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## ARTICLE

### PERVASIVE IMAGE CAPTURE AND THE FIRST AMENDMENT: MEMORY, DISCOURSE, AND THE RIGHT TO RECORD

SETH F. KREIMER<sup>†</sup>

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<sup>†</sup> Kenneth W. Gemmill Professor of Law, University of Pennsylvania Law School. This Article had roots in conversations with my late colleague Ed Baker. The memory of his insight and passion provides continued inspiration. This work has also benefited from the comments of Regina Austin, Stephanos Bibas, and John Humbach, and the excellent research assistance of Christy Slavik. Each is entitled to my deep thanks, but none bears responsibility for remaining errors or misunderstandings.

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## INTRODUCTION

Scholars have recently begun to contemplate the prospect of “pervasive computing,” with data-processing capacity and cues to digital data ubiquitously embedded in devices distributed throughout the human environment.<sup>1</sup> Pervasive computing still lies in the future, but in the last half-decade we have begun to experience the reality of pervasive image capture.<sup>2</sup>

As digital technology proliferates in camera phones, iPhones, and PDAs, almost any image we observe can be costlessly recorded, freely reproduced, and instantly transmitted worldwide. We live, relate, work, and decide in a world where image capture from life is routine, and captured images are part of ongoing discourse, both public and private. Capture of images has become an adjunct to memory and an accepted medium of connection and correspondence. Digitally captured memories, in turn, precipitate conflicts between governmental authority and free expression.

In the aftermath of the Iranian election during the summer of 2009, authorities sought to impede reporting on efforts to suppress opposition demonstrators. Yet cell phone videos disseminated over social-networking sites illuminated both official abuse and the scope of civil resistance. The most striking images, depicting the shooting death of Neda Agha-Soltan, were captured by nearby owners of cell phone cameras, e-mailed to a series of correspondents outside the country, posted on Facebook and YouTube, and then broadcast by conventional media the same day.<sup>3</sup> In the United States, amid arrests of inconvenient photographers at the 2009 G-20 Summit in Pittsburgh, images of efforts to suppress demonstrations documented on amateur digital video followed a similar route to public cognizance.<sup>4</sup>

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<sup>1</sup> E.g., Jerry Kang & Dana Cuff, *Pervasive Computing: Embedding the Public Sphere*, 62 WASH. & LEE L. REV. 93 (2005).

<sup>2</sup> I borrow the felicitous phrase “pervasive image capture” from a proposal written for the PICS workshop at UbiComp 2005, the Seventh International Conference on Ubiquitous Computing. Mirjana Spasojevic et al., *Pervasive Image Capture and Sharing: New Social Practices and Implications for Technology* (2005) (unpublished manuscript), available at <http://www.spasojevic.org/pics/PICS/UbicompCamphoneFinal.pdf>. For the purposes of this Article, captured “images” can be either visual or aural: the analysis applies to recordings in digital media of humanly perceivable sensory inputs.

<sup>3</sup> See Brian Stelter & Brad Stone, *In a Death Seen Around the World, a Symbol of Iranian Protests: Web Pries Lid of Censorship a Bit*, N.Y. TIMES, June 23, 2009, at A1.

<sup>4</sup> See, e.g., Don Babwin, *Chicago Police Probed for Posing with Suspect*, SOUTHTOWN STAR (Chicago), Oct. 17, 2009, at A28, available at 2009 WLNR 21936697 (“The Chicago Police Department . . . began investigating the Pittsburgh claims [of police misconduct] after video of the alleged incident was posted on YouTube.”); Marty Levine, *Image Prob-*

At the boundary between public and private, conservative activists Hannah Giles and James O'Keefe impersonated a prostitute and a procurer seeking aid from local offices of the Association of Community Organization for Reform Now (ACORN) and surreptitiously captured images of the resulting interactions. The videos, initially posted on YouTube and a conservative website, rapidly spread to generate mainstream political controversy.<sup>5</sup> ACORN brought suit claiming that the image capture constituted an invasion of privacy and a violation of state wiretapping statutes.<sup>6</sup>

A similar dynamic unfolds in more personal contexts. The phenomenon of "sexting," in which owners of digital cameras capture their own nude or revealing images and convey them by text message or e-mail—with the accompanying danger of retransmission—has become increasingly prevalent with ubiquitous ownership of cell phone cameras.<sup>7</sup> Law enforcement authorities have taken alarm, and they

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*lem: Did Cops Target Cameras During G20?*, PITTSBURGH CITY PAPER, Oct. 14–21, 2009, at 6 (describing arrests of photographers and independent media activists during G-20 demonstrations); Kurt Nimmo, *Video from G20 the Corporate Media Will Never Show You*, INFOWARS (Sept. 25, 2009), <http://www.infowars.com/video-from-g20-the-corporate-media-will-never-show-you> (linking to YouTube videos showing the police advancing on students in Pittsburgh).

<sup>5</sup> See, e.g., Darryl Fears & Carol D. Leonnig, *The \$1,300 Mission to Fell ACORN: Duo in Sting Video Say Their Effort Was Independent*, WASH. POST, Sept. 18, 2009, at A1; Scott Shane, *A Political Gadfly Lampoons the Left via YouTube*, N.Y. TIMES, Sept. 19, 2009, at A9; Howard Kurtz, *Guerrilla Journalism*, WASH. POST, Sept. 25, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/09/25/AR2009092501130.html>.

<sup>6</sup> Complaint, *ACORN v. O'Keefe*, No. 90-6238 (Cir. Ct. Balt. City Sept. 23, 2009); see also Carol D. Leonnig, *ACORN Sues over Damaging Video*, WASH. POST, Sept. 24, 2009, at A4.

<sup>7</sup> See KNOWLEDGE NETWORKS, THE MTV-ASSOCIATED PRESS POLL: DIGITAL ABUSE SURVEY (2009), [http://www.athinline.org/MTV-AP\\_Digital\\_Abuse\\_Study\\_Full.pdf](http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Full.pdf); MTV & THE ASSOCIATED PRESS, A THIN LINE: 2009 AP-MTV DIGITAL ABUSE STUDY (2009), [http://www.athinline.org/MTV-AP\\_Digital\\_Abuse\\_Study\\_Executive\\_Summary.pdf](http://www.athinline.org/MTV-AP_Digital_Abuse_Study_Executive_Summary.pdf). Together, these reports indicate that of the 1247 respondents aged 14 to 24, 81% owned cell phones with cameras. Additionally, 33% of respondents aged 18 to 24 and 24% of the respondents aged 14 to 17 had sent or received a naked image by text message or e-mail. Finally, 10% of the respondents had sent a naked image of themselves, and the majority of the images were transmitted to actual or potential romantic partners. See also COX COMMUNICATIONS, TEEN ONLINE & WIRELESS SAFETY SURVEY: CYBERBULLYING, SEXTING, AND PARENTAL CONTROLS 36, 41 (2009), [http://www.cox.com/takecharge/safe\\_teens\\_2009/media/2009\\_teen\\_survey\\_internet\\_and\\_wireless\\_safety.pdf](http://www.cox.com/takecharge/safe_teens_2009/media/2009_teen_survey_internet_and_wireless_safety.pdf) (reporting that 9% of thirteen-year-olds surveyed either sent or received sexually suggestive nude or nearly nude digital images by text message or e-mail; that this figure rose to 24% of seventeen-year-olds; and that the vast majority of recipients were actual or potential romantic partners); THE NATIONAL CAMPAIGN TO PREVENT TEEN AND UNPLANNED PREGNANCY & COSMOGIRL.COM, SEX AND TECH: RESULTS FROM A SURVEY OF TEENS AND YOUNG ADULTS 1, 11-12 (2008), [http://www.thenationalcampaign.org/sextech/PDF/SexTech\\_](http://www.thenationalcampaign.org/sextech/PDF/SexTech_)

have responded by invoking child pornography and obscenity statutes to threaten prosecution of underage sexters.<sup>8</sup>

These clashes between image capture and attempted suppression are typical, but hardly exhaustive. In the next decade, the proliferation of digital visual capacity will regularly require legal decision-makers to come to grips with the status of pervasive image capture under the First Amendment. This Article commences the task.

I begin by parsing the technological trends that have set the stage for pervasive image capture as a social practice and proceed to sketch the emerging ecology of visual memory and discourse. I then canvass legal developments that threaten to shadow the promise of the new medium and discuss their proper analysis under the First Amendment. I argue against claims of earlier analysts that the process of recording images constitutes unprotected action. In today's world, personal image capture is part of a medium of expression entitled to First Amendment cognizance. I close with an initial account of the First Amendment protections of pervasive image capture.

## I. THE EMERGING TECHNOLOGY OF PERVASIVE IMAGE CAPTURE

Three developments converge to form the new reality of pervasive image capture: digital photographic capability merges synergistically with the ubiquity of the cell phone camera and the growth of online venues for image sharing.

Digital cameras, introduced to the public in 1997,<sup>9</sup> have driven the marginal monetary cost of recording and saving images toward zero.

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Summary.pdf (reporting that 20% of respondents aged 13 to 19 had sent or posted "a nude or semi-nude picture[] or video" of themselves; that 31% had received such an image; and that the vast majority of these images were sent to romantic partners).

<sup>8</sup> See, e.g., *State v. Canal*, 773 N.W. 2d 528, 529 (Iowa 2009) (affirming obscenity conviction for sexting); Nancy Rommelmann, *Anatomy of a Child Pornographer*, REASON, July 2009, at 30-37 (discussing the growing trend of sexting prosecutions); *Sexting in the News*, PC'S N DREAMS, <http://www.pcsndreams.com/Pages/News.htm#Sexting> (last visited Oct. 15, 2010) (providing a news feed of sexting investigations and prosecutions). For a discussion of legislative and judicial action related to sexting, see also *infra* notes 70-71.

Readers should be aware that I served on the counsel team representing teenage girls along with their parents in a case in which the girls were threatened with child pornography prosecution for appearing in digital photographs from the waist up clad in white opaque brassieres. The prosecution was preliminarily enjoined in *Miller v. Skumanick*, 605 F. Supp. 2d 634, 647 (M.D. Pa. 2009); the injunction was affirmed in *Miller v. Mitchell*, 598 F.3d 139, 143 (3d Cir. 2010); a final injunction was entered by consent in *Miller v. Mitchell*, 2010 U.S. Dist. LEXIS 42512, at \*5 (M.D. Pa. Apr. 30, 2010).

<sup>9</sup> See Mark Halper, *The Digital Camera Fights for Survival*, TIME, Aug. 13, 2006,

Freed of the expense of film, developing, and printing, a digital camera owner can capture almost any number of images without effective monetary constraint. Once captured, digital images can be reproduced and disseminated like any other data; digital images flow frictionlessly from cables to flash drives, to e-mail and web pages.<sup>10</sup> Digital cameras began to outnumber film cameras in the United States in 2003, and today more than two-thirds of Americans own digital cameras.<sup>11</sup> Similarly, video cameras, priced at \$1500 in 1992, are available in digital versions today for less than a tenth of that cost, and digital image capture technology is increasingly available in a variety of inexpensive and ubiquitous personal digital devices.<sup>12</sup>

Cell phone cameras, introduced in the United States in 2002,<sup>13</sup> have radically reduced the nonmonetary cost of image capture. In modern life, cell phones constantly accompany their users. They combine effortless and immediately accessible digital photographic capability with the capacity to transmit captured images instantaneously.<sup>14</sup>

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<http://www.time.com/time/magazine/article/0,9171,1226058,00.html> (“[D]igital cameras hit the mass market in 1997 . . .”).

<sup>10</sup> See PRINCETON SURVEY RESEARCH ASSOCS. INT’L FOR THE PEW INTERNET & AM. LIFE PROJECT, ANNUAL GADGETS SURVEY 2007, at 21 (2007), [http://www.pewinternet.org/~media/Files/Questionnaire/2009/PIAL%20Gadgets07%20FINAL%20Topline\\_1213.pdf](http://www.pewinternet.org/~media/Files/Questionnaire/2009/PIAL%20Gadgets07%20FINAL%20Topline_1213.pdf) [hereinafter ANNUAL GADGETS SURVEY 2007] (reporting that 70% of respondents shared photos through e-mail and that 34% posted photos on the Internet).

<sup>11</sup> See *id.* at 15 (reporting that 62% of respondents owned digital cameras); Halper, *supra* note 9 (reporting that digital cameras were adopted so universally that the market may have reached saturation); *Digital Cameras—Whereto?*, SOFTPEDIA (Mar. 21, 2005, 7:45 GMT), <http://news.softpedia.com/news/Digital-cameras-whereto-709.shtml> (noting that, in 2003, digital camera sales outnumbered those of classical cameras for the first time and that digital camera sales have been increasing since).

<sup>12</sup> See, e.g., Peter Gabriel et al., *Moving Images: Witness and Human Rights Advocacy*, INNOVATIONS: TECHNOLOGY, GOVERNANCE, GLOBALIZATION, Spring 2008, at 35, 50 (explaining how Witness, a human rights organization, is transforming because of the availability and widespread adoption of recording tools and noting the drop in the pricing of such technology); ANNUAL GADGETS SURVEY 2007, *supra* note 10, at 15 (reporting that 41% of respondents owned video cameras).

