employment; or even in a private home where one is an invited guest. Many government regulations would affect recording that meets this threshold requirement, even if there are other arguments for permitting such regulation. Ag-gag laws categorically ban recording in the physical spaces where an employee is

177. Notably, had the park been open during the hours of recording, the case might have been decided differently. See, e.g., Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) ("Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the 'free discussion of governmental affairs.'" (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966))).

178. See 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, 185 (2012) [hereinafter Blitz, The Right to Map] (discussing public forum doctrine and broad right to not only receive but also acquire information).

179. See Chen & Marceau, supra note 17, at 1505 (explaining First Amendment protections for lies used to facilitate access to business). That the access is obtained through a lie or misrepresentation does not necessarily mean that all such persons could claim a right to record. As addressed below, other countervailing government interests may outweigh the right to record in some circumstances.

not only entitled but required to be present.[180] Bans on recording in courtrooms would also implicate this first threshold, assuming that the proceedings are otherwise open to members of the public.[181] Likewise, the making of a consensual private sex tape would fall within this first requirement because the participants are lawfully present and aware of the recording—even if, for privacy reasons, the right might not attach to the tape's later dissemination. Regulations of recordings made from privately operated drones might, or might not, meet this requirement, depending on where the drone is flown.[182]

Thus, as a threshold matter, it cannot be overemphasized that the right to video record everything from the mundanity of life to atrocities in a slaughterhouse does not carry with it a corollary right of access. The power of a recording, no more than the importance of Upton Sinclair's notepad, does not justify uninvited entry into an area of public or private property.[183] Thus, for example, the First Amendment right to record

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180. See, e.g., supra notes 14–21 and accompanying text (describing origin of ag-gag laws and their effect on access to private agricultural workplaces).

181. See, e.g., M.D. Ala. LR 83.4(a) ("The taking of photographs and operation of audio or video recording in the courtroom . . . during the progress or in connection with judicial proceedings . . . is prohibited."); E.D. Pa. L.R. Civ. P. 83.3(a) ("No Judicial proceedings may be . . . filmed by still or motion-picture camera . . . .").

182. See Blitz et al., Regulating Drones, supra note 5, at 121–25 (arguing act of recording using unmanned aircrafts in public navigable airspace should enjoy First Amendment protection). For a thoughtful examination of the constitutional implications of government-imposed limits on computer-generated digital mapping, such as those created by large search engine companies, see generally Blitz, The Right to Map, supra note 178 (discussing First Amendment implications of digital mapping).

183. It also bears noting that some courts might seek to limit the right to record by noting that the Supreme Court has concluded that there is no right to engage in First Amendment activities on private property, even when that private property is otherwise open to the public. For example, there is no constitutional right to use shopping malls or their respective parking lots for protests, leafletting, or other First Amendment activity. Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976). Indeed, compelling a private party to permit certain speech might constitute a violation of the First Amendment's prohibition on compelled speech. Compare PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980) (rejecting argument that California rule giving protestors right to use parking lot was compelled speech that violated First Amendment), with Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 259 (1974) (finding state statute granting political candidates equal space to respond to criticism by newspapers unconstitutional). In this vein, one is barred from speaking even where she otherwise has a right of access, thus implying that acts of recording could similarly be subject to government-imposed restrictions even where one has the right to be present. Notably, however, these cases do not impede the recognition of the right to record (even on private land) because they are predicated on the right of persons to exclude unwelcome speakers and speech from their private property. As explained below, the right to record, properly conceived, does not include any right to communicate in a particular forum. The right to record is just that—the right to take actions to engage in audiovisual memorialization—and it does not include a right to contemporaneously communicate a message in any particular location. As such, the cases permitting limits on speech, even when the public is permitted access, evince nothing more than the reasonable desire to protect owners from having others express themselves in ways the owner does not approve on the owner's property.

would not attach to a person who breaks into a private residence or the Oval Office to record a video, even if the content relates to a matter of great public concern.

b. *Limited to the Act of Recording.* — The right to record is also limited to recording information and images and does not extend protection to the actual use of public or private property to engage in overt expression. Recording and speaking are both expressive activities, but as explained below, the qualitative differences between these categories require distinct doctrinal responses. There are fundamental differences between recording for later use and speaking at the present moment. When done without the property owner's consent, audible expression can interfere with the use and enjoyment of the property. One who is recorded may not appreciate it and may even have privacy interests strong enough to overcome the right to record in some instances, but insofar as recording is a form of speech activity, it does not affirmatively impede the property owner's solitude in the same manner as other speech acts do. Video recording does not disturb, annoy, or even bore the listener because there is no listener at the moment of recording. Recording one's surroundings in a surreptitious manner should not affect the observed interaction at all.[184]

Again, many of the contexts in which the government regulates recording meet this limitation as well. There is a critical difference between a member of the media taking a job at an assisted living center and secretly recording instances of poor sanitation or elder abuse and an instance of an activist gaining employment at an insurance company to provide himself with a soapbox on which to lecture a captive audience on the pros and cons of the Affordable Care Act. The latter would not be

184. Critics might analogize to the Heisenberg effect and argue that our claim that recording will have no effect is erroneous insofar as the mere act of being observed (or recorded) will almost always affect one's behavior. See Henry T.C. Hu, Too Complex to Depict? Innovation, "Pure Information," and the SEC Disclosure Paradigm, 90 Tex. L. Rev. 1601, 1685–86 (2012) (citing relevant physics literature regarding Heisenberg principle and noting "very act of observation of an atomic particle itself affects the state and properties of that particle"); see also Julie E. Cohen, Privacy, Visibility, Transparency, and Exposure, 75 U. Chi. L. Rev. 181, 192 (2008) ("Surveillance infrastructures alter the experience of places in ways that do not depend entirely on whether anyone is actually watching."). There are two responses to this line of critique. First, if people do not know they are being recorded, then the risk of altered behavior is minimal. Second, if people fear that they are being recorded (or might be recorded), then they actually might be deterred from wrongful conduct. That is to say, the threat of recording might cause people to alter their behavior toward that which is more socially desirable. The idea that people behave better when they are recorded is exactly the sort of thinking that undergirds efforts to spur video recording of police interactions with citizens. Cf. Michael Potere, Comment, Who Will Watch the Watchmen?: Citizens Recording Police Conduct, 106 Nw. U. L. Rev. 273, 314–15 (2012) (contesting idea that videotaping police institutionalizes distrust). While there is a potential concern that the alteration in behavior could, in some circumstances, cause the subject of the recording to be "overdeterred" and to behave in ways that exceed what is socially optimal, on balance the advantages of accountability outweigh such a risk.

encompassed by the right to record, which does not include a right to speak in a disruptive manner in one's workplace. Similarly, the act of recording from a drone is qualitatively different from broadcasting a loud message from an electronic amplifier while flying over private property. And recording a public courtroom proceeding is distinct from standing up and disruptively shouting in the middle of a trial.

2. *Recording in Public and Private Settings.* — Even if these two threshold prerequisites to the right to record are universally accepted, there will still be doctrinal resistance to recognizing recording as a form of protected First Amendment activity. This is particularly true with regard to recording on private property. Because the stakes of the right to record may be different depending on the location of the recording, the right may be articulated in two broad categories. First, this section addresses the right to record in public places or in private places where the person engaged in recording has the consent of the property owner. Second, this section defines the right to record on private property without the owner's consent.

a. *Recording in Public or on Private Property with Consent.* — This Article maintains that the First Amendment protects individuals from government regulation of audiovisual recordings made in publicly accessible spaces, subject to reasonable, content-neutral time, place, or manner restrictions. Such recordings can increase knowledge and advance public discussions of race, police reform, and other issues of social, political, and moral significance. This conception of the right to record is supported by the decisions of courts that have recognized that the state may not restrict people from recording the public activities of law enforcement officers.[185] Similarly, government restrictions on recording political demonstrations or parades or the everyday plight of a city's homeless population would infringe the right to record. But so would a prohibition on video recording everyday activities on the street or in a public park, even if they were not directly connected to a political or artistic objective.

The right to record would also extend to protect recordings made on one's own private property and to recordings made on another's property with that person's consent and knowledge. Thus, recording oneself, or one's family or pets, is speech subject to constitutional protection from government constraints. This might include everything from recordings of commonplace activity such as home movies to self-recorded instructional videos to be posted on YouTube to private sex tapes.[186] If another

185. See Glik v. Cunniffe, 655 F.3d 78, 85 (1st Cir. 2011) (finding right to film government officials is "well-established liberty" protected by First Amendment); Crawford v. Geiger, 996 F. Supp. 2d 603, 617 (N.D. Ohio 2014) (outlining general consensus that videotaping police activity is protected by First Amendment).

186. Again, restrictions on the subsequent, nonconsensual circulation of private sex tapes for viewing by third parties, however, might implicate compelling government interests in protecting individual privacy, which would likely fall outside of the scope of the right

person invites the recorder into his home and consents to the recording, the act of making those recordings would be constitutionally protected as well.

The right to record in public or in private with consent should be afforded First Amendment protection for at least two important reasons. First, outside a few narrow circumstances, there will seldom be any legitimate reason for the state to ban recording in these settings. To the extent the government wishes to ban public recordings, its reasons are likely, though not always, related to prohibiting exposure of matters that it would like to hide from public scrutiny and not to advance any legitimate police power concern. Moreover, it is difficult to imagine many circumstances in which the state might have a legitimate, much less compelling, reason to ban private, consensual video recordings. This is not to suggest that all such recording will be protected. One area in which this has been highly controversial is when parents have been criminally charged for taking private photographs or video recordings of their minor children in the nude.[187]

Second, to the extent property or privacy concerns might animate government restrictions on video recordings, such interests are much less likely to be implicated by public and consensual private recordings than by nonconsensual recordings on private property. As catalogued above, implicit in many of the right to record cases is the notion that individuals who are in public typically have reduced expectations of privacy. For example, throughout the Seventh Circuit's opinion in *ACLU v. Alvarez*, the court implies that the absence of "any expectation of privacy" on the part of the recorded party was relevant to the finding that the recording was in fact speech.[188] The fact that the recording was not disruptive and was

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to record. See Citron & Franks, supra note 10, at 37 (explaining privacy concerns override any First Amendment value in confidential, sexually explicit images).

187. See, e.g., Amy Adler, The Perverse Law of Child Pornography, 101 Colum. L. Rev. 209, 234–44 (2001) (outlining evolution of child pornography law including historical development of pornography law, Supreme Court decisions related to child pornography laws, and rationales for those decisions).

188. 679 F.3d 583, 595 n.4 (7th Cir. 2012). The court elaborated later in the opinion:

> [S]urreptitiously accessing the private communications of another by way of trespass or nontrespassory wiretapping or use of an electronic listening device clearly implicates recognized privacy expectations . . . [but] these privacy interests are not at issue here. The ACLU wants to openly audio record police officers performing their duties in public places and speaking at a volume audible to bystanders. Communications of this sort lack any "reasonable expectation of privacy" for purposes of the Fourth Amendment . . . . [B]y making it a crime to audio record *any* conversation, even those that are *not* in fact private—the State has severed the link between the eavesdropping statute's means and its end. Rather than attempting to tailor the statutory prohibition to the important goal of protecting personal privacy, Illinois has banned nearly all audio recording without consent of the parties—including audio recording that implicates *no* privacy interests at all.

"carried out by people who have a legal right to be in a particular public location and to watch and listen to what is going on around them," seems inextricably linked with the court's reasoning.[189] Furthermore, consensual private recordings are unlikely to ever implicate property or privacy concerns because there is, by definition, consent of the property owner and the subject or subjects being recorded.

b. *Recording on Private Property Without Consent.* — As discussed earlier, video image capture on private property, even without consent, is no different from video recording in public in terms of its qualities as speech as understood under First Amendment theory. Thus, a constitutional right to free speech should also extend to nonconsensual recordings on private property. This section addresses the skepticism about this view under existing case law and also suggests some important limitations on the right to nonconsensual video recordings on private property that will ameliorate concerns that the government might have in regulating them. First, with respect to nonconsensual recordings on private property, the right to record should be limited to recordings about matters of public concern. Second, these types of recordings, while protected, must still be examined in light of the appropriate First Amendment doctrinal test, depending on how the regulation operates. Thus, the conclusion of this Part suggests that the right to record on private property without consent is subject to limitations if the recording directly interferes with tangible property rights or infringes upon a reasonable expectation of personal privacy.

i. *Commentary and Case Law.* — To date, the limited scholarly and judicial treatment of video recording or photography under the First Amendment has typically assumed that any constitutional protections for recording are limited to acts of public recording. For example, despite all of his groundbreaking clarity about the role of recording in political debate, Professor Kreimer is decidedly circumspect when talking about the prospect of a right to record in private. Indeed, he concedes that "[m]atters become more complicated" when the recording is made in a nonpublic venue.[190] Professor Kreimer recognizes that the newsworthiness of a private recording (and concomitant lack of intimacy or offensiveness) may justify First Amendment protection,[191] but this is a subtle point that is relegated to a cursory discussion.[192] On the whole, his project is devoted to articulating a clear vision for a right to record in public. Professor Kreimer even acknowledges the argument that when one engages in activities on

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Id. at 605–06.

189. Id. at 606.

190. Kreimer, supra note 24, at 403.

191. Id. at 404 ("The interest in assuring that our private words and images are not conveyed against our will to a public audience is constitutionally cognizable.").

192. Id. at 404–05.

private property the recorder may have "waived [her] First Amendment rights to capture images."[193]

Lower courts considering assertions of a right to record are even more guarded. Private recordings are assumed to enjoy either less or perhaps no First Amendment protection because a person recorded in private has "done nothing to reveal herself to the public gaze and the capture and dissemination of her image singles her out for an impingement of her privacy and dignity."[194] An older state court of appeals case addressing various privacy torts elaborates on this view. In reviewing the scope of privacy, the court explains:

> It seems to be generally agreed that anything visible in a public place can be recorded and given circulation by means of a photograph, to the same extent as by a written description, since this amounts to nothing more than giving publicity to what is already public and what anyone present would be free to see.[195]

This encapsulates the conventional wisdom about the right to record: That which is available to the public can be recorded, but that which is not must be protected under notions of privacy and dignity.

More recently, a Seventh Circuit decision illustrates that the increasing prevalence of recording technologies has not entirely eroded the entrenched private–public dichotomy.[196] In *ACLU v. Alvarez*, the court considered a First Amendment challenge to a law that required consent in order to record another person.[197] The court struck down the statute on the basis that there is a constitutional "right to record."[198] However, the court emphasized that the recordings plaintiff sought to produce were of officials "performing their duties in traditional public fora."[199] Its reasoning stresses that the recordings in question were not "of a private communication" and instead were of actions and utterances "occur[ing] in public."[200] The court stops short of holding that recording is only speech when it occurs in public, but *Alvarez* only addresses public recording.

Other federal decisions have also implicitly suggested a distinction between private and public recording. For example, it is commonplace for courts to recognize a right to record "on public property"[201] or to rec-

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193. Id. at 403 (citing Andrew J. McClurg, Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality, 74 U. Cin. L. Rev. 887, 916–17 (2006); Neil M. Richards and Daniel J. Solove, Privacy's Other Path: Recovering the Law of Confidentiality, 96 Geo. L.J. 123, 177–80 (2007)).

194. Id. To be sure, Professor Kreimer goes on to recognize that not all limits on private recording are constitutionally tolerable.

195. Hollander v. Lubow, 351 A.2d 421, 426 (Md. 1976).

196. ACLU v. Alvarez, 679 F.3d 583 (7th Cir. 2012).

197. Id. at 586.

198. Id. at 595.

199. Id. at 594.

200. Id. at 595.

201. Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000).

ord "public meetings."[202] Other cases recognize a more capacious "First Amendment right to film matters of public interest," but even these cases tend to arise in the context of litigation over recordings made in public.[203] As Professor Bambauer has explained, in the limited cases that have confronted the question of a right to record, "with one exception, the right was crafted narrowly, as a right to record public officials performing their public duties."[204] Quite simply, there is a dearth of case law addressing the right to record generally and even fewer decided cases on the issue of private recordings on matters of public interest. The assumption of most courts addressing public recording, though certainly not all,[205] seems to be that speech rights corresponding to acts of recording are strongest in public.

Perhaps no case stands more clearly for the proposition that recordings made outside of the public sphere may offend notions of privacy than the arguably outdated Ninth Circuit decision in *Dietemann v. Time, Inc.*[206] A.A. Dietemann was practicing some form of "healing" out of a home office when a reporter from *Life* magazine pretended to be an interested patient in order to obtain audio and image recordings for a story called "Crackdown on Quackery."[207] Dietemann alleged that his privacy was violated, and the Ninth Circuit agreed, holding that the "First Amendment has never been construed to accord newsmen immunity from torts or crimes committed during the course of newsgathering."[208]

The *Dietemann* rule, if read broadly, is largely incompatible with a right to record outside of purely public realms. If states can criminalize or impose civil penalties for all variety of nonpublic recordings, then recording is protected speech *exclusively* in public domains or private domains with consent. But *Dietemann* does not portend such a First Amendment rule, and in fact, a close reading of the case leads to the conclusion that it is dated to the point of near irrelevance. The court faults the media defendant for intruding on reasonable expectations of privacy, but that concept, substantially limited in the Fourth Amendment context, was less meaningfully developed when *Dietemann* was decided.[209] In other words,

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202. Iacobucci v. Boulter, No. Civ. A. 94-10531-PBS, 1997 WL 258494, at *6 (D. Mass. Mar. 26, 1997); see also Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (holding plaintiffs' free speech rights were violated when they were prohibited from recording public meeting).

203. Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995).

204. Bambauer, supra note 28, at 84; see also id. at 84 n.117 (compiling cases on this point).

205. See Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009, 1023 (D. Idaho 2014) (holding ban on unauthorized recording while on private property was subject to First Amendment scrutiny).

206. 449 F.2d 245 (9th Cir. 1971).

207. Id. at 245–46.

208. Id. at 249.

209. Compare id. (explaining while invitee assumes risk "visitor may repeat all he hears and observes when he leaves[,] . . . [he] should not be required to take the risk that

Dietemann is a case about privacy in an era when expectations of privacy were understood to be more capacious.[210] Moreover, other circuits have readily distinguished or rejected *Dietemann*,[211] and even the Ninth Circuit has distanced itself from the decision.[212] Most importantly, many courts have emphasized that the reasoning of *Dietemann* is limited to an intrusion into one's *private home*, where he happened to also engage in his healing practices and not a commercial office or workplace.[213]

In short, while there is very limited judicial consideration of the issue to date, some courts seem to take for granted that recording constitutes an act of expression protected by the First Amendment only if it occurs in public. But such a position warrants significantly more attention. There is no other action that is categorized as speech (or not) depending on where it occurs. One would assume that recording either is or is not a speech activity and the location of the activity would simply dictate whether a limit on such speech satisfies the requisite scrutiny. However, because there seems to be an underlying assumption that recording loses its status as speech if it is done in private, this Article will articulate and analyze the most compelling arguments for bifurcating the speech value of recording along private and public lines.

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what is heard and seen will be transmitted by photograph or recording . . . ."), with United States v. Davis, 326 F.3d 361, 366 (2d Cir. 2008) (holding video recordings made by invited guest did not violate Fourth Amendment where "hidden camera did not capture any areas in which Davis retained a privacy interest . . . .").

210. For example, citizens do not hold a reasonable expectation of privacy in the phone numbers they dial, Smith v. Maryland, 442 U.S. 735, 742 (1979), or in their bank records, United States v. Miller, 425 U.S. 435, 443 (1976), because they take the risk their information, when revealed to another individual, "will be conveyed by that person to the government." Id. In some circumstances, individuals also have a lower expectation of privacy in shared premises. See Fernandez v. California, 134 S. Ct. 1126, 1134 (2014) (holding warrantless search was valid where third party consented after defendant's lawful arrest); Illinois v. Rodriguez, 497 U.S. 177, 188–89 (1990) (explaining warrantless search does not violate Fourth Amendment when police obtain consent from person whom they reasonably believe to have authority to grant consent).

211. See, e.g., Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1352–53 (7th Cir. 1995) (distinguishing public ophthalmic clinic from private "quackery" at issue in *Dietemann*).