<sup>13</sup> *A Camera in Every Cellphone*, AMERICANHERITAGE.COM, [http://www.americanheritage.com/articles/magazine/it/2010/4/2010\\_4\\_18.shtml](http://www.americanheritage.com/articles/magazine/it/2010/4/2010_4_18.shtml) (last visited Oct. 15, 2010) (“Sprint introduced the Sanyo SCP-5300, the first cellcam available to American consumers, in December 2002.”).

<sup>14</sup> See, e.g., AMANDA LENHART, PEW INTERNET & AM. LIFE PROJECT, TEENS AND MOBILE PHONES OVER THE PAST FIVE YEARS: PEW INTERNET LOOKS BACK 4 (2009), <http://www.pewinternet.org/~media/Files/Reports/2009/PIP%20Teens%20and%20Mobile%20Phones%20Data%20Memo.pdf> (reporting that 77% of American adults, and 71% of teenagers owned cell phones in 2008); ANNUAL GADGETS SURVEY 2007, *supra* note 10, at 16 (reporting that 58% of American cell phone owners use their phones to take pictures).

In modern America, cell phone ownership is on its way to becoming universal, and virtually every cell phone has digital image capacity.<sup>15</sup>

Finally, during the last five years, distribution channels for digital images have expanded exponentially. Social networking sites like Facebook, along with sites like Flickr, YouTube, and TwitPic, have combined with increasingly usable blogging technology to enable any holder of an image to make it instantly available to the world at large.<sup>16</sup>

## II. THE OPPORTUNITIES OF IMAGE CAPTURE: THE DISCURSIVE ECOLOGY OF DIGITAL IMAGES

Pervasive image capture opens both personal and political opportunities; the capture of digital images is a part of an emerging ecology of memory and discourse linking holders of cell phones, iPhones, PDAs, and computers. At the personal level, the diffusion of image-capture technologies provides channels to create life records, to connect with others, and to exercise creative capacities. In public discourse, pervasive image capture allows its users to hold public actors accountable and to participate effectively in public dialogue.

### A. *Enrichment of Private Lives*

Users of camera phones typically deploy the devices to enrich their private lives. They augment their memories with captured im-

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<sup>15</sup> See, e.g., *For Everyday Photography, Cell Phones Are Growing as Camera of Choice*, BUSINESS WIRE, July 8, 2008 [hereinafter *For Everyday Photography*], available at Westlaw, 7/8/08 Bus. Wire 13:34:00 (“A whopping 96.3% of adult cell phone owners report that they have a cell phone with a camera.”); Kristy Clairmont, *PMA Data Watch: Camera Phone Penetration Continues to Rise*, PMA FORESIGHT (Mar. 15, 2010), <http://pmaforesight.com/?p=402> [hereinafter *PMA Data Watch*] (reporting that, in 2009, more than 60% of households owned camera phones); AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, SOCIAL MEDIA & MOBILE INTERNET USE AMONG TEENS AND YOUNG ADULTS 4 (2010), [http://pewinternet.org/~media/Files/Reports/2010/PIP\\_Social\\_Media\\_and\\_Young\\_Adults\\_Report\\_final\\_with\\_toplines.pdf](http://pewinternet.org/~media/Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_final_with_toplines.pdf) (“Three quarters (75%) of teens and 93% of adults aged 18-29 now have a cell phone.”).

<sup>16</sup> See FACEBOOK, <http://www.facebook.com/facebook?v=info&ref=pf> (last visited Oct. 15, 2010) (listing the founding date of Facebook as February 4, 2004); FLICKR, <http://blog.flickr.net/en/2004/02/> (last visited Oct. 15, 2010) (discussing the February 2004 launch of Flickr); TwitPic, *TwitPic Company Profile*, LINKEDIN, <http://linkedin.com/companies/twitpic> (last visited Oct. 15, 2010) (providing TwitPic founding date of 2008); YOUTUBE, <http://www.youtube.com/t/about> (last visited Oct. 15, 2010) (stating that YouTube was founded in February 2005); see also Kristen Nicole, *Twit Pic. It's for Twitter Pictures, Of Course*, MASHABLE, (Feb. 5, 2008), <http://mashable.com/2008/02/05/twit-pic> (explaining that TwitPic allows users to add images to their Twitter streams).



ages. They strengthen personal bonds by sharing images with others. They create works of visual authorship.

Visual memory is notoriously thin and unreliable.<sup>17</sup> In response, camera-phone users ubiquitously capture and archive images to record their experiences for future reference.<sup>18</sup> Regular and costless image capture reinforces a sense that quotidian images are worthy of retention and potential recall.<sup>19</sup> And, in turn, the perceived worth of the images encourages their further capture.

Modern life is increasingly atomized and centrifugal; pervasive image capture allows users to build and nurture interpersonal connections. Camera-phone users capture images to share their lives with

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<sup>17</sup> Cf. *Guys and Dolls*, WIKIQUOTE, [http://en.wikiquote.org/wiki/Guys\\_and\\_Dolls](http://en.wikiquote.org/wiki/Guys_and_Dolls) (last visited Oct. 15, 2010) (“SKY MASTERSON: However, if you are really looking for some action, I will bet you the same thousand that you do not know the color of necktie you are currently wearing. (*puts hand on top of Nathan’s tie*) Well? NATHAN DETROIT: . . . No bet. (*Sky removes his hand*) Polka Dots! Only Nathan Detroit could blow a bet on polka dots!”).

<sup>18</sup> See Tim Kindberg et al., *The Ubiquitous Camera: An In-Depth Study of Camera Phone Use*, IEEE PERSVASIVE COMPUTING, Apr.-June 2005, at 42, 45 (reporting that 41% of images were captured for the purpose of “personal reflection or reminiscing”); Nancy A. Van House & Marc Davis, *The Social Life of Cameraphone Images 2* (2005) (unpublished manuscript prepared for the PICS workshop, UbiComp 2005), available at [http://www.spasojevic.org/pics/PICS/van\\_house\\_and\\_davis.pdf](http://www.spasojevic.org/pics/PICS/van_house_and_davis.pdf) (“Images are used, to preserve memories, but also to construct individual [sic] and group narratives of oneself and one’s life.”); *For Everyday Photography*, *supra* note 15, at 2 (“46.4% of all adults and 2/3 of adults age 18-30 say that they use their cell phone to snap self-portraits. . . . ‘Fifty-eight percent of adults age 18-30 tell us they use their camera phones to document nightlife.” (quoting Scott Abelman, Senior Vice President of Marketing at Wirefly.com)); *PMA Data Watch*, *supra* note 15 (“Forty-three percent of camera phone owners take pictures with the camera phone so they can have the picture with them at all times.”); see also Anna Reading, *Memobilia: The Mobile Phone and the Emergence of Wearable Memories* (arguing that mobile phones contribute significantly to digital memory), in *SAVE AS . . . DIGITAL MEMORIES* 81, 81-92 (Joanne Garde-Hansen et al. eds., 2009).

<sup>19</sup> See, e.g., Okabe Daisuke & Mizuko Ito, *Camera Phones Changing the Definition of Picture-worthy*, JAPAN MEDIA REV., Aug. 29, 2003, <http://www.ojr.org/japan/wireless/1062208524.php> (describing the camera phone as an “intimate and ubiquitous presence that invites a new kind of personal awareness, a persistent alertness to the visually newsworthy,” and noting that camera-phone users reported that they took photos mostly of “things that they happened upon that were interesting,” as well as, in decreasing amounts, family members, friends, themselves, pets, and travel (quoting a survey by IPSE Marketing)); see also GERARD GOGGIN, *CELL PHONE CULTURE* 145-47 (2006) (explaining that studies on the use of camera-phones share “a strong emphasis on the embeddedness in an orientation of the camera phone towards a technology of everyday life”); JOSÉ VAN DIJCK, *MEDIATED MEMORIES IN THE DIGITAL AGE* 113 (2007) (“Since the 1990s . . . cameras increasingly serve as tools for mediating quotidian experiences other than rituals or ceremonial moments.”).

friends and family.<sup>20</sup> Particular shared images convey information, perceptions, stories, or emotions; the stream of shared images establishes a sense of “co-presence” in correspondents’ lives.<sup>21</sup>

Pervasive image capture provides the raw material of visual aesthetic works.<sup>22</sup> The increasingly broad availability of costless image capture and storage enables every owner of a cell phone or PDA to practice the craft of the photographer or the filmmaker. With the emergence of Photoshop and its relatives, art previously confined to the darkroom and the studio is open to all members of the digerati; anyone with an iPhone can achieve visual expression that a decade ago was confined to cinematographers.<sup>23</sup> This efflorescence of photographic and videographic expression enriches the lives of practitioners at least as much as it enlivens those of viewers.

<sup>20</sup> See, e.g., Kindberg et al., *supra* note 18, at 45 (reporting that 35% of images are “intended to enrich a shared experience,” and 21% are intended for communication to absent family and friends); *For Everyday Photography*, *supra* note 15 (stating that 38.6% of camera-phone photos are sent to friends and adding that 13.9% of adults and 28.1% of respondents aged 18 to 30 report having sent a “flirtatious, suggestive, or nude photo”).

<sup>21</sup> See, e.g., Tim Kindberg et al., *I Saw This and Thought of You: Some Social Uses of Camera Phones*, in CHI '05 EXTENDED ABSTRACTS ON HUMAN FACTORS IN COMPUTING SYSTEMS 1545, 1546 (2005), available at [http://portal.acm.org/ft\\_gateway.cfm?id=1056962&type=pdf&CFID=116614411&CFTOKEN=54905948](http://portal.acm.org/ft_gateway.cfm?id=1056962&type=pdf&CFID=116614411&CFTOKEN=54905948); Kindberg et al., *supra* note 18, at 46; Nancy A. Van House, *Flickr and Public Image-Sharing: Distant Closeness and Photo Exhibition*, in CHI '07 EXTENDED ABSTRACTS ON HUMAN FACTORS IN COMPUTING SYSTEMS 2717, 2718-20 (2007), available at [http://portal.acm.org/ft\\_gateway.cfm?id=1241068&type=pdf&CFID=116614411&CFTOKEN=54905948](http://portal.acm.org/ft_gateway.cfm?id=1241068&type=pdf&CFID=116614411&CFTOKEN=54905948); Amy Volda & Elizabeth D. Mynatt, *Six Themes of the Communicative Appropriation of Photographic Images*, in CHI 2005: CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS, CONFERENCE PROCEEDINGS 171, 171 (2005); Mizuko Ito, *Intimate Visual Co-Presence 1* (2005) (unpublished manuscript prepared for the PICS Workshop, UbiComp 2005), available at <http://www.spasojevic.org/pics/PICS/ito.ubicomp05.pdf>; Van House, *supra* note 18, at 2; Nancy A. Van House, *Distant Closeness: Cameraphones and Public Image Sharing* (2006) (unpublished manuscript prepared for the PICS Workshop, UbiComp 2006, the Eighth International Conference on Ubiquitous Computing), available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.114.8102&rep=rep1&type=pdf>; see also VAN DIJCK, *supra* note 19, at 112-18 (reporting the evolution among younger users of digital photography “from memory tools to communication devices, and from sharing (memory) objects to sharing experiences”).

<sup>22</sup> See, e.g., *For Everyday Photography*, *supra* note 15, at 2 (stating that 45.4% of photos taken on a cell phone are used as wallpaper design for the phone’s home screen).

<sup>23</sup> See, e.g., Frank Beacham, *The Impact of Mobile Technology*, TV TECH. (July 20, 2009), <http://www.tvtechnology.com/article/84134> (“The new iPhone 3GS . . . democratizes video . . . [A]nyone with about \$300 in their pocket [can] become a TV producer with a potential global market.”).

## B. Public Discourse and Accountability

Pervasive image capture enhances public discourse. Premeditated efforts to record publicly relevant occurrences are bolstered by the continual accretion of images from spontaneous image capture. Images, unlike words, do not demand great literary ability, or even literacy, for persuasiveness; they provide apparently robust verification that does not depend on the reputation of the proponent. In the emerging digital environment, broadly available and marginally costless image capture provides potential access to public dialogue for individuals and groups without firm economic or political bases or established public credibility. Image capture therefore has the virtue, like leafleting and house signs, of providing “an unusually cheap and convenient form of communication . . . [e]specially for persons of modest means or limited mobility.”<sup>24</sup> The last decade has seen increasingly important use of both targeted and spontaneous image capture as foundations for public discourse.

### 1. Premeditated Image Capture

Images captured by chroniclers of public dramas lend impact and immediacy to public discourse. Political activists increasingly substantiate and dramatize claims with videos.<sup>25</sup> Political campaigns accumulate public records of opponents’ statements by instructing campaign workers to capture images of the opponent on the campaign trail.<sup>26</sup> In

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<sup>24</sup> *City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994). The Court in *City of Ladue* held that a city’s “ban on almost all residential signs violate[d] the First Amendment.” *Id.* at 58; see also *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943) (upholding the right to distribute leaflets door-to-door as “essential to the poorly financed causes of little people”).

<sup>25</sup> See, e.g., THOMAS HARDING, *THE VIDEO ACTIVIST HANDBOOK* 69-73 (2d ed. 2001) (citing examples of videos used to support a claim of wrongdoing); Roumen Dimitrov, *Acting Strategically: Skilled Communication by Australian Refugee Advocacy Groups*, GLOBAL MEDIA J.—AUSTRALIAN EDITION, no. 2, 2008, [http://www.commart.uws.edu.au/gmjau/iss2\\_2008/pdf/GMJ%20Roumen%20Dimitrov%20v2\\_1%202008.pdf](http://www.commart.uws.edu.au/gmjau/iss2_2008/pdf/GMJ%20Roumen%20Dimitrov%20v2_1%202008.pdf) (observing that “resource-poor groups . . . too weak to elevate . . . their problems to a higher level of significance” used video advocacy to gain access to the public arena); *Getting Burmese Atrocities on Camera* (National Public Radio broadcast Dec. 9, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6602518> (detailing human rights activists’ use of video cameras in Burma to document government atrocities).

<sup>26</sup> In one striking example, the 2008 senatorial campaign of Jim Webb captured images of Webb’s opponent, Senator George Allen, denigrating Webb’s photographer, S.R. Sidarth, with the racist epithet “macaca.” The incident was then disseminated on YouTube, Zkman, *George Allen Introduces Macaca* (Aug. 15, 2006), <http://www.youtube.com/watch?v=r90z0PMnKwI>, and later picked up by other media. Allen’s campaign crumbled. See Tim Craig, *The ‘What If’ of Allen Haunts the GOP Race*, WASH. POST, Feb. 6, 2008, at B1.

smaller gatherings, citizen journalists capture words of politicians that are difficult to disavow to a broader public.<sup>27</sup> Recorded interactions at public meetings establish a shared basis of knowledge for public discussion and critique.<sup>28</sup>

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.<sup>29</sup> Conservative activists seek to capture and publish images of their opponents engaged in activities that the activists believe the public would oppose.<sup>30</sup> Human rights campaigners document violations of humanitarian norms.<sup>31</sup> News organizations place dubious police tactics on the public record.<sup>32</sup>

<sup>27</sup> See, e.g., ERIC BOEHLERT, BLOGGERS ON THE BUS 166-71 (2009) (describing campaign donor Mayhill Fowler's recording of then-Senator Barack Obama's comments about "bitter" Pennsylvanians delivered in a 2008 fundraising meeting in San Francisco and the subsequent publishing of the recording on *Huffington Post*).

<sup>28</sup> See, e.g., *Blackston v. Alabama*, 30 F.3d 117, 120, 121 (11th Cir. 1994) (per curiam) (protecting a fathers' rights group's interest in filming public meetings of a rules committee); *Iacobucci v. Boulter*, No. 94-10531, 1997 U.S. Dist. LEXIS 7010, at \*19-20 (D. Mass. Mar. 26, 1997) (protecting an independent reporter's videotaping of a public meeting of the town historical commission); *Thompson v. City of Clio*, 765 F. Supp. 1066, 1070 (M.D. Ala. 1991) (holding that proscription of the tape recording of a city council meeting "regulates conduct protected by the [F]irst [A]mendment"); *Tarus v. Borough of Pine Hill*, 916 A.2d 1036, 1039 (N.J. 2007) (holding that a municipal "watchdog" had the right to videotape a borough council meeting); *Maurice River Twp. Bd. of Educ. v. Maurice River Twp. Teachers Ass'n*, 475 A.2d 59, 61 (N.J. Super. Ct. App. Div. 1984) (holding that a teachers' union was entitled to videotape school board meetings); *Csorny v. Shoreham-Wading River Cent. Sch. Dist.*, 759 N.Y.S.2d 513, 519 (App. Div. 2003) (protecting the right of parents to videotape a school-board meeting).

<sup>29</sup> See, e.g., *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 561-62 (6th Cir. 2007) (discussing the lawfulness of a recording taken in a public park during a deer-culling operation); *Cuviello v. City of Stockton*, No. 07-1625, 2009 U.S. Dist. LEXIS 4896, at \*76-79 (E.D. Cal. Jan. 23, 2009) (enforcing an injunction to allow a group to record alleged animal abuse by a circus); *Cuviello v. City of Oakland*, No. 06-5517, 2007 U.S. Dist. LEXIS 59833, at \*7-8 (N.D. Cal. Aug. 14, 2007) (granting a preliminary injunction to allow an organization to film animal abuse by a circus from public property); *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1280 (Nev. 1995) (reviewing the videotaping of an entertainer disciplining orangutans backstage).

<sup>30</sup> E.g., Erica Noonan, *Activist Seeks Cash for Case*, BOS. GLOBE, Oct. 18, 2001, at W1 (describing a conservative activist who recorded segments of an AIDS-prevention workshop sponsored by the Gay and Lesbian Student Education Network and provided the recordings to local talk radio).

<sup>31</sup> See, e.g., Gabriel et al., *supra* note 12, at 35-36 (describing the work of Witness.org, which since 1992 has provided video technology and training to human rights activists who document human rights abuses for use in legal action, advocacy, and organizing); Sam Gregory, *Transnational Storytelling: Human Rights, WITNESS, and*

It is increasingly common for participants in situations of conflict to deploy image capture techniques. Law enforcement officials regularly record images to document criminal violations. Recorded surveillance evidence is typical of many modern prosecutions involving “stings,” but police officials have begun to record unscripted interactions as well.<sup>33</sup> Conversely, some criminal defendants have relied on their own electronic recordings to impeach police accusations,<sup>34</sup> while others have introduced their video recordings of public conduct to rebut claims that they had violated laws or to substantiate misconduct by police officials.<sup>35</sup>

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*Video Advocacy*, 108 AM. ANTHROPOLOGIST 195, 202-04 (2006) (exploring video use for local, national, and transnational human rights audiences).

<sup>32</sup> See, e.g., *Alvarado v. KOB-TV*, L.L.C., 493 F.3d 1210, 1213 (10th Cir. 2007) (rejecting tort claims against a news media team for filming undercover officers in connection with an alleged incident of sexual assault); *Hornberger v. ABC, Inc.*, 799 A.2d 566, 571 (N.J. Super. Ct. App. Div. 2002) (dismissing action against ABC news crews filming traffic stops of African American “testers” to investigate racial profiling on the New Jersey Turnpike); cf. *Cassidy v. ABC, Inc.*, 377 N.E.2d 126, 131-32 (Ill. App. Ct. 1978) (holding that a journalist who surreptitiously videotaped an undercover officer in a massage parlor during an arrest of a parlor employee did not violate the officer’s right of privacy where the officer was “discharging a public duty”).

For a somewhat more aggressive sting by an activist who distributed the record on the Internet, see Doug Carman, *OPD May Investigate Postings*, ODESSA AM., Dec. 31, 2008, at 1A, which describes a police raid of a residence that officers had been led to believe was a marijuana grow house: “when they entered the home they instead found Christmas trees under grow lights and a poster telling them they were being filmed . . . for a reality TV show.” See also *The KopBusters Story*, KOPBUSTERS.COM, <http://www.nevergetbusted.com/kopbusters/about.php> (last visited Oct. 15, 2010) (describing the use of video to expose illegal police raids on marijuana grow rooms).

<sup>33</sup> See, e.g., *Scott v. Harris*, 550 U.S. 372, 391 n.3 (2007) (Stevens, J., dissenting) (discussing evidence based upon video captured by a dash-mounted video camera activated by police during an effort to apprehend a speeding car); Sharon Noguchi, *San Jose Police Test Head-Mounted Cameras for Officers*, SAN JOSE MERCURY NEWS, Dec. 18, 2009, available at LEXIS (describing a “pilot project equipping officers with head-mounted cameras to document contacts with civilians”); David A. Harris, *Picture This: Body Worn Video Devices (“Head Cams”) as Tools for Ensuring Fourth Amendment Compliance by Police*, 43 TEX. TECH. L. REV. (forthcoming 2010) (manuscript at 4-8), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1596901](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1596901) (describing police experiences with dashboard cameras and “head cams”).

<sup>34</sup> See, e.g., Jim Dwyer, *A Switch Is Flipped, and Justice Listens In*, N.Y. TIMES, Dec. 8, 2007, at B1 (reporting that a defendant recorded a conversation with a police officer and later used the recording in court); Jeanne Meserve & Mike Ahlers, *Passenger Says TSA Agents Harassed Him*, CNN.COM, June 20, 2009, <http://www.cnn.com/2009/US/06/20/tsa.lawsuit/index.html#cnNSTCText> (reporting that a passenger used an iPhone to record an interaction with TSA agents, resulting in a disciplinary action against one agent as well as a lawsuit against Homeland Security Secretary Janet Napolitano).

<sup>35</sup> See, e.g., Jim Dwyer, *One Protest, 52 Arrests and a \$2 Million Payout*, N.Y. TIMES, Aug. 20, 2008, at B1 (reporting on a video which showed that arrested protestors had

Captured images need not be conveyed to others to have a salutary effect. Just as public surveillance cameras are said to reduce crime, the prospect of private image capture provides a deterrent to official actions that would evoke liability or condemnation.<sup>36</sup> Images allow victims to claim their voice and to leverage widely held norms to shame violators.<sup>37</sup>

## 2. Ambient Image Capture

As image-capture capability has diffused, publicly salient images emerge not only from premeditated efforts to prepare for public dialogue, but from recordings by serendipitous amateur photographers. The iconic videotapes of the beating of Rodney King in 1991 were recorded by a plumbing shop manager, George Holliday, who was

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not, in fact, blocked pedestrians as charged); Jim Dwyer, *Videos Challenge Hundreds of Convention Arrests*, N.Y. TIMES, Apr. 12, 2005, at A1 (discussing the use of video to rebut allegations of resisting arrest and impeach claims of officers that defendants engaged in misconduct); cf. *Williamson v. Mills*, 65 F.3d 155, 156-57 (11th Cir. 1995) (per curiam) (reviewing an action against a police officer who seized the film of and arrested a participant who had been photographing undercover officers at a demonstration); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (sustaining the claim of the plaintiff who videotaped police at a demonstration and overturning summary judgment below); *Campbell Clark et al., Sûreté du Québec to Review Practices*, GLOBE & MAIL (TORONTO), Aug. 25, 2007, at A5, available at 2007 WLNR 16583215 (reporting that video recorded by demonstrators showed identifiable police agents acting as provocateurs seeking to instigate violence and resistance among demonstrators). Footage of the Quebec protest is available at CanadiansNanaimo, *Stop SPP Protest-Union Leader Stops Provocateurs* (Aug. 20, 2007), <http://www.youtube.com/watch?v=StI-WTcIkow>.

<sup>36</sup> See, e.g., HARDING, *supra* note 25, at 65-67 (describing examples of video “pacifying” potential conflicts with officials); Gabriel et al., *supra* note 12, at 44 (describing “[v]ideo filming as a deterrent to further abuse”); Karen Auge, *Images Capture Big Show: Protesters, Celebrity Fans and the Curious Are Taking Videos and Pictures Outside the DNC*, DENVER POST, Aug. 28, 2008, at P-17, available at 2008 WLNR 16257906 (“CopWatch has been trailing Denver police for years, videotaping confrontations with large groups . . . [D]emonstrators . . . have made sure that cameras are rolling as they traipse through Denver streets.” (citing Steve Nash, founder of CopWatch)); *Residents Given Video Cameras to Monitor Cops*, MSNBC.COM, June 20, 2007, <http://www.msnbc.msn.com/id/19340005/> (reporting that the ACLU distributed video cameras to residents of “high-crime neighborhoods” to help monitor police conduct).

The tactic of using cameras to defend against abuses by officials is not new. See Charles E. Jones, *The Political Repression of the Black Panther Party 1966–1971: The Case of the Oakland Bay Area*, 18 J. BLACK STUD. 415, 417 (1988) (reporting on the “Panther Police Patrol,” which deployed tape recorders and cameras to document police stops), cited in Regina Austin, *The Next “New Wave”: Law-Genre Documentaries, Lawyering in Support of the Creative Process, and Visual Legal Advocacy*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J., 809, 865 n.166 (2006).

<sup>37</sup> See HOLLABACK!, <http://www.ihollaback.org/about> (last visited Oct. 15, 2010) (featuring photos and stories about “street harassers” in an effort to empower women and people who identify as LGBTQ to “holla back” at men who sexually harass them in public areas).

awakened by noise outside of his window.<sup>38</sup> Holliday captured the unfolding arrest and beating on a video camera he had bought a month before to record friends and family.<sup>39</sup> After his attempts to share the tape with the Los Angeles police department were rebuffed, he submitted the tape to a local television station that aired a segment and offered it to CNN for syndication.<sup>40</sup>

Today, cell phones provide constant and costless opportunities to capture images—opportunities that generate a burgeoning social practice of recording images from daily life.<sup>41</sup> The resulting records provide an underpinning of corroboration and salience to events that otherwise might have been briefly observed ephemera.