212. See, e.g., Med. Lab. Mgmt. Consultants v. Am. Broad. Cos., 306 F.3d 806, 818 n.6 (9th Cir. 2002) (distinguishing private nature present in *Dietemann* from workplace interaction). Professor Bambauer has also provided a stinging critique of *Dietemann*'s reasoning:

> A right to access information (or, more precisely, a right to be free from government restraint on access to information) is at odds with *Dietemann* and other cases that presume the First Amendment imposes absolutely no constraint on the tort of intrusion upon seclusion. But [such an] approach seems necessary. If access to knowledge were not a constitutionally protected right, the intrusion tort could be boundless. At the extreme, the government could prohibit a person from recording anything at all without conflicting with the First Amendment. This cannot be right.

Bambauer, supra note 28, at 85.

213. See, e.g., *Med. Lab. Mgmt. Consultants*, 306 F.3d at 818 n.6 (limiting *Dietemann* in this respect); Desnick, 44 F.3d at 1352–53 (same).

ii. *A Public Concern Limitation on the Right to Nonconsensual Recording on Private Property.* — Under our conception, the right to engage in nonconsensual video recordings on private property (but not on public property or on private property with consent) would be limited to protecting recordings that pertain to a matter of public concern or at least have a strong connection to public discourse. That is, the recordings must somehow relate to a general matter of political, social, or moral significance that is an appropriate subject of public debate. Another relevant consideration ought to be whether the person engaged in recording is motivated by a political, journalistic, or investigative purpose, which would receive greater First Amendment protection, or a purely commercial purpose or purely private/personal reason, which would be less protected.[214] This distinction parallels existing theoretical and doctrinal distinctions between core political expression and commercial speech.

This focus on recordings relating to matters of public concern ties the right to make audiovisual recordings directly to the underlying purposes of the First Amendment, which include the promotion of democratic self-governance and the search for truth. By critically informing public discourse, recordings can be a powerful facilitator of both of these interests. Like public recordings, video recordings on private property may substantially inform public discourse. Again, many of the illustrations of important recordings already discussed involve recordings on private property, such as at private political fundraisers or on the premises of private agricultural operations. Use of electronic drones to engage in surveillance of industrial polluters is another example of recordings that have public significance.

As the Supreme Court has repeatedly declared, "[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'"[215] That is because "'speech concerning public affairs is more than self-expression; it is the essence of self-government.'"[216] Accordingly, "'speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'"[217] Whatever one might think about a right to record on private property, if the First Amendment covers such activity, the Court has been clear that insofar as the recording relates to matters of public concern, the highest rung of First Amendment protection applies.

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214. Motive is not a controlling feature of the public concern inquiry, but it often plays a nontrivial role in the manner in which the Supreme Court decides whether something is speech. See, e.g., Snyder v. Phelps, 131 S. Ct. 1207, 1227 (2011) (Alito, J., dissenting) (faulting majority for deciding funeral protests were entitled to First Amendment protection because speech "was not motivated by a private grudge").

215. Id. at 1215 (majority opinion) (alteration in original) (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (plurality opinion)).

216. Id. (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

217. Id. (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

In addition, it is worth pointing out that to a certain extent, the recording of another person or another person's property will always pit some assertions of privacy (well-founded or not) against the speech rights attached to recording. In this regard, any such privacy concerns are much less likely to be deemed a significant—let alone a compelling—interest when the matters sought to be revealed are matters of public concern.[218] This is not to suggest that all restrictions on recordings of nonpublic concern should be upheld. Certainly a ban on making videos of one's own cat from within the privacy of the home, while perhaps serving a significant government interest in avoiding workplace distractions broadcast over YouTube,[219] would not be permissible. On the other hand, the recording of another's cat without permission while on someone else's private property would be entitled to less protection than other recording bans or limitations because the recording is not about a matter of public concern. On balance, the fact that a recording is related to a matter of public concern cuts in favor of the recorder and against limits on such recording.

Limiting the right to make nonconsensual recordings on private property to matters of public concern further helps sort out some of the government regulations of recording that are the subject of current controversy. Ag-gag laws, which categorically prohibit all recordings on the premises of agricultural operations, would be unconstitutional to the extent that the recordings were of activities that would implicate the legal regulation of factory farms and the ethical choices our society makes about the treatment of nonhuman animals.[220] However, a narrowly tailored ban on videotaping a business's operations to appropriate trade secrets would not implicate the right to record because that is a matter of private concern. Bans on drone recordings to reveal the conduct of in-

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218. To be sure, public concern is not self-defining, but we are comfortably saying all nonprivate, nonintimate details are generally public. As the Court has explained,

> Speech deals with matters of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."

Id. at 1216 (citations omitted) (quoting San Diego v. Roe, 543 U.S. 77, 83–84 (2004); Rankin v. McPherson, 483 U.S. 378, 387 (1987); *Connick*, 461 U.S. at 146).

219. See, e.g., Hadley Freeman, Opinion, So This Is How the World Ends: With Us Distracted by Cute Cats, Guardian (Mar. 4, 2015), http://www.theguardian.com/commentisfree/2015/mar/04/cute-cats-internet [http://perma.cc/Y2VZ-RK92] (arguing cat memes are distracting from world news). But cf. Lucia Peters, Pew Survey Reveals the Internet Doesn't Distract Us from Our Jobs, No Matter How Many Cat Videos We Watch, Bustle (Dec. 31, 2014), http://www.bustle.com/articles/56315-pew-survey-reveals-the-internet-doesnt-distract-us-from-our-jobs-no-matter-how-many-cat [http://perma.cc/L5F3-JMZW] (reporting results showing cats on Internet are not distracting).

220. Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1208 (D. Idaho 2015) (holding ag-gag statute did not have rational purpose).

dustrial polluters would be at risk for invalidation but not bans on the use of drones to record nude sunbathers.

Critics of this approach might raise at least two legitimate objections to the public-concern requirement. First, it may import administrability problems into this area of First Amendment doctrine. Disputes about the definitions of public concern have plagued First Amendment employee speech doctrine,[221] and the same thing might occur here. Indeed, as the Court has candidly acknowledged, "the boundaries of the public concern test are not well defined."[222]

Nonetheless, the Court has, of course, elaborated on the standard at some length. Speech deals with matters of public concern when it can

> 'be fairly considered as relating to any matter of political, social, or other concern to the community,' or when it "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." The arguably "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern."[223]

A second critique of tying the protection of recording in private to the question of public concern also relates to the lack of a clear dividing line between recordings about matters of public concern and recordings that do not relate to public discourse. Because there is ambiguity as to exactly what constitutes a matter of public concern, such a standard could have a chilling effect. Persons engaged in video activism[224] might consider making a recording that would be valuable, but its public significance may be unclear or ambiguous, or perhaps not yet apparent. While there will be some level of uncertainty in the application of this standard, it need not be fatal. Other areas of First Amendment doctrine have provided robust protection for speech even where the boundaries of the right are not crystal clear. Moreover, the public concern requirement permits the law to draw important distinctions between different contexts of private recordings and balance critical interests of speech and privacy. On balance, this Article proposes that the value in permitting these distinctions to be drawn outweighs the uncertainty that might accompany a public concern limitation.

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221. See, e.g., Stephen Allred, From *Connick* to Confusion: The Struggle to Define Speech on Matters of Public Concern, 64 Ind. L.J. 43, 75 (1988) (explaining inconsistency in lower federal courts arising from their discretion in determining scope of public employees' free-speech rights); Michael L. Wells, Section 1983, The First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (and Vice Versa), 35 Ga. L. Rev. 939, 960–61 (2001) (same).

222. *San Diego*, 543 U.S. at 83.

223. *Snyder*, 131 S. Ct. at 1211 (citations omitted) (quoting *San Diego*, 543 U.S. at 83–84; *Rankin*, 483 U.S. at 387; *Connick*, 461 U.S. at 146).

224. See generally Thomas Harding, The Video Activist Handbook 1 (2d ed. 2001) (surveying emergence of video activism, which "uses video as a tactical tool to bring about social justice and environmental protection").

B. *Addressing Potential Barriers to a Right to Record in Private Under Existing First Amendment Doctrine*

This section identifies three possible areas of First Amendment jurisprudence that would seem to either directly or by implication conflict with the recognition of a constitutional right to record on private property: the newsgatherers' privilege cases, the captive audience cases, and the public forum cases. These doctrines have not been specifically invoked by any of the courts or commentators to date. Instead, this section identifies and responds to these arguments preemptively. While each of these doctrines appears at first glance to impose limits on the right to record on private property, they are, on closer examination, inapposite.

1. *No Newsgatherers' Privilege.* — One objection to the argument that video recording is protected expression under the First Amendment might be that the Supreme Court has heretofore failed to embrace the idea of a constitutional newsgatherers' privilege. In *Branzburg v. Hayes*, the Court rejected the First Amendment claim of newspaper reporters who refused to appear before grand juries to testify about information they had acquired from confidential informants.[225] The reporters claimed that they should have some protection from having to testify because revealing confidential sources and information would impair their ability to gather information for news stories.[226] The Court found that no citizen has immunity from a grand jury investigation and that there is no special right for journalists to have a special exemption because of their association with the press.[227] More generally, the Court has elsewhere noted that the enforcement of general laws does not "offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[228]

Although the Court rejected the claim for a newsgatherers' privilege from grand jury subpoenas, it was clear that that conclusion did not mean that "news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[229] Thus, the absence of a narrowly defined newsgatherers' privilege does not necessarily lead to the conclusion that there is no broader right to record. Indeed, this Article does not advocate for any sort of journalistic exceptionalism for recording, and in any event, the right to record should not be limited to professional newsgatherers. Some of the most important video recordings that have informed public debate have been by political activists, amateur hobbyists, and un-

225. 408 U.S. 665, 708 (1972).

226. Id. at 679–80.

227. Id. at 682–83.

228. Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991).

229. *Branzburg*, 408 U.S. at 681.

dercover government investigators.[230] Moreover, with the expansion of Internet avenues for conveying information, the line between professional journalists and citizen activists is becoming less clear, making a right contingent on one's professional credentials both difficult to administer and to justify.[231] In any event, a right to record in private without consent does not threaten the longstanding view that there is no general newsgatherers' privilege.