In the 2004 Asian tsunami and the 2005 London Tube bombings, cell phone videos were uploaded to publicly available websites and rapidly emerged as the foundation of public deliberation.<sup>42</sup> Digital pictures of the abuses at Abu Ghraib recorded by American service members documenting their daily lives catalyzed both internal inves-

<sup>38</sup> See John Carman, *The Story Behind the King Videotape*, ST. PETERSBURG TIMES, May 10, 1992, at 3A, available at 1992 WLNR 2056138 (chronicling the origins of the Rodney King video).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*; see also Photographer of Inglewood Incident Arrested; Why Did Inglewood Officer Strike Handcuffed Teen?, CNN CONNIE CHUNG TONIGHT (CNN television broadcast July 11, 2002), <http://transcripts.cnn.com/TRANSCRIPTS/0207/11/cct.00.html> (quoting George Holliday explaining to the announcer, “I called the police department and they pretty much hung up on me. I was even before [sic] I could mention I had a tape of it. So then I called Channel 5.”).

The Sony Handycam was developed in 1985 and became widely available shortly thereafter. See Ron Sanchez & D. Sudharshan, *Real-Time Market Research*, 11 MARKET-ING INTELLIGENCE & PLAN., no. 7, 1993, at 34-35; cf. Lambert v. Polk County, 723 F. Supp. 128, 133 (S.D. Iowa 1989) (recognizing the First Amendment right of a videographer who videotaped a street fight and sought to sell the footage to news media).

Digital video began to emerge in the nonprofessional consumer market in 1995. See David Brott, *Product Probe*, VIDEOMAKER, Nov. 1995, at 43.

<sup>41</sup> See sources cited *supra* notes 18-19.

<sup>42</sup> See, e.g., Anna Reading, *Mobile Witnessing: Ethics and the Camera Phone in the “War on Terror,”* 6 GLOBALIZATIONS 61, 67-72 (2009) (discussing a widely circulated video of the 2005 London Tube bombings taken by a nonjournalist on his mobile camera phone); Matea Gold, *Cellphones Change the View of Disaster*, L.A. TIMES, July 8, 2005, at A1 (providing numerous examples of amateur videos that captured the London Tube bombings and were broadcast to large audiences by major news networks); Verne Kopytoff, *Terror in London: The Day After*, S.F. CHRON., July 9, 2005, at A9, available at 2005 WLNR 10757533 (noting the substantial increase in publicly available images of the Asian tsunami and London Tube bombings due to the growing presence of cell phone cameras in the hands of the average individual); Jo Twist, *Mobiles Capture Blast Aftermath*, BBC NEWS, July 8, 2005, <http://news.bbc.co.uk/2/hi/technology/4663561.stm> (explaining that many of the initial images of the London Tube bombings—and some of the most publicly recognized ones—were captured by cell phone cameras).

tigations and public outrage.<sup>43</sup> Spontaneously captured videos provided iconic images of September 11, 2001, the shootings at Virginia Tech, and the death of Saddam Hussein.<sup>44</sup>

Images of Iranian demonstrations and repression captured by participants and onlookers evaded efforts of the Iranian government to suppress media coverage in the aftermath of the 2009 election, and digital networks continue to disseminate images of protests.<sup>45</sup> In the United States, barriers to news gathering are less often official, but the decline in resources available to gather news in an industry under pressure from online competition poses increasing challenges

<sup>43</sup> See, e.g., PHILIP GOUREVITCH & ERROL MORRIS, STANDARD OPERATING PROCEDURE 178-79, 262-64 (2008) (describing Abu Ghraib digital photographic documentation, the submission of photographs to military investigators, and the subsequent effect of that submission); Seth F. Kreimer, *Rays of Sunlight in a Shadow "War": FOIA, the Abuses of Anti-Terrorism, and the Strategy of Transparency*, 11 LEWIS & CLARK L. REV. 1141, 1197-208 (2007) (analyzing the submission of Abu Ghraib photographs to U.S. military investigators by Specialist Joseph Darby, the ensuing investigations, and the ultimate catalytic disclosure of the abuses); Philip Gourevitch, Op-Ed., *The Abu Ghraib We Cannot See*, N.Y. TIMES, May 24, 2009, at WK10 (discussing the impact of photographs of Abu Ghraib taken by American soldiers with digital cameras).

<sup>44</sup> See, e.g., Judi Hetrick, *Amateur Video Must Not Be Overlooked*, MOVING IMAGE, Spring 2006, at 66, 67 (explaining that an amateur video is the only visual record of both planes hitting the World Trade Center on 9/11); May Wong, *Camera Phone Technology Creates Cultural Impact*, CHI. TRIB., May 28, 2007, § 3, at 5 (reporting that cell phone users captured and made public video footage from the shooting at Virginia Tech in 2007 and Saddam Hussein's execution in 2006).

<sup>45</sup> See, e.g., Editorial, *Reporting Duty: Censoring the Foreign Media Hurts, and Diminishes Both Iran and Its People*, TIMES (London), June 18, 2009, at 2 (commenting that average Iranians have turned to images and videos captured by cell phones and cameras to find the "truth" of what is happening in their country because of the Iranian government's ban on the international press); Christopher Rhoads, *Activists Skirt Web Crackdown to Reach the Outside World*, WALL ST. J., Dec. 8, 2009, at A8 (explaining that despite crackdown on Iran's opposition movement, people were still posting videos and other media online); Brian Stelter, *News Media Relax Their Rules to Cope with Media Ban in Iran*, INT'L HERALD TRIB., June 30, 2009, at 21, available at 2009 WLNR 12415098 ("In a news vacuum, amateur videos and eyewitness accounts became the de facto source for information."); *Iran Bans International Journalists from Covering Rallies*, CNN.COM, June 16, 2009, <http://www.cnn.com/2009/WORLD/meast/06/16/iran.journalists.banned> (describing the Iranian government's ban of the international media from reporting on opposition rallies protesting the controversial presidential election results); Dave Siavashi, *Live-blog: Ashura in Iran—December 27, 2009*, IRAN NEWS NOW (Dec. 26, 2009), <http://www.irannewsnow.com/2009/12/live-blog-ashura> (documenting the clashes between Iranian police and protestors on December 27, 2009, through live reporting, video feeds, and photographs); Brett Soloman, *Ready Set Revolution*, CITIZENTUBE (Dec. 29, 2009), <http://www.citizentube.com/2009/12/ready-set-revolution.html> (documenting the distribution of citizen videos from Iran to social media sites and news organizations).



to the viability of informed public discussion.<sup>46</sup> Serendipitous amateur image capture can fill some of the lacunae left by the decimation of salaried news staffs.<sup>47</sup>

Officials have introduced spontaneously captured images in public prosecutions.<sup>48</sup> Conversely, police abuse captured by the cameras of bystanding videographers, followed by public broadcast of the footage, has become a regular feature of our public life and the underpinning of effective demands for redress.<sup>49</sup> Spontaneously captured

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<sup>46</sup> Cf. *Andrew v. Clark*, 561 F.3d 261, 272-73 (4th Cir. 2009) (Wilkinson, J., concurring) (arguing that First Amendment jurisprudence should be sensitive to the evolving state of journalism, as “[t]he verdict is still out on whether the Internet and the online ventures of traditional journalistic enterprises can help fill the void left by less comprehensive print and network coverage of public business”).

<sup>47</sup> Cf. Paul Harris, *The King of Online Gossip Who Became the Scourge of Hollywood*, OB-SERVER (London), Oct. 25, 2009, at 33, available at LEXIS (describing a celebrity news site “full of vidoes [sic], taking advantage of its staff, freelancers, tourists and just about anyone with a camera phone who happens to spot a famous face”); CNN iREPORT, <http://ireport.cnn.com> (last visited Oct. 15, 2010) (encouraging the CNN audience to submit photographs and video on a variety of issues); YOUTUBE DIRECT, <http://www.youtube.com/direct> (last visited Oct. 15, 2010) (making software available to allow news organizations to solicit and edit videos from members of the general public).

<sup>48</sup> See, e.g., Jim Dwyer, *Three Men Who Had No Reason to Run*, N.Y. TIMES, Apr. 5, 2008, at B1 (reporting that a recording by a “freelance videographer” was introduced at trial by prosecutors to support their case of police abuse); John Lauinger, *Cops Nail Subway Pervert*, N.Y. DAILY NEWS, Aug. 14, 2009, at 14, available at 2009 WLNR 15866932 (detailing the arrest of a suspect after a woman who had been subjected to indecent exposure on a New York City subway captured an image of the man on her cell phone and provided it to police); Doug Page, *Dayton Woman Wanted in Attack with Stiletto Heel*, DAYTON DAILY NEWS, July 27, 2010, at A5, available at 2010 WLNR 14946577 (chronicling the account of a victim attacked by a woman with a stiletto heel and noting that an iPhone video of the incident helped police apprehend the suspect); Stewart M. Powell, *Moussaoui Jury Hears Graphic 9/11 Details*, HOUS. CHRON., Apr. 7, 2006, at A3, available at 2006 WLNR 5901371 (describing prosecution’s presentation of testimony of a “visitor from Washington state, Tamar Rosbrook, who narrated a video that she and her husband took of the World Trade Center from their hotel room that showed dozens of victims falling toward the ground”).

<sup>49</sup> See, e.g., Jim Dwyer, *When Official Truth Collides with Cheap Digital Technology*, N.Y. TIMES, July 30, 2008, at B1 (describing a YouTube video shot by a tourist that contradicts a police officer’s account of why he shoved a cyclist off his bicycle); John Eligon & Colin Moynihan, *Police Officer Seen on Tape Shoving a Bicyclist Is Indicted*, N.Y. TIMES, Dec. 16, 2008, at A33 (reporting on the indictment and on a community group’s demands that police use less aggressive tactics against bicyclists accused of creating public safety hazards); Raj Jayadev, Op-Ed., *Much Harder to “Spin” Violence in Web 2.0 Era*, SAN JOSE MERCURY NEWS, Jan. 12, 2009, at 9A, available at 2009 WLNR 627686 (discussing the impact of cell phone videos posted on YouTube and aired by local news organizations that show a young man being shot to death by a police officer); Meg Coyle, *FBI Launches Civil Rights Probe into Seattle PD Video*, KING5.COM, May 10, 2010, <http://www.king5.com/news/FBI-launches-civil-rights-investigation-into-Seattle-PD-video-93336449.html> (detailing the content of a video that shows several police officers phys-

images from different sources can be combined to generate public information that could not have been gleaned by any single observer. Thus, in the aftermath of the mass arrests at the 2004 Republican National Convention in New York City, an activist forensic video analyst gathered and collated images of the demonstrations to reveal a robust police practice of infiltrating political demonstrations,<sup>50</sup> while investigators in London collated amateur videos to lay the basis for prosecuting police abuse during demonstrations in April 2009.<sup>51</sup>

### III. PERCEIVED DANGERS AND REGULATORY REACTIONS: DARK SIDES AND SHADOWS

The advent of pervasive image capture brings anxiety as well as opportunity. Most Americans have never believed that photographs will steal their souls, but innovations in the technology of image capture have historically generated a sense of vulnerability and discomfort. The introduction of the portable camera in the late nineteenth century provoked unease, along with legal innovations that laid the groundwork for the modern law of privacy.<sup>52</sup> In the last decade and a

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ically and verbally abusing a young man and that later ignited a civil rights investigation); Mayra Moreno, *Teacher Fired After Beating Caught on Camera*, 39ONLINE.COM, May 11, 2010, <http://www.39online.com/news/local/kiah-charter-school-student-beaten-story,0,1079016.story> (reporting on the dismissal of a teacher after she was recorded on a cell phone camera beating up a student); Alex Veiga, *YouTube.com Video Prompts Probe of LAPD*, USA TODAY, Nov. 13, 2006, [http://www.usatoday.com/tech/news/2006-11-13-youtube-arrest\\_x.htm](http://www.usatoday.com/tech/news/2006-11-13-youtube-arrest_x.htm) (reporting on the posting of a cell phone video on YouTube that led to an investigation of police brutality because it captured police officers repeatedly punching a suspect as they arrested him).

<sup>50</sup> See Jim Dwyer, *New York Police Covertly Join In at Protest Rallies*, N.Y. TIMES, Dec. 22, 2005, at A1 (describing collection and collation of these images).

<sup>51</sup> Amateur videos played a key role in exposing the police brutality that occurred during the London G-20 Summit in April 2009. Jerome L. Sherman, *Ubiquitous Cameras Capture Actions by Police*, PITTSBURGH POST-GAZETTE, Sept. 6, 2009, at A15, available at 2009 WLNR 17488543. A New York hedge fund manager filmed an incident in which a London police officer “struck . . . and pushed . . . to the ground” a newspaper vendor, who died shortly thereafter from the trauma. *Id.*

The *Guardian* newspaper soon acquired the video, which contradicted police statements about [the vendor’s] death. It pushed Britain’s Independent Police Complaints Commission to launch one of the largest investigations in the commission’s history, relying heavily on video footage captured by people who were on the streets of London on April 1 and 2.

*Id.*

<sup>52</sup> See, e.g., Robert E. Mensel, “Kodakers Lying in Wait”: *Amateur Photography and the Right of Privacy in New York, 1885–1915*, 43 AM. Q. 24, 28–41 (1991) (describing the spread of inexpensive cameras and widespread distribution of photographs which made photography possible for “thousands upon thousands” of amateur photograph-

half, pervasive image capture has begun to generate a similar sense of dislocation and unease. This concern for a dark side of image capture has precipitated legal theories, regulatory strategies, and enforcement decisions—theories, strategies, and decisions that cast shadows on the practice of image capture and threaten to cripple its promise.

### A. Proposed Public Privacy Torts

The original proposal by Samuel Warren and Louis Brandeis for a tort remedy to protect privacy was rooted in late nineteenth-century concern over portable cameras and the emerging plebeian press.<sup>53</sup> Over the course of the last century, American common law developed a portfolio of “privacy torts” that constrains the capture and dissemination of images. Mainstream common law precedent recognizes both the tort of intrusion on seclusion and the tort of publication of private facts. Neither applies directly to most digital image capture. Intrusion on seclusion provides relief only against images involuntarily captured within the target’s own home or in facilities remote from the public; publication of private facts is generally held to be inapplicable to images voluntarily exposed to the public gaze.<sup>54</sup>

Emphasizing the extent of potential surveillance in public areas by pervasive image capture and the harms that can attend Internet-enabled distribution of embarrassing images, contemporary commentators have regularly advocated expanding the privacy tort to encompass nonconsensual image capture in public spaces. The arguments

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ers, and exploring the consequent anxiety and “profound sense of exposure and violation” among potential unwilling subjects of photography, as well as subsequent legal efforts to curb unbridled photography); *see also* *The Right of Privacy*, N.Y. TIMES, Aug. 23, 1902, at 8 (discussing the dangers of “‘kodakers’ lying in wait,” the “ordeal of the camera,” and the need for a remedy for “these savage and horrible practices”).

<sup>53</sup> *See* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890) (“Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that ‘what is whispered in the closet shall be proclaimed from the house-tops.’”). *But see* *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442, 443 (N.Y. 1902) (refusing to enjoin publication of advertisements featuring unauthorized photographs of the plaintiff because a principle that restrains “publication of that which purports to be a portrait of another person, even if obtained upon the street by an impertinent individual with a camera . . . [would extend to a vast] list of things that are spoken and done day by day which seriously offend the sensibilities of good people”).

<sup>54</sup> *See* RESTATEMENT (SECOND) OF TORTS § 652B cmt. c (1977) (discussing the doctrine of intrusion upon seclusion); *id.* § 652D cmt. b (examining the doctrine of “publicity given to matters concerning private . . . life”).

began with concern about handheld camcorders<sup>55</sup> and flourished with worries about cell phone cameras.<sup>56</sup> Most recently, commentators have taken alarm at the emergence of Internet capabilities, arguing for the necessity of providing “legal recourse in networked places crawling with camera-toting citizen-journalists.”<sup>57</sup>

These proposals have not yet begun to bear abundant fruit in case law; most reported cases involve either private intrusions into intimate situations or media defendants rather than citizen-journalists. Cases involving surreptitious capture of images in intimate situations have found some success.<sup>58</sup> But reported cases tend to run aground either on the absence of a reasonable expectation of privacy<sup>59</sup> or on a news-

<sup>55</sup> See e.g., Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1021-22 (1995).

<sup>56</sup> E.g., Alan Kato Ku, Comment, *Talk Is Cheap, But a Picture Is Worth a Thousand Words: Privacy Rights in the Era of Camera Phone Technology*, 45 SANTA CLARA L. REV. 679 (2005); Aimee Jodoi Lum, Comment, *Don't Smile, Your Image Has Just Been Recorded on a Camera-Phone: The Need for Privacy in the Public Sphere*, 27 U. HAW. L. REV. 377 (2005).

<sup>57</sup> Timothy Zick, *Clouds, Cameras and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 46 (2007); see also, e.g., Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 5-7 (2007); Jacqueline D. Lipton, “We, the Paparazzi”: *Developing a Privacy Paradigm for Digital Video*, 95 IOWA L. REV. 919, passim (2010); Josh Blackman, Student Article, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image over the Internet*, 49 SANTA CLARA L. REV. 313, 354-92 (2010).

<sup>58</sup> See, e.g., *Doe v. Luster*, No. B184508, 2007 WL 2120855, at \*8 (Cal. Ct. App. July 25, 2007) (determining that a cause of action existed for distribution of videos of alleged rapist committing multiple sexual assaults after drugging victims); *In re Marriage of Tigges*, 758 N.W.2d 824, 830 (Iowa 2008) (finding that a husband who surreptitiously videotaped his wife in their marital bedroom violated the wife’s “reasonable expectation of privacy”); *Lewis v. LeGrow*, 670 N.W.2d 675, 680 (Mich. Ct. App. 2003) (affirming a jury verdict against a man who secretly videotaped a series of consensual sexual encounters with ex-girlfriends).

<sup>59</sup> See, e.g., *Med. Lab. Mgmt. Consultants v. ABC, Inc.*, 306 F.3d 806, 815 (9th Cir. 2002) (holding that, under Arizona law, a medical lab owner had no objectively reasonable expectation of privacy when he met with ABC representatives who covertly taped the encounter); *Deteresa v. ABC, Inc.*, 121 F.3d 460, 466 (9th Cir. 1997) (holding that a woman videotaped “in public view from a public place” without her knowledge did not have a reasonable expectation of privacy); *Hornberger v. ABC, Inc.*, 799 A.2d 566, 595 (N.J. Super. Ct. App. Div. 2002) (holding that police officers had no reasonable expectation of privacy to support their claims of violation of privacy under New Jersey’s Wiretapping and Electronic Surveillance Control Act when a reporter’s hidden camera filmed the officers searching a car); cf. *J.H. Desnick, M.D., Eye Servs., Ltd. v. ABC, Inc.*, 44 F.3d 1345, 1353 (7th Cir. 1995) (holding that use of “test patients” with concealed cameras did not violate employees’ privacy rights); *People for the Ethical Treatment of Animals v. Bobby Beronini, Ltd.*, 895 P.2d 1269, 1281 (Nev. 1995) (holding that a backstage video recording of an animal trainer did not violate a trainer’s privacy right because the recording did not interfere with the trainer’s expected privacy). *But cf.* *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 524 (4th Cir.

worthiness defense.<sup>60</sup> Still, with the continued spread of pervasive image capture, efforts to impose common law liability are unlikely to abate.

### B. *Legislative Initiatives Directed at Image Capture*

Legislative initiatives aimed at the perceived dangers of the emerging digital visual ecology have been less restrained. California has adopted several waves of antipaparazzi statutes attempting to limit capture of celebrity images.<sup>61</sup> Localities have banned the use of cell phone cameras in public restrooms and have proposed prohibiting the use of cell phone cameras near ATM sites.<sup>62</sup>

The last decade and a half has brought the unpleasant phenomenon of “upskirt photography,” in which images of pudenda and undergarments are captured in public locations by means of aggressive digital photography. These images, and others captured surreptitiously in a variety of venues, have come to be posted on a burgeon-

1999) (affirming judgment against employees for breach of loyalty when employees used hidden cameras to film employer’s food handling practices); *Turnbull v. Am. Broad. Cos.*, No. 03-3554, 2004 WL 2924590, at \*10 (C.D. Cal. Aug. 19, 2004) (sustaining cause of action for secretly filming a casting workshop); *Sanders v. ABC, Inc.*, 978 P.2d 67, 71 (Cal. 1999) (sustaining cause of action for invasion of privacy against a reporter for posing as a coworker and secretly recording conversations); *Special Force Ministries v. WCCO Television*, 584 N.W.2d 789, 792-95 (Minn. Ct. App. 1998) (sustaining action for trespass and fraud against a television station after a station employee posed as a volunteer and secretly videotaped activities in the facility for use in a news story).

<sup>60</sup> *See, e.g., Anderson v. Suiters*, 499 F.3d 1228, 1236 (10th Cir. 2007) (sustaining newsworthiness defense of television station’s broadcast of videotape showing accused rapist’s assault on unconscious victim); *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1223-25 (10th Cir. 2007) (sustaining newsworthiness defense of broadcast of images of undercover police officer accused of abuse); *Lee v. Penthouse Int’l, Ltd.*, No. 96-7069, 1997 WL 33384309, at \*4 (C.D. Cal. Mar. 19, 1997) (sustaining newsworthiness defense in publication of celebrities’ private honeymoon photographs). *But see, e.g., Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 501 (Mo. Ct. App. 1990) (finding that plaintiffs’ privacy interests outweighed station’s interest in publicizing newsworthy events after plaintiffs were filmed at a gathering of in vitro fertilization participants).

<sup>61</sup> *See, e.g., Alexandra B. Klass, Tort Experiments in the Laboratories of Democracy*, 50 WM. & MARY L. REV. 1501, 1528 (2009) (describing the “constructive invasion of privacy” tort, which provides a remedy against the use of a “visual or auditory enhancing device” . . . ‘regardless of whether there is a physical trespass’” (quoting CAL. CIV. CODE § 1708.8(b) (West 2009))); *see also Richardson-Tunnell v. Schs. Ins. Program for Empls. (SIPE)*, 69 Cal. Rptr. 3d 176, 183 (Ct. App. 2007) (explaining the history of § 1708.8).

<sup>62</sup> *Ku, supra* note 56, at 691-92 (describing enacted and considered local bans on cell phone cameras in certain public places).

ing variety of pornographic websites.<sup>63</sup> In response, legislatures around the country have promulgated statutes prohibiting “video voyeurism.”<sup>64</sup> An early initiative in Tennessee made it an offense

for a person to knowingly photograph, or cause to be photographed an individual, when such individual is in a place where there is a reasonable expectation of privacy, without the prior effective consent of the individual . . . if such photograph:

- 1) Would offend or embarrass an ordinary person if such person appeared in the photograph; and
- 2) Was taken for the purpose of sexual arousal or gratification of the defendant.<sup>65</sup>

The federal version, adopted a decade later, applies in the special maritime and territorial jurisdiction of the United States to punish an individual who has “the intent to capture an image of a private area of an individual without their consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy.”<sup>66</sup>

Many applications of these video voyeurism statutes have prosecuted image capture that would be considered abusive under almost any standard.<sup>67</sup> But the more broadly written statutes constrain the capture of

<sup>63</sup> See, e.g., Clay Calvert & Justin Brown, *Video Voyeurism, Privacy, and the Internet: Exposing Peeping Toms in Cyberspace*, 18 CARDOZO ARTS & ENT. L.J. 469, 499 (2000).

<sup>64</sup> Early articles advocating such statutes include Calvert & Brown, *id.*, Maria Pope, *Technology Arms Peeping Toms with a New and Dangerous Arsenal: A Compelling Need for States to Adopt New Legislation*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1167 (1999), and Lance E. Rothenberg, Student Article, *Re-thinking Privacy: Peeping Toms, Video Voyeurs, and the Failure of Criminal Law to Recognize a Reasonable Expectation of Privacy in the Public Space*, 49 AM. U. L. REV. 1127 (2000).

<sup>65</sup> TENN. CODE ANN. § 39-13-605 (Supp. 2001).

<sup>66</sup> 18 U.S.C. § 1801 (2006). For a recent survey of “video voyeurism” statutes, see Timothy J. Horstmann, Comment, *Protecting Traditional Privacy Rights in a Brave New Digital World: The Threat Posed by Cellular Phone-Cameras and What States Should Do to Stop It*, 111 PENN ST. L. REV. 739, 739-41 (2007). See also *Video Voyeurism Laws*, NAT’L CTR. FOR VICTIMS OF CRIME, <http://www.ncvc.org/src/AGP.Net/Components/DocumentViewer/Download.aspxnz?DocumentID=37716> (last visited Oct. 15, 2010) (listing states with “video voyeurism” statutes).