2. *Protection of Captive Audiences.* — A distinct line of First Amendment cases permits the state to limit speech in private spaces, and even some public spaces, to the extent that the speech interferes with individual liberty by forcing people to be "captive" audiences.[232] The captive audience cases recognize a right to be free from uninvited speech activities in the zone of privacy of one's own property.[233] For example, the Court has upheld a law allowing persons to prevent the delivery of salacious mailings to their homes[234] and an ordinance prohibiting picketing "before or about" any particular individual's residence.[235] The Court emphasized that although "communication is imperative to a healthy social order[,] . . . the right of every person 'to be let alone' must be placed in the scales with the right of others to communicate."[236] On this basis, the Court has even upheld laws limiting door-to-door commercial sales[237] and in *Rowan v. U.S. Post Office Department* explained:

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230. See generally Adam Cohen, The Media that Needs Citizens: The First Amendment and the Fifth Estate, 85 S. Cal. L. Rev. 1, 7–23 (2011) (discussing ways in which amateur videographers have contributed to public debate).

231. See Bhagwat, Producing Speech, supra note 28, at 1053 (arguing First Amendment should protect more than just "institutional press" in age where broader public regularly engages in information gathering).

232. See, e.g., Hill v. Colorado, 530 U.S. 703, 735 (2000) (upholding Colorado statute prohibiting any person from approaching within eight feet of another person near health care facilities based, in part, on state's desire to protect listeners from unwanted communication); Frisby v. Schultz, 487 U.S. 474, 488 (1988) (upholding ordinance banning picketing in front of targeted residences based on government's interest in protecting residential privacy). For a critique of the Court's extension of the captive audience doctrine to public sidewalks in *Hill*, see Chen, Statutory Speech Bubbles, supra note 123, at 60–61.

233. The phrase "unwilling listener" is closely associated with the "captive audience" doctrine. See, e.g., Snyder v. Phelps, 131 S. Ct. 1207, 1220 (2011) ("As a general matter, we have applied the captive audience doctrine only sparingly to protect unwilling listeners from protected speech.").

234. Rowan v. U.S. Post Office Dep't, 397 U.S. 728, 729, 736–38 (1970) (considering challenge to portion of "Postal Revenue and Federal Salary Act . . . under which a person may require that a mailer remove his name from its mailing lists and stop all future mailings to the householder" (citation omitted)).

235. *Frisby*, 487 U.S. at 476–78, 488.

236. *Rowan*, 397 U.S. at 736.

237. Breard v. City of Alexandria, 341 U.S. 622, 645 (1951) ("It would be . . . a misuse of the great guarantees of free speech and free press to use those guarantees to force a community to admit the solicitors of publications to the home premises of its residents."). But see Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 622, 638–39 (1980) (invalidating "ordinance prohibiting the solicitation of contributions by charitable organi-

> The Court has traditionally respected the right of a householder to bar, by order or notice, solicitors, hawkers, and peddlers from his property . . . . To hold less would tend to license a form of trespass and would make hardly more sense than to say that a radio or television viewer may not twist the dial to cut off an offensive or boring communication and thus bar its entering his home.[238]

In short, the unwilling-listener line of cases bespeaks a foundational principle: "Even protected speech is not equally permissible in all places and at all times."[239] Focusing on "the 'place' of . . . speech" is a staple of First Amendment analysis.[240] This protection of "unwilling listeners" might suggest another barrier to recognizing a right to record on private property.

Upon reflection, however, the captive audience cases do not have any application in the recording context because while recording on private property is part of the spectrum of expressive activity, it is not immediately communicative to those present during the recording.[241] As explained in the context of distinguishing the right of access cases, recording is not tantamount to protesting, chanting, soliciting, leafletting, or otherwise communicating on private property.[242] The captive audience doctrine is designed to protect individuals from having their private space intruded upon with unwelcome messages or disturbing communications. It is not a generic and invariable right to privacy against those you have invited to be present on your property. For example, if a Walmart employee secretly records a conversation with her boss that documents demeaning or inappropriate behavior, it may be embarrassing for the supervisor or the company, but it is not forcing the supervisor to be an unwilling audience to speech,[243] nor is it impeding or coercing her private behavior. The concerns in the captive audience cases are that one party is forced to suffer speech she finds offensive, disagreeable, incor-

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zations that do not use at least 75 percent of their receipts for 'charitable purposes'" and noting no "substantial relationship between the 75-percent requirement and the protection . . . of residential privacy").

238. 397 U.S. at 737.

239. Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 799 (1985).

240. *Frisby*, 487 U.S. at 479; see also id. at 485 ("[W]e have repeatedly held that individuals are not required to welcome unwanted speech into their own homes . . . .").

241. A recording that is livestreamed is arguably speech but for an audience different than those who are the subject of the recording.

242. See supra section II.A.1.a (discussing First Amendment cases dealing with right to access property).

243. In *Snyder v. Phelps*, the Court emphasized that observing replays of speech on news or other media sites does not itself raise captive audience concerns. 131 S. Ct. 1207, 1220 (2011) (declining to apply captive audience doctrine where party did not learn content of offensive speech until viewing news broadcasts later).

rect, or simply boring while she is in a private space such as the home.[244] But recording does not interfere with owners' use of property or require them to listen to any speech, so the unwelcome expression interest does not attach in this circumstance. The captive audience doctrine does not apply to recordings because the private property owner is not the intended audience. The difference is material.

Because recording is not actively communicating to the persons present, the concerns of interruption and captive audience are generally nonexistent. There will be circumstances when recording (or even the risk of being recorded) could interrupt proceedings, such as in a courtroom, as discussed below.[245] There may also be times when a recording of intimate, private details from one's home or a restroom invades privacy concerns so fundamental as to exceed First Amendment protection.[246] So there will be recording that is unprotected, perhaps in both the private and the public spheres. But the core rationales behind doctrines that protect nonpublic and private forums from unwelcome speech—the captive audience doctrine—cannot be reasonably extended to noninterruptive audiovisual recording of nonintimate acts.

Moreover, if the concern with recording is expressed not as to the harms of recording at the moment—disturbances or interruptions—but with preventing the subsequent dissemination of the recording, then serious prior restraint concerns arise, at least with respect to matters of public concern. Justifying a prohibition on recording in private in order to prevent subsequent distribution and concomitant reputational or privacy harms "runs afoul of First Amendment doctrine's established hostility toward suppressing expression in order to interdict future harms."[247] If the goal is not to prevent interruption or unwilling listeners but to avoid downstream speech in public forums, then the First Amendment is uniquely implicated.

3. *Analogies to Public Forum Doctrine.* — A third doctrinal area that is possibly inhospitable to the right to record in private, at least by anal-

244. See, e.g., *Frisby*, 487 U.S. at 484–85 (explaining all citizens have heightened privacy interests at home and government may protect citizens from unwanted speech in their homes).

245. See infra section II.C.3 (discussing rationale behind prohibiting video recording of courtroom proceedings).

246. Kreimer, supra note 24, at 395 ("These justifications often suffice to justify bans on peeping Toms with cameras or surreptitious image capture of intimate conduct.").

247. Id. at 404. Another way of making this same point is to recognize that forum-based restrictions are often designed to preserve the proper functioning of public spaces and to avoid harming the dignity, peace, and cleanliness of the public space. See, e.g., Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 817 (1984) (explaining restriction on posting to signposts was permissible to avoid clutter and aesthetic injury). By contrast, recording will generally not interfere or hinder the forum's activities at all. Instead, limits on recording function only to prevent subsequent dissemination.

ogy,[248] is the Court's public forum doctrine.[249] This area of First Amendment law gives wide latitude to the state to regulate the time, place, or manner of speech in traditional public forums and even greater discretion to limit speech on other public property.[250] The Court clearly privileges speech more in open governmental properties than in other places. It has recognized that public forums such as streets and sidewalks "occupy a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate."[251] Traditional public forums such as parks and sidewalks are said to be "immemorially . . . held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[252] It is common wisdom that "[t]he greatest [First Amendment] protection is provided for traditional public fora."[253] Speech in these locations enjoys the strongest constitutional protection, and content-based limits are therefore subject to the most exacting scrutiny.[254]

The Court has established a hierarchy among locations for First Amendment protection, recognizing a distinction between traditional public forums, designated public forums, and nonpublic forums.[255] As to the

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248. Of course, it is only by analogy. The public forum doctrine has nothing at all to say about the regulation of speech that does not occur on public property.

249. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983) (explaining public forum doctrine).

250. See id. at 46 ("In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

251. McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) (quoting United States v. Grace, 461 U.S. 171, 180 (1983)).

252. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) (plurality opinion).

253. Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist., 640 F.3d 329, 334 (8th Cir. 2011).

254. See *Perry Educ. Ass'n*, 460 U.S. at 44–45 (noting historically strong constitutional protections in public forums).

255. The Court succinctly summarized the distinction among the three categories in the following way:

> [O]ur decisions have sorted government property into three categories. First, in traditional public forums, such as public streets and parks, "any restriction based on the content of . . . speech must satisfy strict scrutiny . . . ." Second, governmental entities create designated public forums when "government property that has not traditionally been regarded as a public forum is intentionally opened up for that purpose"; speech restrictions in such a forum "are subject to the same strict scrutiny as restrictions in a traditional public forum." Third, governmental entities establish limited public forums by opening property "limited to use by certain groups or dedicated solely to the discussion of certain subjects." . . . "[I]n such a forum, a governmental [sic] entity may impose restrictions on speech that are reasonable and viewpoint-neutral."

latter, the Court has recognized that some government property can be closed off to all speech activities.[256] Stated simply, there is one set of (greater) speech protections for places that constitute traditional public forums for speech and a separate (and lesser) set of protections for government-owned forums that are not open to speech or that are only open to speech by certain groups or on certain subjects.[257] Thus, for places that are not traditional or designated public forums, unless the government has affirmatively made the area "generally available" for speech activities, the Court has upheld forum restrictions on speech so long as they are not viewpoint based and are reasonable.[258] If the law recognizes the right of the government to close its property to speech activities, then it might stand to reason that recording on nonpublic property is subject to at least as much regulation by the State.[259]

But like the right of access and captive audience cases, the public forum doctrine does not apply to the distinction between private and public recording for at least a couple of reasons. First, the government's legitimate interest in regulating speech on public property relates to its authority to manage those spaces for enjoyment by multiple users and to prevent uses of public property that may interfere with its intended purposes.[260] Competing demands for use of public spaces for First Amendment activity can result in chaos and disruption and inhibit both the exercise

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Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 n.11 (2010) (citations omitted) (quoting Pleasant Grove City v. Summum, 555 U.S. 460, 469–70 (2009)) (misquotation) (applying limited public forum doctrine to evaluate regulation of certain student activities); see generally Chemerinsky, supra note 168, §§ 11.4.1–.2 (explicating public forum doctrine).