<sup>67</sup> E.g., *People v. Hobbs*, 60 Cal. Rptr. 3d 685, 687 (Ct. App. 2007) (“[D]efendant snuck into the girls’ locker room . . . set up a video camera so he could film [unseen] . . . [and] filmed at least 45 girls who were competing in the swim meet as they changed into and out of their bathing suits.”); *State v. Schaller*, 08-0522, p. 15-16 (La. App. 5 Cir. 5/26/09); 15 So. 3d 1046, 1055-56 (defendant secretly videotaped the sexual acts between a teenage girl and her boyfriend); *State v. Huffman*, 165 Ohio App. 3d 518, 2006-Ohio-1106, 847 N.E.2d 58, at ¶¶ 1-6 (defendant installed a hidden camera in a tanning room).

images that carry considerably more claim to protection,<sup>68</sup> and aggressive officials have been inclined to stretch the statutes even further.<sup>69</sup>

The recent moral panic regarding sexting has produced similar results. Alarmed prosecutors have invoked child pornography and obscenity statutes to prosecute minors who capture or transmit nude or provocative images of themselves.<sup>70</sup> Legislators dissatisfied with existing statutes have begun to draft statutes directed specifically at the practice.<sup>71</sup>

Recent foreign legislation has targeted potentially harmful image capture even more aggressively. New British criminal statutes could be used to prohibit photographs of police officers that are “likely to be useful” to terrorists.<sup>72</sup> Confronted with the disturbing fad of “happy slapping,” in which assaults are perpetrated in order to capture and distribute images of the attacks, French law now forbids “recording or

<sup>68</sup> See, e.g., *State v. Stevenson*, 2000 WI 71, ¶¶ 21-22, 236 Wis. 2d 86, 613 N.W.2d 90 (invalidating a statute for overbreadth because it could apply to newsworthy images and political satire); cf. *State v. Reep*, 167 P.3d 1156, 1157-58 (Wash. 2007) (considering prosecution for images of children sitting on trampolines taken from the defendant’s bedroom window).

<sup>69</sup> See, e.g., *Griesinger v. Loveland City Sch. Dist.*, No. 06-0569, 2007 WL 433298, at \*1 (S.D. Ohio Feb. 5, 2007) (recounting a prosecution for voyeurism when plaintiff complained about the inappropriate attire of a high school dance-team manager and e-mailed three still pictures from a videotape of a dance team performance to responsible school administrators); Allen Gwinn, *Photographer Arrest Tossed; D.A. Apologizes For Southlake Police Behavior*, DALLAS.ORG, Nov. 1, 2005, <http://www.dallas.org/node/97> (reporting the improper arrest of a photographer for taking pictures at Oktoberfest); Darius Radzius, *Man Arrested for Unlawful Photography*, TRICITIES.COM, July 12, 2008, [http://www.tricities.com/news/2008/jul/12/man\\_arrested\\_for\\_unlawful\\_photograph\\_y-ar-254606](http://www.tricities.com/news/2008/jul/12/man_arrested_for_unlawful_photograph_y-ar-254606) (reporting the arrest for “unlawful photography” of a citizen who took a picture of a police officer during a traffic stop).

<sup>70</sup> See *supra* notes 7-8 and accompanying text (discussing the rise of sexting); see also, e.g., *A.H. v. State*, 949 So.2d 234, 235-36 (Fla. Dist. Ct. App. 2007) (affirming the adjudication of delinquency for child pornography of a sixteen-year-old girl who had taken 117 digital photos of herself and her seventeen-year-old boyfriend “naked and engaged in sexual behavior” and e-mailed the images to her home computer); *State v. A.R.S.*, 684 So.2d 1383, 1384 (Fla. Dist. Ct. App. 1996) (per curiam) (reversing the dismissal of child pornography charges against a fifteen-year-old boy who videotaped himself and a younger female “engaged in nude, sexual foreplay” and then played the tape for a friend); *State v. D.H.*, 9 P.3d 253, 254 (Wash. Ct. App. 2000) (upholding the “sexual exploitation of a minor” conviction of a fifteen-year-old boy who brought a video camera to high school and persuaded three of his fifteen-year-old classmates to expose their breasts for the camera).

<sup>71</sup> See 2009 “Sexting” Legislation: Year-end Summary, NAT’L CONF. OF STATE LEGISLATORS (revised Sept. 1, 2010), <http://www.ncsl.org/default.aspx?tabid=17756> (listing states that introduced “sexting” legislation in 2009 and discussing the goals of these statutes).

<sup>72</sup> See Olivier Laurent, *Jail for Photographing Police?*, BRIT. J. PHOTOGRAPHY, Jan. 28, 2009, at 4 (describing the increased police power to prevent photography under the Counter-Terrorism Act of 2008).

distributing images of violent crime” by individuals who are not professional journalists.<sup>73</sup>

### C. *Wiretapping Statutes, Open-Textured Prohibitions, and Official Fiat*

Police, like many civilians, are often camera-shy. Officers dislike being recorded in embarrassing situations and may be concerned that dissemination of their images may put them at risk of retaliation.<sup>74</sup> They are accustomed, as well, to substantial deference in the construction of official narratives,<sup>75</sup> and many would prefer to be in a position to shape perceptions of their actions without competing digital records. Police officers often view private digital image capture as a challenge to their authority.

As a result, the spread of pervasive image capture in the last decade has been accompanied by a rich set of cases in which police have sought to prosecute critics or potential critics who capture their images. In these cases, police officers and other officials have enlisted both existing statutes and creative prosecutorial discretion in the struggle to constrain inconvenient image capture.

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<sup>73</sup> Adam Sage, *Happy-Slapping Film Ban ‘Will Gag Citizen Journalists,’* TIMES (London), Mar. 9, 2007, at 43 (quoting the French law) (internal quotation marks omitted); see also Peter Sayer, *France Bans Citizen Journalists from Reporting Violence,* MACWORLD (Mar. 6, 2007, 3:00 AM), <http://www.macworld.com/article/56615/2007/03/franceban.html> (“The law could lead to the imprisonment of eyewitnesses who film acts of police violence, or operators of web sites publishing the images . . . .”); *New Prevention of Criminality Law Poses Threat to Citizen Reporting,* REPORTERS SANS FRONTIÈRES (Mar. 8, 2007), [http://en.rsrf.org/IMG/article\\_PDF/france-new-prevention-of-criminality-law-08-03-2007,21237.pdf](http://en.rsrf.org/IMG/article_PDF/france-new-prevention-of-criminality-law-08-03-2007,21237.pdf) (reporting the potential implications of the ban).

<sup>74</sup> Cf. *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1213 (10th Cir. 2007) (remarking on “the difficult and potentially dangerous situation undercover officers face after having their identities revealed to the public”); *Williamson v. Mills*, 65 F.3d 155, 158 (11th Cir. 1995) (observing that photographs could be useful in carrying out death threats against officers and that “criminal organizations prize photographs of undercover officers”).

<sup>75</sup> E.g., CITY OF NEW YORK COMM’N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEP’T, COMM’N REPORT 36 (1994), available at [http://www.parc.info/client\\_files/special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf](http://www.parc.info/client_files/special%20Reports/4%20-%20Mollen%20Commission%20-%20NYPD.pdf) (identifying incidence of police perjury in New York sufficiently common to coin the broadly current neologism “testilying”). For other discussion of “testilying,” see, for example, I. Bennett Capers, *Crime, Legitimacy, and Testilying*, 83 IND. L.J. 835 (2008); Morgan Cloud, *Judges, “Testilying,” and the Constitution*, 69 S. CAL. L. REV. 1341 (1996); Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).



## 1. Wiretapping Statutes

Many state statutes originally drafted to regulate wiretapping prohibit more generally the recording or interception of oral communications unless all parties to the conversation consent.<sup>76</sup> Police officers regularly rely on these statutes to arrest citizens who insist on recording the officers without their consent, often after the citizens have used the records to file complaints against the police.<sup>77</sup> Some states have construed their statutes to preclude such prosecutions on the ground that exercises of public authority by police officers cannot by

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<sup>76</sup> See Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 868, 869 & n.313, 870-81, app. C (1998) (discussing consent requirements in state eavesdropping and wiretapping statutes and enumerating eleven states that prohibit single-party-consent recordings); Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. RICH. L. REV. 1185, 1215, 1216 & n.139, 1217 (2000) (identifying thirteen states requiring both parties to consent to a recorded conversation).

Some statutes also prohibit the capture of visual images. See, e.g., S.D. CODIFIED LAWS § 22-21-1 (1988); see also *People v. Gibbons*, 263 Cal. Rptr. 905, 908-09 (Ct. App. 1989) (interpreting a statute punishing nonconsensual recording of confidential "communications" to reach videotaping of expressive conduct in sexual encounters); cf. THE REPORTERS COMM. FOR FREEDOM OF THE PRESS, *Can We Tape?* (2008), <http://www.rcfp.org/taping/index.html> ("At least 24 states have laws outlawing certain uses of hidden cameras in private places . . .").

<sup>77</sup> See, e.g., Kat Kanning, *SPCA Joins the Police State*, N.H. FREE PRESS, Nov. 2008, at 8 (describing the arrest of Cooper Travis "at his home in Candia, New Hampshire for refusing to turn off his video camera while speaking with a police officer"); Annys Shin, *From YouTube to Your Local Court*, WASH. POST, June 16, 2010, at A1 (describing an early-morning raid and wiretapping prosecution of Anthony Graber, who had posted on YouTube his helmet-camera video of a police officer who had stopped his motorcycle for speeding); Andrew Wolfe, *Vindication: Police Drop Wiretap Charges*, NASHUA TEL., Aug. 5, 2006, at 1 (describing the arrest of Michael Gannon after his home security camera videotaped conversations with New Hampshire detectives at his door and after he took the videotape to police headquarters to complain about harassment, though the case was later dropped); Jon Yates, *Rights, Eavesdropping Law Collide in Filmmakers' Case*, CHI. TRIB., Oct. 7, 2004, § 2, at 1 (describing freelance documentary filmmakers who had videotaped traffic stops: "[P]olice seized Miller's video camera. . . . [Filmmakers] submitted [the] documentary to Urbana Public Television, prosecutors confiscated that, too, and charged the two with eavesdropping . . ."); Derrick Blakely, *Artist Charged for Eavesdropping During His Arrest*, CBS2CHICAGO.COM, Jan. 29, 2010, <http://cbs2chicago.com/local/artist.chris.drew.2.1458494.html> (recounting felony prosecution of a street vendor for recording police officers without their consent); Mary Schenk, *Eavesdropping Charges Dismissed*, NEWS-GAZETTE (Champaign), Dec. 2, 2004, [http://www.news-gazette.com/news/local/2004/-12/-02/eavesdropping\\_charges\\_dismissed](http://www.news-gazette.com/news/local/2004/-12/-02/eavesdropping_charges_dismissed) (describing the decision of Champaign County State's Attorney to drop charges against members of a "community watchdog group"); Ray Sanchez, *Growing Number of Prosecutions for Videotaping the Police*, ABCNEWS.COM, July 19, 2010, <http://abcnews.go.com/US/TheLaw/videotaping-cops-arrest/story?id=11179076> (describing Graber's arrest in Maryland for videotaping police, as well as arrests in Florida and New Hampshire). For other examples, see *infra* notes 78-95.

their nature support an expectation of privacy. The state of Washington has been clearest on this point, refusing to “transform the privacy act into a sword available for use against individuals by public officers acting in their official capacity.”<sup>78</sup> Pennsylvania case law similarly excludes recordings of law enforcement officials’ exercise of official authority in public settings from the consent requirement because officials lack the legitimate expectation of privacy required for statutory protection.<sup>79</sup> And a Maryland judge recently rebuffed efforts to prosecute an inconvenient videographer under the state wiretap statute,

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<sup>78</sup> *State v. Flora*, 845 P.2d 1355, 1358 (Wash. Ct. App. 1992); *see also Johnson v. Hawe*, 388 F.3d 676, 685 (9th Cir. 2004) (quoting *Flora* and ruling that police officers do not have an expectation of privacy when performing an official function on a public thoroughfare); *Alford v. Haner*, 333 F.3d 972, 976 (9th Cir. 2003) (citing *Flora* and noting that “[t]ape recording officers conducting a traffic stop is not a crime in Washington”), *rev’d on other grounds*, *Devenpeck v. Alford*, 543 U.S. 146 (2004); *Lewis v. Dep’t of Licensing*, 139 P.3d 1078, 1084 (Wash. 2006) (citing *Alford* and *Flora* with approval and holding that “traffic stop conversations are not private for purposes of the privacy act”).

New Jersey courts have held that police officers could assert no Wiretap Act claim against media “testers”—minorities hired by news outlets to drive expensive cars—who recorded their racial profiling in a highway stop. *See Hornberger v. ABC, Inc.*, 799 A.2d 566, 594-95 (N.J. Super. Ct. 2002) (concluding that police did not have an expectation of privacy during a traffic stop filmed through an arrangement with ABC); *see also Angel v. Williams*, 12 F.3d 786, 790 (8th Cir. 1993) (rejecting a wiretap claim by police officers who alleged that an audio recording of an incident in which the officers were accused of using excessive force on a prisoner constituted an unlawful interception of private communication).

<sup>79</sup> *See, e.g., Agnew v. Dupler*, 717 A.2d 519, 523-24 (Pa. 1998) (finding no reasonable expectation of privacy for police conversations conducted in the squad room, which could be overheard without amplification); *Commonwealth v. Henlen*, 564 A.2d 905, 907 (Pa. 1989) (holding that a suspect interviewed by a state trooper who submitted a recorded interview in a complaint against a state trooper could not be prosecuted for violating the Wiretap Act).

Pennsylvania police officers, however, continue to invoke the wiretap statute against those who antagonize them by recording them. *See, e.g., Kelly v. Borough of Carlisle*, No. 09-2644, 2010 U.S. App. LEXIS 20430, at \*22 (3d Cir. Oct. 4, 2010) (“[A]t the time of Kelly’s arrest, it was clearly established that a reasonable expectation of privacy was a prerequisite for a Wiretap Act violation. Even more to the point, two Pennsylvania Supreme Court cases—one almost 20 years old at the time of Kelly’s arrest—had held that covertly recording police officers was not a violation of the Act. Finally, it was also clearly established that police officers do not have a reasonable expectation of privacy when recording conversations with suspects.”); *Matheny v. County of Allegheny*, No. 09-1070, 2010 WL 1007859, at \*6-7 (W.D. Pa. Mar. 16, 2010) (granting qualified immunity for police officers who arrested an activist on wiretap charges for the video recording of a friend’s detention despite later dismissal of charges); *cf. Paula Reed Ward, DA’s Office Agrees to Unusual Settlement*, PITTSBURGH POST GAZETTE, July 15, 2010, at B1, available at 2010 WLNR 14156921 (describing the agreement of the District Attorney’s office in *Matheny* to distribute legal memorandum concluding that recording police in public does not violate Wiretap Act). Readers should be aware that I serve as counsel to the team that represents the plaintiff in *Matheny*.

commenting that “[i]n this rapid information technology era in which we live, it is hard to imagine that either an offender or an officer would have any reasonable expectation of privacy with regard to what is said between them in a traffic stop on a public highway.”<sup>80</sup>

Other states, however, have upheld prosecutions of citizens who record police in the exercise of their duties. The leading case is *Commonwealth v. Hyde*,<sup>81</sup> in which the defendant tape-recorded a traffic stop during which he contended that he was harassed because of his long hair. When Hyde went to the police station to file a formal complaint and submitted the tape recording as substantiation, he was arrested, prosecuted, and convicted under the Massachusetts Wiretap Act on the ground that he had not obtained the consent of the arresting officers.<sup>82</sup> The Supreme Judicial Court of Massachusetts affirmed the conviction and concluded that “the Legislature intended . . . strictly to prohibit all secret recordings by members of the public, including recordings of police officers or other public officials interacting with members of the public, when made without their permission or knowledge.”<sup>83</sup> In the aftermath of *Hyde*, Massachusetts police officers invoked the wiretapping statute to arrest bystanders who recorded arrests on cell phones.<sup>84</sup> Massachusetts courts have

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<sup>80</sup> State v. Graber, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at \*17 (Sept. 27, 2010). The judge continued, “Those of us who are public officials and are entrusted with the power of the state are ultimately accountable to the public. When we exercise that power in public fora, we should not expect our actions to be shielded from public observation. Sed quis custodiet ipsos cutodes [sic].” *Id.* at \*35 (internal quotation marks omitted).

<sup>81</sup> *Commonwealth v. Hyde*, 750 N.E.2d 963 (Mass. 2001). For adverse commentary on *Hyde*, see, for example, Howard M. Wasserman, *Orwell’s Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 649-52 (2009). See also *id.* (“It is inconsistent with democracy and democratic political accountability for government officials to have protectable privacy interests when performing official functions . . . .”); Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to Check Police Officers’ Power*, 117 YALE L.J. 1549, 1551-55 (2008) (arguing that citizen recordings provide a valuable external check on police corruption and that current protections against abuse are insufficient).

<sup>82</sup> *Hyde*, 750 N.E. 2d at 964-65.

<sup>83</sup> *Id.* at 967.

<sup>84</sup> See Daniel Rowinski, *Police Fight Cell Phone Recordings: Witnesses Taking Audio of Officers Arrested, Charged with Illegal Surveillance*, BOS. GLOBE, Jan. 12, 2010, at 1, available at 2010 WLNR 610060 (describing arrests in Massachusetts of civilians recording police officers in 2007 and 2008); Harvey Silverglate & James Tierney, *Echoes of Rodney King*, BOS. PHOENIX, Feb. 21, 2008, available at <http://thephoenix.com/boston/News/56680-Echoes-of-Rodney-King> (recounting arrest of Simon Glik, who “used his cell phone to record Boston police officers making what he thought was an overly forceful arrest”); cf. *Jean v. Mass. State Police*, 492 F.3d 24, 25, 33 (1st Cir. 2007) (enjoining police officers from interfering with Internet publication of images of a warrantless police

upheld the conviction of a freelance journalist who photographed and tape-recorded police officers at a political rally,<sup>85</sup> and refused to dismiss a cause of action against a defendant who “[d]uring his arrest, transport and booking . . . secretly tape recorded the entire incident.”<sup>86</sup> In Illinois, where legislation was amended to target the recording of police officers,<sup>87</sup> the ACLU brought suit to invalidate the ban, although the suit was recently dismissed for lack of standing.<sup>88</sup>

Many states have not yet resolved the application of their wiretap prohibitions to distributed image capture. In situations where there is doubt about state law, courts have allowed arresting officers who seek to suppress image capture and distribution to invoke qualified immunity to shield their arrests from subsequent damage actions.<sup>89</sup>

## 2. Catchall Statutes: Interference, Disobedience, and Disorderly Conduct

Where wiretap prohibitions do not apply, officers faced with defiant videographers frequently turn to broader criminal statutes that provide substantial enforcement discretion. In recent years, police officers in Philadelphia arrested a man who filmed the arrest of his neighbor on a cell phone for “obstructing an investigation.”<sup>90</sup> Police

search and arrest recorded on “nanny-cam,” but suggesting that the capture of images could be subject to prosecution in cases where the “government interests in preserving privacy and deterring illegal interceptions” are more compelling).

<sup>85</sup> Commonwealth v. Manzelli, 864 N.E.2d 566, 568 (Mass. App. Ct. 2007).

<sup>86</sup> Gouin v. Gouin, 249 F. Supp. 2d 62, 79 (D. Mass. 2003) (internal quotation marks omitted).

<sup>87</sup> Compare People v. Beardsley, 503 N.E.2d 346, 350 (Ill. 1986) (holding that a wiretap statute did not forbid recording police officers), with 720 ILL. COMP. STAT. ANN. 5/14-1(d) (West Supp. 2009) (superseding *Beardsley*, and defining “conversation” as “any oral communication . . . regardless of whether one or more of the parties intended their communication to be of a private nature”).

<sup>88</sup> ACLU v. Alvarez, No. 10-5235, 2010 U.S. Dist LEXIS 115354, at \*6, \*11 (N.D. Ill. Oct. 28, 2010); see also Becky Schlikerman & Kristen Mack, *ACLU Challenges State’s Eavesdropping Law*, CHI. TRIB., Aug. 20, 2010, at 1, available at 2010 WLNR 16605495 (describing the ACLU’s legal action).

<sup>89</sup> See, e.g., Skoog v. County of Clackamas, 469 F.3d 1221, 1225, 1235 (9th Cir. 2006) (granting qualified immunity to an officer for seizure of the plaintiff’s camera and arrest of the plaintiff for filming the officer and “juvenile ‘decoy’” seeking to purchase tobacco).

<sup>90</sup> *Cell Phone Picture Called Obstruction of Justice: Man Arrested for Shooting Photo of Police Activity*, NBC10.COM, July 25, 2006 (quoting the photographer’s mother) (internal quotation marks omitted), <http://web.archive.org/web/20060821200354/http://www.nbc10.com/news/9574663/detail.html>. Creatively, the police also told the suspect “that he broke a[n] imaginary] new law that prohibits people from taking pictures of police with cell phones.” *Id.*; cf. Williamson v. Mills, 65 F.3d 155, 157-59 (11th Cir.

in St. Louis arrested a photographer for “interfering” with an officer when she recorded a police arrest of protesters at a health care rally.<sup>91</sup> Similar charges resulted in arrests of photographers at crime scenes and fires in Illinois, Arkansas, and Louisiana.<sup>92</sup>

A student photographer in State College, Pennsylvania who refused to cease photographing a riot faced trial for failure to obey an officer,<sup>93</sup> while a freelance photographer in Miami who insisted on filming an arrest was acquitted of disorderly conduct and disobeying an officer, but convicted of resisting arrest and obstructing a street.<sup>94</sup> Other police officers offended by citizens recording their activities have recently arrested private videographers on charges of harassment.<sup>95</sup>

1995) (reversing the district court’s grant of qualified immunity to a law enforcement officer who arrested, and seized the film of, a demonstration participant for photographing undercover officers).

<sup>91</sup> *Dueling Protesters Disrupt Carnahan Forum on Aging*, ST. LOUIS POST-DISPATCH, Aug. 7, 2009, at A1.

<sup>92</sup> See David Heinzmann, *Photographer Finds Himself in Hot Water with Police*, CHI. TRIB., Nov. 20, 2008, at 26, available at 2008 WLNR 22140824 (discussing two separate arrests of a freelance photographer in Chicago); Stacy Hudson, *Maumelle Reporter Cleared of Charges*, ARKANSAS DEMOCRAT-GAZETTE, Dec. 16, 2007, at 9, available at Factiva, Doc. No. AKDG000020071217e3cg0004c (discussing the arrest of a reporter who took a picture of a house fire in Little Rock, though the charges were later dropped); Sonia Smith, *Photographer Arrested at Crime Scene*, BATON ROUGE ADVOC., Jan. 18, 2009, at B2 (detailing the arrest of a photographer at a crime scene in Baton Rouge for interfering with a homicide investigation).

<sup>93</sup> Heather Schmelzlen, *Photographer Receives Misdemeanor Charges*, THE DAILY COLLEGIAN, Nov. 7, 2008, [http://www.collegian.psu.edu/archive/2008/11/07/photographer\\_receives\\_misdemea.aspx](http://www.collegian.psu.edu/archive/2008/11/07/photographer_receives_misdemea.aspx).

<sup>94</sup> See Press Release, Society of Professional Journalists, SPJ Leaders Express Disappointment in First Amendment Violation in Miami (June 19, 2008), available at <http://www.spj.org/news.asp?REF=812#812>; see also *Tarus v. Borough of Pine Hill*, 916 A.2d 1036, 1042-44 (N.J. 2007) (discussing the arrest for disorderly conduct of a resident who refused to cease filming a public meeting); *Special Officer Suspended After Arrest of Cameraman*, FIRST AMENDMENT CENTER, Oct. 28, 2008, <http://www.firstamendmentcenter.org/news.aspx?id=20796> (describing the suspension of an officer in Newark, New Jersey, for arresting a television cameraman for disorderly conduct for filming a demonstration); Carlos Miller, *Homeland Security Cop Arrests Man for Filming FBI Building in NYC*, PHOTOGRAPHY IS NOT A CRIME, PIXIQ (Aug. 20, 2009, 1:59 AM), <http://carlosmiller.com/2009/08/20/homeland-security-arrests-man-for-filming-fbi-building-in-nyc/> (discussing a photographer who was arrested for “disorderly conduct, failure to comply and impeding duties of a federal officer” and whose camera was seized for taking photos of an FBI building); Search and Seizure Warrant, *In Re Search of a Silver and Black Aiptek Handheld Video Camera Serial No. BMC70155393* (S.D.N.Y. Aug. 18, 2009), available at <http://carlosmiller.com/wp-content/uploads/2009/08/randallthomas.pdf> (arrest and search warrant).

<sup>95</sup> See, e.g., *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (discussing the arrest of a private videographer who filmed state troopers on a public highway on charges of harassment); Complaint at 1-2, *Hookway v. E. Vincent Twp.*,

### 3. Fiat: The “Crime” of Photographic Defiance of Authority

In the absence of viable charges under established criminal law, offended police officers frequently have baldly demanded that photographers cease their activities and surrender captured images; those who fail to comply with official fiat are subjected to arrest.<sup>96</sup> Thus, in Houston, authorities recently agreed to a \$1.7 million settlement of a lawsuit initiated by Erik and Sean Ibarra, who were arrested in 2002 at their home for photographing a sheriff department’s drug raid at a neighbor’s home and videotaping the subsequent struggle as sheriffs’ deputies pursued the Ibarra brothers into their home to destroy the images.<sup>97</sup> Although the former district attorney for the county later acknowledged that taking photos of officers “is not, per se, illegal,” the sheriff’s department maintains that the deputies acted appropriately.<sup>98</sup>

Police in Seattle settled a case for the arrest of Bogdan Mohora, an amateur photographer who was taking pictures of scenery when he captured images of an arrest on a public street and refused to relinquish the photos to the pictured officers. He was released when no charges against him could be substantiated.<sup>99</sup> Similarly, a press photo-

No. 08-05821 (E.D. Pa. Dec. 15, 2008) (complaint against police who arrested a videographer); see also Tim Eberly, *Man Is Cleared to Record Police*, THE FRESNO BEE, June 6, 2006, at B1, available at 2006 WLNR 9703080 (reporting the dismissal of a police effort to enjoin a private videographer for harassment, and the imposition of attorneys’ fees on the city); *Reedley Drops Case Against Cop Watcher*, KFSN-TV, Mar. 8, 2006, updated Mar. 23, 2006, <http://abclocal.go.com/kfsn/story?section=news/local&id=3975295> (discussing the charges against an activist who videotapes police and posts videos on “Copwatch” blog).