256. Adderley v. Florida, 385 U.S. 39, 46–47 (1966) (holding sheriff has power to direct demonstrators off jail grounds).

257. Compare Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992) (holding speech in airport terminals is not subject to First Amendment protec¬tion because airport terminals are not public forums), with Frisby v. Schultz, 487 U.S. 474, 481 (1988) (holding residential street was public forum).

258. Ark. Educ. Television v. Forbes, 523 U.S. 666, 678–79 (1988) (explaining if government provides only selective access to forum, then property is nonpublic forum). A content-based or subject-matter restriction on speech in a limited or nonpublic forum is permitted. Id. at 667 ("Access to a nonpublic forum can be restricted if the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's views.").

259. Outside of traditional public forums, public spaces are open to speech only if the government chooses to allow speech in such a space. Chemerinsky, supra note 168, § 11.4.2.3 (explaining restrictions in designated public forum—those affirmatively opened for speech by government—must be content- and viewpoint-neutral and serve important government interest, whereas restrictions in limited public forums need only be viewpoint-neutral and reasonable); id. § 11.4.2.5 ("Nonpublic forums are government properties that the government can close to all speech activities.").

260. See, e.g., *Pleasant Grove City*, 555 U.S. at 480 (explaining accepting every monument donation into park would inevitably lead to closing of park); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983) (noting "content-based prohibition must be narrowly drawn to effectuate a compelling state interest").

of speech and the use of the property for other nonspeech reasons, such as little league baseball games and picnics. Similarly, limits on speech at schools are designed to ensure that the educational mission is not impaired,[261] solicitation limits at airports are intended to avoid hassles for already frenzied airline travelers,[262] and limits on courtroom protests are designed to maintain the dignity of the forum and protect the due process rights of participants.[263] As the Supreme Court has observed, "[t]he crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[264]

None of these governmental interests in preventing speech to avoid inconvenience or interference with the present use of an area apply to the act of recording. That is, the public forum doctrine applies to activities that are at the pure speech end of the expression spectrum. As explained earlier, the First Amendment covers a wide range of conduct, from pure political speech to wearing armbands and burning flags to recording images and sounds.[265] All of these acts are expressive enough to trigger speech protections, but only those speech activities toward the pure communicative end of the spectrum are covered by the public forum cases. It simply makes no sense to treat a noncommunicative act of expression as raising the same concerns as a protest or a concert; the latter forms of expression will cause immediate interference with the contemporaneous use of the forum—the very problem that the public forum doctrine was designed to address.

To reiterate the central point here: All expressive activity falls along a spectrum. At the one end is pure speech—the speaking of words—and at the other end are acts that are essential components of such speech or are integral to facilitating such speech—such as purchasing a printing press. Though recording is not pure speech, it is still protected activity and entitled to undiluted First Amendment protection. However, the fact that recording is a precursor to pure speech also means that the law's general concerns with communicative interruptions are irrelevant because recording is typically not incompatible with others' uses of either public or private space. To use the Court's own example, the public forum cases would allow the state to ban a person from standing up on the table in a public library and shouting out in protest of a government policy be-

261. See, e.g., Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (explaining student's "vulgar and lewd speech . . . would undermine the school's basic educational mission").

262. See, e.g., *Krishna Consciousness*, 505 U.S. at 682 (finding airports may limit solicitation practices in order to "provide services attractive to the marketplace").

263. See, e.g., Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986) (balancing public's right of access with right to fair trial).

264. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

265. Supra sections II.B–.C.

cause that speech interferes with other patrons' use of the library.[266] But that interest would not justify a regulation prohibiting video recording in a public library, say, to document the plight of the local homeless population because that law would not implicate the government's legitimate managerial interests.

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In short, there are a variety of important First Amendment considerations that, at least by analogy, suggest that recording in private is less protected than recording in public. But upon close examination, none of these limits hold up to careful scrutiny. The concerns that undergird various location-related limits on speech—the public forum doctrine, the captive audience cases, the newsgatherers' privilege, and the right of access rules—are all inapplicable to a noncommunicative act of recording done in a location where one is otherwise permitted to be.

C. *Governmental Interests and the Right to Record*

The previous sections have developed the claim that there is a right to record and that it extends to private property. When a person is lawfully present at the place of recording and is engaged only in recording—and not audible speech—the recording is presumptively protected. In addition, when that person is recording on private property without the owner's consent, the right is presumptively protected only if the recording is on a matter of public concern or contributes to public discourse. Even if all of these conditions are met, however, not all recording is or should be universally protected. As acknowledged at the outset of this Article, assessment of the right to record will necessarily be context specific.

As the opportunities for individuals to record videos have expanded, governments have identified reasons to regulate either the recording or the later dissemination of such recordings. Examination of state action that interferes with the right to record would still be subject to application of the basic infrastructure of First Amendment doctrine. Thus, viewpoint- and content-based restrictions on recording would be highly suspect and would be evaluated under traditional strict scrutiny; the laws would have to be narrowly tailored to advance a compelling governmental interest, and the state would have to show that no less speech-restrictive alternative was available to serve that interest.[267] In contrast, content-neutral regulations of video recording would be subject to intermediate scrutiny,

266. See *Grayned*, 408 U.S. at 116 ("Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would." (citation omitted)).

267. See Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–42 (1994) (contrasting level of scrutiny for content-based and content-neutral regulations).

drawing on the Court's public forum cases.[268] Under that standard, laws must be "narrowly tailored to serve a significant governmental interest" and must "leave open ample alternative channels for communication of the information."[269]

A comprehensive treatment of the right to record, therefore, must include an assessment of when the state's interest in regulating recording is either "compelling" under strict scrutiny or at least "significant" under intermediate scrutiny. These tests have real meaning in the context of adjudications of the right to record. In contrast to the work of other scholars, this Article argues that heightened scrutiny should not be considered fatal in fact.[270] It is legitimate for courts to closely examine the government's asserted interests to determine both their legitimacy and weight. Sometimes the government's interests may be credible and powerful, as in the context of laws criminalizing the nonconsensual recording of nudity.[271] Likewise, there are certainly other times when the gov-

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268. The Court also applies a version of intermediate scrutiny in cases examining the constitutionality of government regulations of expressive conduct. See United States v. O'Brien, 391 U.S. 367, 377 (1968). The Court has essentially acknowledged that time, place, or manner and speech/conduct tests are now the same standard. See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (applying rule from *O'Brien* after determining "time, place, or manner" test applied to law at issue); Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989) (affirming use of intermediate scrutiny); see also Ashutosh Bhagwat, Of Markets and Media: The First Amendment, the New Mass Media, and the Political Components of Culture, 74 N.C. L. Rev. 141, 167–70 (1995) (describing Court's merger of time, place, or manner test with speech/conduct test as "*Ward*/*O'Brien* test"). The "*Ward* statement of the test has become the standard formulation." Id. at 168. See generally Geoffrey R. Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. 189, 190–93 (1983) (discussing doctrine on content-neutral analysis).

269. *Ward*, 491 U.S. at 791; see also McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) (applying standard articulated in *Ward* to speech on public sidewalks).

270. See Gerald Gunther, The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv. L. Rev. 1, 8 (1972) (noting most rigorous level of constitutional scrutiny is often "'strict' in theory and fatal in fact"). One of the arguments against sometimes upholding laws under the strict scrutiny standard is that doing so will dilute the meaning of the standard and eventually undermine the enforcement of fundamental constitutional rights. See, e.g., Michael C. Dorf & Charles F. Sabel, A Constitution of Democratic Experimentalism, 98 Colum. L. Rev. 267, 394–95 & n.408 (1998) (pointing out Court's hesitation to apply higher standards of scrutiny in particular cases "will undermine the integrity of the standard in others"). On the contrary, courts can implement strict scrutiny in a meaningful manner that is highly skeptical of the government's justifications but sufficiently flexible to recognize that sometimes state interests can be truly compelling. See Chen, Statutory Speech Bubbles, supra note 123, at 88–89 (arguing applying strict scrutiny "promote[s] a more honest discourse about the fundamental constitutional conflicts that confront contemporary society").

271. See, e.g., 18 U.S.C. § 1801 (2012) (criminalizing intentional and knowing capture of naked parts of individual's body without consent). See generally Citron & Franks, supra note 10, at 363 (asserting criminalizing video voyeurism protects against "dignitary harms upon the individual observed . . . [and] a social harm serious enough to warrant criminal prohibition and punishment").

ernment will have strong reasons to safeguard the rights of individuals who have reasonable expectations of personal privacy in the activity being recorded or to restrict recording to protect misappropriation of tangible, material property interests.[272]

Other times, however, the very legitimacy, much less the weight, of the state's interests is highly questionable. Ag-gag laws, which criminalize nonconsensual recordings of conduct at commercial agricultural facilities to expose unsavory and sometimes illegal abuses of farm animals, have been argued to advance broad, undifferentiated interests in protecting private property.[273] There is good reason to suspect, however, that the legislatures in jurisdictions that have adopted such laws are more concerned with protecting the economic interests of large agricultural corporations, which may be the source of significant campaign contributions.[274] Ag-gag laws have reportedly been pushed by industry trade groups as part of a national campaign in response to the bad publicity arising from the undercover investigations of animal rights groups and not out of legitimate privacy concerns.[275]

In the following sections, this Article considers three government interests that are likely to be advanced to support regulating the First Amendment right to video image capture. First, it considers whether the government may impose such regulations to protect tangible interests in private property. Next, it examines the extent to which states might restrict video recording to protect personal privacy interests. Finally, it analyzes whether other distinctive, context-specific interests might sometimes justify a limitation on the right to record.

1. *Tangible Property Interests.* — In certain contexts, the state will be able to assert a compelling interest in protecting tangible property rights. However, it is important to note that the mere assertion of a property interest is not sufficient to overcome a ban on recording, either in public or private. An undifferentiated assertion of private-property protection as a government interest is simply too generalized, just as an assertion that the state enacted this law to "make the state a better place" could not

272. See infra section II.C.1 (discussing when government interest in protecting tangible property interests may be compelling).

273. See, e.g., Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1202 (D. Idaho 2015) (noting Idaho's contention that its ag-gag statute "is intended to protect private property and the privacy of agricultural facility owners").

274. See, e.g., Will Potter, U.S. Congressmen Compare Undercover Investigators to Arsonists and Terrorists, Green Is the New Red (Aug. 28, 2012), http://www.greenisthenewred.com/blog/undercover-investigation-usda-slaughterhouse-terrorism/6296/ [http://perma.cc/D9M3-DCMX] ("[O]ne member of Congress equated the recent investigation of Central Valley Meat Co. in California to arson, and called it 'economic terrorism.'").

275. See Matthew Shea, Note, Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag Laws, 48 Colum. J.L. & Soc. Probs. 337, 349 (2015) (quoting ag-gag bill supporter's claim "it doesn't take much for a producer to be put out of business if they get some very bad publicity about things that have gone on at their farm" (citation omitted) (internal quotation marks omitted)).

suffice as a compelling or significant interest. The very purpose of heightened scrutiny is to require a close judicial examination of the state action and its rationales.[276]

Framed at a greater level of specificity, however, there are a number of tangible property interests that might support state regulation of video recording. First, there could be legitimate concerns about the misappropriation of intellectual property. For example, a government regulation that prohibited taking video recordings of copyrighted performances at a publicly owned theater might be justified on that ground. Similarly, laws that prohibit video recordings used to steal a business's trade secrets would likely be tolerated because there is a state interest in protecting those secrets and promoting innovation as a matter of public policy.[277] Moreover, such a prohibition might survive First Amendment scrutiny whether the recording was made in public or in private. Another legitimate interest might be the imposition of penalties for physical damage to property resulting from a person's video recording. For instance, tort liability for damage to property caused by the use of large video recording equipment would not necessarily be invalid even if the recording met the other requirements of the right to record. Similarly, if an undercover investigator caused personal injury or some other tangible harm to property arising from the act of recording, she could be held criminally or civilly liable. What these interests have in common is that they are identifiable and tangible.

By contrast, in the absence of such tangible harms, the act of recording does not intrinsically cause any legally cognizable harm to property interests. As one federal judge recently concluded:

> Other than physical damage to property, the most likely loss that would flow from a violation of section 18–7042 [Idaho's ag-gag law] would be losses associated with the publication of a video critical of an agricultural facility's practices. In fact, the more successful an activist is in mobilizing public opinion against a facility by publishing a video or story critical of the facility the more the activist will be punished. Moreover, agricultural operations will be able to collect the same damages as in a libel action without satisfying the constitutional defamation standard, which the Supreme Court has expressly prohibited.[278]

The actual physical presence of the person making the recording and the act of recording itself do not typically interfere with a property interest in any meaningful way. It is a concept foreign to law to argue, for

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276. It is not that privacy or private property is not compelling per se, it is that a vague assertion of such rights does not allow a court to assess whether the interest behind the law is truly important. A compelling interest has to be meaningfully concrete and specific.

277. This assumes, of course, that the phrase "trade secrets" is not defined at a level of generality that is too vague and unmoored to constitute a concrete, compelling government interest.

278. *Otter*, 44 F. Supp. 3d at 1024.

example, that one enjoys a property right to be free from the very *presence* of an invited guest who later turns out to be a civil-rights tester or whistleblower.[279] And to the extent that a company suffers a loss of business because of the reputational effects of the exposure of its illegal or otherwise unsavory conduct, that harm is not caused by the person revealing the conduct but by the company's own behavior.[280] This is analogous to the argument that there should be a limited First Amendment right to use investigative lies to access important information:

> Of course, it is true that without publication there would be no reputational harm, but the First Amendment cannot tolerate a limitation on lies simply because they may lead to the publication of information that is otherwise unavailable, at least not when the information is non-intimate, non-defamatory, and of great political importance.[281]

The same could be said about video recording. Though the exhibition of that recording may be a but-for cause of any harm that might befall a company whose abusive practices are exposed, the actual underlying cause of the loss of reputation is the practices that have been exposed. As one commentator has suggested, "One reason *the means by which raw information is obtained* is not the proximate cause of publication damages is because that raw information harms no one."[282]

To state the matter more directly, a bare desire to avoid reputational injury is not a cognizable property interest entitled to be insulated from the limitations on liability imposed by defamation law. If the harm alleged was grounded on damage caused by *false* factual statements, then there is no question that common law defamation torts would be adequate to address their harms, even with the First Amendment limits imposed by the Court on such claims.[283] There is no right to mislead or provide false impressions through video recording. No one could reasonably assert a right to record and cause damage through the presentation of untruthful (or substantially untrue) broadcasts. This consideration may cause courts to look differently at situations in which the video is alleged to be edited or otherwise presented in a way that conveys untruthful in-

279. See, e.g., Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1353 (7th Cir. 1995) ("'Testers' who pose as prospective home buyers in order to gather evidence of housing discrimination are not trespassers . . . .").

280. Chen & Marceau, supra note 17, at 1502–04 (arguing undercover investigations generally do not proximately cause any legally cognizable harm by exposing unsavory acts).

281. Id. at 1502.

282. Nathan Siegel, Publication Damages in Newsgathering Cases, Comm. Law., Summer 2001, at 11, 15 (emphasis added).

283. See, e.g., United States v. Alvarez, 132 S. Ct. 2537, 2553–54 (2012) (Breyer, J., concurring in the judgment) (conceding "many statutes and common-law doctrines make the utterance of certain kinds of false statements unlawful").

formation, as in the recent controversy over the CMP's secret videos of Planned Parenthood officials.[284]

But recent legislative efforts, including ag-gag laws, evince a willingness to punish persons who record for the harm caused by their *truthful* broadcasts.[285] By providing government support through measures that impose criminal or civil penalties on the persons making these recordings, such laws are designed to evade the limitations imposed on liability by the First Amendment defamation cases. Such efforts to circumvent First Amendment doctrine reduce the likelihood that this type of law will survive constitutional scrutiny.

2. *Personal Privacy Interests.* — In addition, an interest closely related to the protection of private property is safeguarding personal privacy.[286] One of the most important debates among contemporary First Amendment theorists involves the tension between speech and privacy, a potential conflict that has not surprisingly emerged in full blossom as new technologies make data collection, transfer, and dissemination (like video recording) easy and inexpensive.[287] As Professor Neil Richards has compellingly argued, these advances create substantial risks for consumers and others who wish to maintain their privacy and autonomy.[288] Thus, an important consideration in assessing the constitutional right to record is the increased privacy concern applicable to private property. A doctrinal frame-

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284. See Editorial, The Campaign of Deception Against Planned Parenthood, N.Y. Times (July 22, 2015), http://www.nytimes.com/2015/07/22/opinion/the-campaign-of-deception-against-planned-parenthood.html (on file with the *Columbia Law Review*) (explaining edited version of Planned Parenthood video conveyed inaccurate information to public regarding legality of organization's acts). Another aspect of accuracy that could be challenged is when the video is recorded at an angle or produced in a way that might affect the objectivity of its depictions. See Frank Barnas & Ted White, Broadcast News Writing, Reporting, and Producing 13 (5th ed. 2010) (discussing how different camera shots may be used in misleading ways).

285. Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1208 (D. Idaho 2015) (striking down "statute [that] . . . punish[es] employees for publishing true and accurate recordings on matters of public concern").

286. The privacy interests of business entities themselves, while recognized, are not nearly of the same order as individual privacy. The Court "has recognized that a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context . . . ." G.M. Leasing Corp. v United States, 429 U.S. 338, 353 (1977) (distinguishing between entity's and individual's sense of privacy).

287. Indeed, in defending an antiwhistleblower statute's constitutionality, a special interest group describes a ban on audiovisual recording in all farming operations as a classic "conflict of rights" and urges that "[t]he rights of privacy and property . . . are not subordinate to the right of free speech." Brief for Idaho Dairymen's Ass'n, Inc. as Amici Curiae in Opposition to Plaintiffs' Motion for Partial Summary Judgment at 2, Animal Legal Def. Fund v. Otter, 44 F. Supp. 3d 1009 (D. Idaho 2014) (No. 1:14-cv-00104-BLW).

288. See Neil M. Richards, Reconciling Data Privacy and the First Amendment, 52 UCLA L. Rev. 1149, 1158 (2005) (discussing such risks as identity theft, stalking, or harassment associated with consumer profiles); see also Neil Richards, Intellectual Privacy: Rethinking Civil Liberties in the Digital Age 153–68 (2015) (promoting ways to protect both personal data and free speech).

work that adequately accounts for the privacy concerns of those who are recorded in a private setting is essential.[289]

But just as with an overly broad articulation of property rights, a generic reference to the importance of personal privacy cannot categorically defeat any First Amendment claim. Privacy, like any other government interest, must be specifically articulated in terms of what particular privacy goals the law or government action will serve.[290] It is not enough to simply assert a broad, undifferentiated privacy claim on all private property. The privacy interests in the open areas of a large, commercial workplace are quite different than the privacy interests in one's bathroom or living room. Thus, while government interests in privacy are different in public than they are in private, defining expectations of privacy in this context purely in terms of whether the recording is in public or private is overly simplistic and analytically incomplete.

On the most basic level, the argument that private recording *always* violates privacy rights rests on the erroneous assumption that the First Amendment right to record on private property would necessarily imply a right of access to private property in order to record. As previously explained, the former does not imply the latter; the right to record should be limited to those who already have lawful access to the place where the recording occurs.[291] One cannot enter someone else's home, even a politician's, just because he thinks the occupants might be talking about something interesting or newsworthy. On the other hand, if a person is invited to a location, as a guest, an employee, or in some other capacity, the privacy interest in keeping secret any nonintimate details revealed to that party is not as substantial. The interest in privacy for things one does not keep private is not very great. If a politician invites a constituent into his office and uses illegal drugs in his presence, for example, that politician can hardly claim a privacy violation if the constituent later writes a journal entry or a newspaper column about the encounter.[292] Similarly, the politician's objection to the disclosure of a self-authenticating, irrefutable recording of the actions would not be sufficient to overcome the constituent's

289. Kreimer, supra note 24, at 386 (citing Daniel J. Solove, The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure, 53 Duke L.J. 967, 983–84 (2003)) (arguing not all forms of speech are valued as highly as privacy when balancing freedom of speech against other interests).

290. See, e.g., ACLU v. Alvarez, 679 F.3d 583, 586–87 (7th Cir. 2012) (finding government failed to adequately articulate privacy concern that would outweigh right to speech in statute banning audiovisual recordings of police officers).

291. See supra section II.A.1.a (noting right to record should not be prohibited when person has right to be in place where recording occurred).

292. When this Article was originally drafted, this hypothetical was made up to illustrate the point. Since then, it has become a reality. Jenny Gross, Lord Sewel Resigns After Drug Claims, Wall St. J. (July 28, 2015, 7:35 AM), http://www.wsj.com/articles/lord-sewel-resigns-after-drug-claims-1438069487 (on file with the *Columbia Law Review*) (describing how senior member of House of Lords resigned after tabloid newspaper published images and video of his cocaine usage).

right to record under the First Amendment. Likewise, the childcare manager who is caught on tape abusing children by a Dateline NBC investigator might regret that she hired or invited an undercover reporter into her workplace, but she did not have a reasonable expectation of privacy in avoiding the observation—she knew that another person witnessed the abuse. Her interest is exclusively in preventing the distribution of the recording, and a law that facilitates such an interest directly suppresses expression regarding a matter of public concern.[293]

Stated differently, short of stealing trade secrets or potentially intimate bodily images or details, the privacy intrusion narrative is oftentimes a canard. The person who is observed (or observed and recorded) is not arguing that the observation itself was improper, for she consented to the observation by a third party. Rather, she is attempting to prevent "evidence of dubious or potentially embarrassing actions" from being conveyed "to a wider audience."[294] If accepted, such a claim would undermine the work of an Upton Sinclair-like journalist who takes notes about his observations at a large commercial operation and later communicates what he observed to the general public and paint him as a violator of personal privacy rather than a muckraking hero. And the more evidence of harmful activity he exposes, the more "wrongful" his conduct. The notion that the First Amendment does not protect the ability of investigative reporters to expose public harms cannot be the rule.

Photographs are said to be worth a thousand words and videos worth millions of online views.[295] The unimpeachable and rapidly transmittable nature of modern video images ought to make recording more, not less, valuable than the hand-scribbled retellings of a firsthand observation.

Of course, there will sometimes be a compelling government interest in regulating recordings by persons who are lawfully present when they make the recording because the recording violates tangible and concrete privacy interests. The hotel housekeeper who in good faith enters a bathroom to clean it and comes upon a guest in a state of undress has surely intruded on protected privacy if she records the scene.[296] Even though she is lawfully present, the state has an interest in protecting the guest's personal privacy. By the same reasoning, laws banning so-called

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293. Kreimer, supra note 24, at 404–05.

294. Id. at 383.

295. Scott MacFarland, If a Picture Is Worth a Thousand Words, What Is a Video Worth?, Huffington Post (Mar. 20, 2014, 12:32 PM), http://www.huffingtonpost.com/scott-macfarland/if-a-picture-video-production_b_4996655.html [http://perma.cc/5L5C-V6KP] (arguing there should be shift in paradigm from "picture is worth a thousand words" to "moving picture is worth a million people").

296. Because this would constitute a nonconsensual recording on private property, the theory of the right to record would impose a public-concern limitation. Thus, in addition to the privacy considerations, the value of the speech here would be extremely low because it does not touch on a matter of public concern. On balance, the harm is great and the value is low, so bans on such recordings would likely be upheld.

"up-skirt" videos or photos,[297] which can many times be taken from a vantage point where the recorder or photographer is lawfully present, surely comport with the First Amendment insofar as the speech has little social value and the harm to privacy is potentially great.[298]

The government will also have a stronger claim to regulating recordings when they take place in a private home, as opposed to a commercial workplace. The Court's admonition in the Fourth Amendment context that all details of the home[299] are intimate and therefore entitled to a reasonable expectation of privacy, while not dispositive with respect to *First Amendment* claims, certainly has a strong bearing on the extent to which someone's asserted right to record on private property can overcome a prohibition on in-home recordings. Perhaps there is always a compelling government interest in protecting the privacies of the home.[300] Indeed, the one rather dated case that seems to stand as an obstacle to recognizing a right to record on private property, the Ninth Circuit's decision in *Dietemann v. Time, Inc.*,[301] is most cogently explained as a case about a video investigation of one's home.[302]

But even on the assumption that the Constitution might afford persons privacy rights against their fellow citizens that are as strong or stronger than the protections for privacy provided against the government—that is, even if the First Amendment rights of private citizens are diluted to the extent required to protect privacy rights from government

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297. See, e.g., 720 Ill. Comp. Stat. Ann. 5/26-4(a-10) (West Supp. 2015) ("It is unlawful for any person to knowingly make a video record or transmit live video of another person under or through the clothing worn by that other person for the purpose of viewing the body of or the undergarments worn by that other person without that person's consent.").

298. Similarly, while this Article does not directly grapple with the issue here, it is conceivable that the First Amendment might not prohibit narrowly tailored laws that limit use of high-level advanced technology to enhance images and video record what would not be observable to the human eye—or perhaps to modestly enhance visual images, such as through binoculars—to protect individual privacy.

299. Kyllo v. United States, 533 U.S. 27, 38 (2001); see also id. at 37 ("In the home . . . *all* details are intimate details . . . ."); id. at 40 ("[T]he Fourth Amendment draws 'a firm line at the entrance to the house.'" (quoting Payton v. New York, 445 U.S. 573, 590 (1980))).

300. Of course, for persons who gain access to another's home through deception, the courts seem resigned to saying, for Fourth Amendment purposes, that is no reasonable expectation of privacy in the details of the home that are revealed through the otherwise lawful (if deceptive) entry. See, e.g., United States v. Wahchumwah, 710 F.3d 862, 868 (9th Cir. 2013) (holding law enforcement may enter one's home through deceptive means and secretly video record what they observe in house).

301. 449 F.2d 245, 247–50 (9th Cir. 1971) (explaining First Amendment is "not a license to trespass, to steal, or to intrude by electronic means").

302. This Article contends that *Dietemann* is wrongly decided, supra notes 206–213 and accompanying text. Even though the video in that case was taken without consent within the home of another, the homeowner, Dietemann, had actually converted his home to an office where he would see patients, thus substantially reducing any reasonable expectation of privacy.

intrusion under the Fourth Amendment[303]—when the recording at issue occurs outside the home, and particularly when it occurs in a regulated business or industry, the privacy concerns implicated by a video exposé are minimal. The Court has been steadfast in recognizing that persons at their workplace enjoy greatly reduced expectations of privacy.[304] Other courts are in accord. In *Medical Laboratory Management Consultants v. American Broadcasting Cos.*, a federal court examined a privacy tort claim against a television news program that sent undercover reporters to a medical testing company, ostensibly to seek advice about opening a similar business.[305] Meanwhile, the news program had sent pap smear slides for testing at the plaintiff's lab, which failed to detect several cases of cervical cancer that were included among the samples.[306] After the program with the secretly recorded video footage was aired, the plaintiffs sued for invasion of privacy, fraud, and other common law claims.[307] In rejecting the plaintiffs' intrusion-upon-seclusion claim and distinguishing the *Dietemann* case, the court emphasized the following crucial distinction:

> When an intrusion occurs in a home or other personal sphere, the plaintiff's expectation of privacy has, in most instances, been deemed to be objectively reasonable. However, courts have recognized that there is a diminished expectation of privacy in the workplace. When courts have considered claims in the workplace, they have generally found for the plaintiffs only if the challenged intrusions involved information or activities of a highly intimate nature. Where the intrusions have merely involved unwanted access to data or activities related to the workplace, however, claims of intrusion have failed.[308]

As the Supreme Court explained in the context of addressing an unexpected, warrantless intrusion into a junkyard, "in light of the regulatory framework governing his business and the history of regulation of related industries, an operator of a junkyard engaging in vehicle disman-

303. Such an assumption would be strange. It almost goes without saying that "[t]he Fourth Amendment is the chief source of privacy protection" in this country, Matthew R. Koerner, Note, Drones and the Fourth Amendment: Redefining Expectations of Privacy, 64 Duke L.J. 1129, 1136 (2015) (internal quotation marks omitted) (quoting Ronald Jay Allen et al., Criminal Procedure: Investigation and Right to Counsel 337 (2011)), and where it does not provide protection against the government—the very prying eyes the Constitution is designed to protect us against—it would be strange to insist that there is a higher-order common law or constitutional right to privacy against private parties.

304. See O'Connor v. Ortega, 480 U.S. 709, 715–18 (1987) (plurality opinion) (discussing limits of reasonable expectation of privacy in various work contexts).

305. 30 F. Supp. 2d 1182, 1185–86 (D. Ariz. 1998), aff'd, 306 F.3d 806 (9th Cir. 2002) (detailing factual background leading to, inter alia, intrusion claim after reporter from *Prime Time Live* arranged visit to lab because she was "interested in starting a pap smear laboratory").

306. Id. at 1186.

307. Id.

308. Id. at 1188 (citations omitted).

tling has a reduced expectation of privacy."[309] Similarly, the National Labor Relations Board recently ruled that Whole Foods's rules categorically prohibiting employees from engaging in nonconsensual video recording in the workplace violated federal labor law because it tended to chill employees' exercise of their labor rights.[310] To the extent that law enforcement agents or informants remain free to infiltrate and make recordings of truly private information in the commercial context, they would be perverse to recognize an untethered common law privacy right that broadly trumps the First Amendment interests of private parties interested in engaging in audiovisual recording when they are lawfully present.

This does not mean that all workplace recordings are without privacy protections. Even beyond intellectual property or trade secrets, when employees enter workplace restrooms or changing rooms, they manifest an intent to close themselves off from observation or intrusion in a manner that does not necessarily apply when they are standing on the assembly line or sitting in their cubicle.[311]

Thus far, this section has discussed privacy interests in the manner in which they are typically recognized under existing legal doctrine. In her recent work, Professor Margot Kaminski has argued that privacy must be understood not only in spatial terms, such as the privacy of one's home or bedroom, but also in terms of the ability to engage in "temporal" and "social" boundary management.[312] She argues that in addition to the physical intrusions that are commonly used to describe privacy interests, individuals have a strong interest in protecting their privacy through control over social relationships and the use of private information over time.[313] Thus, people may use social cues and behavior to protect privacy in ways that are not linked to physical space.[314] Similarly, an individual may want to control the length of time in which private information is accessible to circumscribe the impact on his privacy.[315] This more expansive understanding of privacy could have important implications for the scope of the right to record. For instance, even in a physical space such as the workplace, where one enjoys less privacy than in the home, one's

309. New York v. Burger, 482 U.S. 691, 707 (1987); see also Minnesota v. Carter, 525 U.S. 83, 91 (1998) (recognizing private home used occasionally for business purposes may have reduced expectations of privacy that extend to commercial properties).

310. Whole Foods Market, Inc., 205 L.R.R.M. (BNA) 1153 (Dec. 24, 2015). Although the employer argued that the purpose of its rule was to promote open communication in the workplace, the NLRB found that it was overly broad. Id. Moreover, the Board did not even discuss any countervailing employer privacy concerns.

311. But see O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (plurality opinion) (holding intrusion on employee's privacy interests is to be judged only by standard of reasonableness).

312. Kaminski, Regulating Real-World Surveillance, supra note 5, at 1116, 1131–35.

313. Id. at 1132–33.

314. Id. at 1133.

315. Id.

social privacy expectations may be that they are not being surreptitiously recorded. If a person knows she is subject to such recording, she might substantially alter her behavior and social relationships in a manner that is socially undesirable.[316] In the same way, one might behave differently if he knows that he has subjected himself only to an ephemeral privacy intrusion, such as engaging in "streaking," than if he understood that this exposure might be permanently documented and disseminated universally, rather than only to random passersby.[317]

Professor Kaminski's important and nuanced understanding of the boundaries of privacy might complicate the calculus of when privacy interests outweigh the expressive value of the right to record, but it does not fundamentally alter our basic premise. Her arguments would most likely be more powerful in the very context in which the right to record might legitimately be circumscribed. For instance, the temporal-boundary-management interest suggests a strong case for permitting the state regulation of video voyeurism, but it is substantially less powerful when it comes to recordings in the workplace or at a public protest. In terms of social-boundary management, it is certainly possible that one might change her social behavior if she were aware that she was being recorded, but this has limited implications in the contexts where the right to record should be most strongly protected—recordings in public, recordings in private with consent, and nonconsensual recordings in private about matters of public concern. The greater the extent to which the recording relates to a matter of public concern and therefore contributes to speech and discourse, the less of a concern there ought to be about individuals altering the manner in which they manage their social boundaries. Indeed, at least in areas where the recording will relate to matters of public concern—such as police arrests or undercover investigations of a child-care or food production facility—any altering of the behavior should be viewed as a net social gain, not a cost.

3. *Other Possible Governmental Interests.* — This Article does not exhaustively catalog the types of governmental interests that will come up in litigation over a right to record, particularly in private. The right to record is context-specific. In most situations, the most likely government interests are concerns about privacy and property rights. But in certain circumstances other context-specific interests will have to be weighed. For example, courtroom-recording bans raise the specter of a government interest that might be important enough to overcome the right to record. Bans on recording courtroom proceedings, while gradually disap-

316. For instance, Professor Kaminski argues that one of the government interests in enacting laws banning "up-skirt" photos is to prevent undesirable shifts in private-boundary management. In the absence of such regulation, it is possible that "more women will stop wearing skirts and wear more conservative coverings instead." Id. at 1137.

317. Cf. id. at 1151–53 (observing laws restricting eavesdropping protect government interests by limiting intrusions on privacy that would otherwise be ephemeral).

pearing, are still commonplace in many jurisdictions.[318] Many factors associated with the right to record would suggest that there should be a right to record all such proceedings. Transparency in the judicial system is important, so virtually every judicial proceeding relates to a matter of public concern.[319] Assuming the courtroom is otherwise open to the public and that the person asserting the right to record is not also audibly speaking, the preconditions to the right to record have been met. While there may be limited circumstances in which the proceedings are sealed to protect interests in trade secrets or personal privacy, in the vast majority of courtroom proceedings there is no individual expectation of privacy.[320] Nonetheless, constitutional challenges to recording bans in courtrooms have typically been unsuccessful.[321] The rationale offered by most courts is that recording may alter the behavior of the proceeding's participants.[322] Lawyers, judges, and witnesses may conduct themselves in a manner that might ultimately alter the environment significantly enough that it could infringe upon due process rights of the parties, especially in the context of criminal defendants.[323] To the extent that permitting video recording of the proceedings might compromise a real and cognizable constitutional right of the parties, this might be sufficient to overcome the right to record in courtrooms. However, courtroom-recording bans tend to be categorical, and such interests will not be present in every circumstance.[324] To the extent that such interests are recognized, individual

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318. Melissa A. Corbett, Lights, Camera, Trial: Pursuit of Justice or the Emmy?, 27 Seton Hall L. Rev. 1542, 1547–50 (1997) (discussing O.J. Simpson trial's effect on states' treatment of cameras in courtroom and federal courts' contention there is no right to broadcast from courtroom).

319. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 568–73 (1980) (discussing historical background of open access to courts).

320. Aldrich v. Ruano, 952 F. Supp. 2d 295, 303–04 (D. Mass. 2013) (finding defendant did not have reasonable expectation of privacy in statements he made in courtroom open to public).

321. See, e.g., United States v. Hastings, 695 F.2d 1278, 1283 (11th Cir. 1983) (finding institutional concerns outweighed minimal First Amendment concerns).

322. See, e.g., Estes v. Texas, 381 U.S. 532, 591 (1965) (Harlan, J., concurring) ("There is certainly a strong possibility that the 'cocky' witness having a thirst for the limelight will become more 'cocky' under the influence of television."). If the recording is covert, one would not expect the behavior of the trial participants to change. Thus, this rationale would justify banning open, but not secret, video recordings of courtroom proceedings. On the other hand, perhaps the mere possibility that one is secretly recording events will alter behavior. See supra note 184 (discussing Heisenberg Principle analogy). However, if the prospect of secret recording alters a persons' behavior, unlike in courtrooms where everything is already transcribed and carefully monitored, one would expect that the behavior would be altered for the better—that is, away from criminal or antisocial conduct.

323. Corbett, supra note 318, at 1557–72.

324. To be sure, there are features of courtroom recording that make bans on such recording unique and perhaps less problematic under the First Amendment. First, the restriction on recording in courtrooms is much less of an impediment on public debate than many other content-based recording bans. Courtrooms are generally open to the public,

claims of a right to record a particular proceeding must be answered with a direct assertion of how the recording would impair the parties' rights.

CONCLUSION

American democracy has a history of being informed by rebellious and often unpopular investigations. Our laws and mores are often reflected in concrete reactions to clandestine discoveries. But even up through the midtwentieth century, documenting a disconcerting or disquieting practice required a pen and paper. Upton Sinclair documented food safety and labor concerns by watching, remembering, and then writing up his notes in his room at the end of each day of investigation. Today, the ubiquity and relatively inexpensive nature of recording devices has resulted in a fundamental shift in our ability to authenticate and document the wrongdoing observed by an individual reporter, investigator, or activist. Just as disruptive innovation[325] can cause revolutionary transformation of economic markets, these technological advances have the capacity to completely change the nature of whistleblowing and free speech. But because First Amendment doctrine has not yet caught up, the modern-day Upton Sinclair is at risk.

By examining the history and purpose of free speech, this Article developed the claim that there is a right to record and that it extends to some recordings on private property. More specifically, there is a right to record even on private property without consent if the recording relates to a matter of public concern and if the person making the recording is otherwise lawfully present at the location the recording is made. Finally, even when each of these threshold conditions is satisfied, this Article examined competing governmental interests that, at least in some in-

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and the proceedings are fully transcribed and available; thus the impingement on public debate is certainly reduced. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) ("[T]he right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole."). Second, in the case of courtroom bans, there is an actual conflict of constitutional rights—the speech rights of those who want to record and the due process rights of the parties. Courts have accepted that the risks of perjury, grandstanding, and interruption in a courtroom are serious and that they are more likely when recording is known to be taking place. Stated differently, recording in a courtroom is said to harmfully disrupt the day-to-day operation of the judiciary. See, e.g., Press-Enter. Co. v. Superior Court, 478 U.S. 1, 9 (1986) ("[T]here are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity."); Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1070 (3d Cir. 1984) ("Although the right of access to civil trials is not absolute . . . it is to be accorded the due process protection that other fundamental rights enjoy."). Finally, at least in some courtrooms, perhaps those where family law or sexual assault cases are heard, there may be discussion of intimate details and personal matters the recording of which is more of a privacy and dignitary harm than, say, the recording of an abusive childcare facility worker.

325. See Joseph L. Bower & Clayton M. Christensen, Disruptive Technologies: Catching the Wave, 73 Harv. Bus. Rev. 43, 43–44 (1995) (analyzing effect of disruptive innovation in technology industry).

stances, must be recognized as sufficiently weighty to overcome a presumption of protection for the act of recording in question.

Video recordings are uniquely able to shape public debate; they are self-authenticating, easily disseminated to a wide audience, and frequently more powerful than words alone. When addressing state regulation of these recordings, courts ought to explicitly recognize that recording is a form of speech and grapple with the harder questions of how to apply the relevant constitutional scrutiny to the particular context in question. Without a coherent First Amendment doctrine for addressing the status of recording, the government puts at risk the modern-day muckrakers who have the greatest potential to shape political debate on issues of grave public concern.