<sup>96</sup> See, e.g., Sean Gardiner, *Shoot First, Hand Over Film Later*, VILLAGE VOICE (New York), June 11–17, 2008, at 9 (reporting an incident in which police demanded that a commercial photographer hand over film that he shot in public on Coney Island). For ongoing documentation of examples of harassment of photographers in public, see links at Carlos Miller, *Photography Is Not a Crime*, PIXIQ, <http://carlosmiller.com> (last visited Oct. 15, 2010).

<sup>97</sup> Peggy O’Hare et al., *County Settles with Ibarra for \$1.7 Million*, HOUS. CHRON., Mar. 4, 2008, at A1, available at 2008 WLNR 4321540.

<sup>98</sup> Peggy O’Hare, *Ex-DA Takes Stand in Trial*, HOUS. CHRON., Feb. 27, 2008, at B1 (internal quotation marks omitted), available at 2008 WLNR 3846533; see also O’Hare, *supra* note 97, at A1 (reporting that the sheriff did “not see where his deputies did anything blatantly wrong”); cf. Dan McKay, *Officer Contests Firing over Attack*, ALBUQUERQUE J., Jan. 7, 2009, at C2, available at LEXIS (discussing a case in which police officer Daniel Guzman “had been caught on camera sizing up, then lunging at veteran KOB-TV cameraman Rick Foley”).

<sup>99</sup> Scott Gutierrez, *Photographer Gets \$8000 for Wrongful-Arrest Claim*, SEATTLE POST-INTELLIGENCER, Nov. 13, 2007, at B2, available at 2007 WLNR 22586931. The Seattle police department subsequently issued a policy that “clearly reminds officers that bystanders have a right to watch or film officers making an arrest.” Scott Gutierrez, *Policy Clarifies Bystanders’ Rights in Police Incidents*, SEATTLE POST-INTELLIGENCER, June 5, 2008, at

grapher who was arrested and then released after taking photographs at the 2008 Republican National Convention in Minneapolis reports hearing the arresting officer inquire, after tackling him and tying his hands, “What do we charge him with?”<sup>100</sup>

Since September 11, a number of governmental agencies have promulgated warnings that photography of public locations could be a precursor to terrorist attacks.<sup>101</sup> As these concerns collide with the

B3. The policy apparently has been less than fully internalized. See Sabra Gertsch, *Cell Phone Snapshot Lands Man in Jail*, KOMONEWS.COM, May 14, 2009, <http://www.komonews.com/news/45065832.html> (describing a twenty-nine-year-old who was detained, handcuffed, and arrested after taking a photo of armored car guards opening an ATM machine); see also *Photographer, Rick Dembow Begins Trial and Lawsuit Against City of New York and NYPD*, NAT'L PRESS PHOTOGRAPHERS ASS'N (Jan. 2009), [http://www.nppa2.org/2009\\_archives/0109\\_archives.html#rick\\_dembow](http://www.nppa2.org/2009_archives/0109_archives.html#rick_dembow) (“As Rick Dembow attempted to photograph the arrest of Peter Foley an [NYPD] officer was instructed to arrest and handcuff Dembow.”); Rafael Martínez Alequín, *NYPD Pix the Wrong Guy*, YOUR FREE PRESS (Feb. 18, 2009, 5:16 PM), <http://yourfreepress.blogspot.com/2009/02/nypd-pix-wrong-guy.html> (discussing the settlement of the Dembow case for \$45,000).

<sup>100</sup> David Brauer, *AP Photographer's Last Pre-arrest Shot Is a Stunner*, MINNEAPOLIS POST, Sept. 3, 2008 (internal quotation marks omitted), [http://www.minnpost.com/stories/2008/09/03/3320/ap\\_photographers\\_last\\_pre-arrest\\_shot\\_is\\_a\\_stunner](http://www.minnpost.com/stories/2008/09/03/3320/ap_photographers_last_pre-arrest_shot_is_a_stunner). Airline officials have demonstrated a similar sense of entitlement. See Aaron Royster, *Woman Detained by Airline over Video*, KINGMAN DAILY MINER, Aug. 7, 2008, <http://www.kingmandailyminer.com/main.asp?SectionID=1&subsectionID=1&articleID=16860> (describing the arrest of an airline passenger who refused to delete video of an in-flight argument between passengers upon demand of the flight attendant).

<sup>101</sup> See, e.g., INFO. SHARING ENV'T, INFORMATION SHARING ENVIRONMENT (ISE) FUNCTIONAL STANDARD (FS) SUSPICIOUS ACTIVITY REPORTING (SAR) VERSION 1.5, at 29 & n.11 (2009), available at [http://www.niem.gov/pdf/ISE-FS-200\\_ISE-SAR\\_Functional\\_Standard\\_V1\\_5\\_Issued.pdf](http://www.niem.gov/pdf/ISE-FS-200_ISE-SAR_Functional_Standard_V1_5_Issued.pdf) (suggesting investigation and reporting of the “[t]aking [of] pictures or video of facilities, buildings, or infrastructure in a manner that would arouse suspicion in a reasonable person,” but observing in a footnote that such activities are generally “First Amendment-protected activities”); Bianca Phillips, *Tourist or Terrorist?*, MEMPHIS FLYER, Apr. 3, 2008, at 9, available at 2008 WLNR 7466117 (quoting an official of the Tennessee Fusion Center as saying “[y]ou may think a guy is just shooting pictures, but if you report it to us, we'll send it on to the FBI” (internal quotation marks omitted)); *Report Suspicious Activity*, COLO. INFO. ANALYSIS CTR., <https://www.ciac.co.gov/index.cfm?fuseaction=main.incident> (last visited Oct. 15, 2010) (seeking reports of “the use of cameras, note taking, drawing diagrams, [or] annotating on maps” as one of the “Eight Signs of Terrorism”); see generally Letter from Ronald A. Jackson, Ass't Gen. Counsel for Operations, U.S. Dep't of Transp., to Arthur B. Spitzer, Legal Dir. A.C.L.U. of the Nat'l Capital Area (Aug. 19, 2009), available at <http://transportation.house.gov/Media/fileEconomics%20Development/20090923/McCann%20Testimony.pdf> (discussing the policy regarding photography of Department of Transportation buildings); Special Security Bulletin, U.S. Dep't of Homeland Sec., *Photography of Federally Owned and Leased Facilities* (Nov. 10, 2004), available at <http://transportation.house.gov/Media/file/Economic%20Development/20090923/McCann%20Testimony.pdf> (outlining guidelines regarding photography of federal facilities); *Transportation Walk Photographer Harassment (Near National's Park)*, FLICKR (Apr. 15, 2009, 8:45 AM), <http://www.flickr.com/groups/dcphtorights/discuss/>

spread of digital photography, baseless arrests of landscape photographers on suspicion of terrorism have proliferated.

New York City has been the epicenter of the phenomenon. Photographers have been arrested or required to relinquish their images for taking photographs near landmarks and subway stations<sup>102</sup> and for photographing trains.<sup>103</sup> Amtrak police arrested a New York photographer for capturing images in order to participate in an Amtrak-sponsored photography contest.<sup>104</sup> The Department of Homeland Security recently settled a case arising out of an arrest for photographing the exterior of a New York federal courthouse; the plaintiff recovered damages, and the Federal Protective Service agreed to issue a directive

72157616811370838 (discussing incidents in which photographers were prevented from capturing images of Department of Transportation buildings).

<sup>102</sup> Graduate student Arun Wiita was detained while taking pictures near a subway station, and movie maker Rakesh Sharma was detained while filming taxis in Manhattan. See Edith Honan, *New York City Sued for Harassing Photographers*, REUTERS, Dec. 6, 2007, available at <http://www.reuters.com/article/domesticNews/idUSN0625091620071206>. Both photographers sued and both cases were ultimately settled. See *Indian Filmmaker Wins NY Lawsuit*, INDIAN EXPRESS (May 25, 2007) <http://www.indianexpress.com/news/indian-filmmaker-wins-ny-lawsuit/31794> (detailing the settlement of the Sharma case for damages and agreement to adopt new rules regarding photography of public places); *Interview by Jen Carlson with Arun Wiita*, GOETHAMIST (June 19, 2009), [http://gothamist.com/2009/06/19/arun\\_wiita\\_subway\\_project\\_1.php](http://gothamist.com/2009/06/19/arun_wiita_subway_project_1.php) (describing the settlement of the Wiita case for damages).

<sup>103</sup> See, e.g., Jim Dwyer, *No Photo Ban in Subways, Yet an Arrest*, N.Y. TIMES, Feb. 18, 2009, at A21 (describing the arrest of Robert Taylor for photographing subway trains, with police spokesman stating that “officers misinterpreted the rules concerning photography,” but “will press on with charges of impeding traffic and unreasonable noise” (quoting Paul J. Browne, NYPD chief spokesman) (internal quotation marks omitted)); Daryl Lang, *No Photo Ban, But Photogs Still Getting Hassled over Transit Shots*, PHOTO DISTRICT NEWS (Mar. 17, 2006), [http://www.pdnonline.com/pdn/eseach/article\\_display.jsp?vnu\\_content\\_id=1002199058](http://www.pdnonline.com/pdn/eseach/article_display.jsp?vnu_content_id=1002199058) (describing harassment by transit police intended to stop photographers from taking pictures of the Long Island Railroad).

<sup>104</sup> Carlos Miller, *Amtrak Photo Contestant Arrested by Amtrak Police in NYC’s Penn Station*, PHOTOGRAPHY IS NOT A CRIME (Dec. 27, 2008, 3:29 AM), <http://carlosmiller.com/2008/12/27/amtrak-police-arrest-photographer-participating-in-amtrak-photo-contest>; see also Colbert Report, *Nailed ‘Em: Amtrak Photographer* (Comedy Central television broadcast, Feb. 2, 2009), available at <http://www.colbertnation.com/the-colbert-report-videos/217341/february-02-2009/nailed-em-amtrak-photographer> (humorously reporting the news story of Amtrak police arresting photographer Duane Kerzic); Daryl Lang, *Arrested for Photographing a Train: “It’s Almost Embarrassing.”* PHOTO DISTRICT NEWS (Feb. 18, 2009), [http://www.pdnonline.com/pdn/content\\_display/eseach/e3i81e87508e923955f84619b82090e19f2](http://www.pdnonline.com/pdn/content_display/eseach/e3i81e87508e923955f84619b82090e19f2) (describing the “five-figure settlement” of Kerzic’s false-arrest suit after broadcast of the Colbert piece (quoting Todd Maisel, Region 2 Director of the Nat’l Press Photographers Ass’n) (internal quotation marks omitted)).



acknowledging the “public’s general right to photograph the exterior of federal courthouses from publicly accessible spaces.”<sup>105</sup>

Similar arrests have befallen recreational photographers around the country,<sup>106</sup> as well as an art professor who photographed power lines in Snohomish, Washington,<sup>107</sup> and a news photographer who photographed a nuclear plant in Vermont.<sup>108</sup>

Many of these prosecutions have ultimately been dropped or dismissed, but the threat of arrest remains a potent deterrent to spontaneous photographers who have no deep commitment to capturing any particular image. Even for photographers and videographers who set out to document specific interactions, the opportunity to ultimately return to their efforts after an arrest does little to mitigate the obstacle to effective participation in digital discourse. The crucial importance of image capture lies precisely in its provision of verifiable contemporaneous records of events; those records are lost when arrest prevents recording.

#### IV. THE PUZZLES OF FIRST AMENDMENT PROTECTION OF PERVERSIVE IMAGE CAPTURE

Pervasive image capture confronts a landscape of legal risks that threatens its promises of public dialogue and private memory. The conjunctive prospects of expanded common law torts, statutory con-

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<sup>105</sup> Stipulation and Order of Dismissal at 2, *Musumeci v. Dep’t of Homeland Sec.*, No. 10-3370 (S.D.N.Y. Oct. 6, 2010); see also David W. Dunlap, *You Can Photograph That Federal Building*, N.Y. TIMES BLOGS (Oct. 18, 2010, 6:00 PM), <http://lens.blogs.nytimes.com/2010/10/18/you-can-photograph-that-federal-building>.

<sup>106</sup> See *Union Station: A Comprehensive Look at the Private Management, the Public Space, and the Intermodal Spaces Present and Future: Hearing Before the Subcomm. on Econ. Dev., Pub. Bldgs., and Emergency Mgmt. of the H. Comm. on Transp. and Infrastructure*, 110th Cong. 143-55 (2008) (statement of Erin McCann, amateur photographer) (describing harassment of photographers in Union Station); Anny Shin, *When Freedom of Photography Doesn’t Click*, WASH. POST, July 26, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/25/AR2010072502795.html?nav=emailpage> (reporting that a guard ordered a recreational photographer not to photograph a U.S. Department of Housing and Urban Development building); Lang, *supra* note 104 (“It’s not just New York City Transit, it’s across the country” (quoting Todd Maisel, Region 2 Director of the Nat’l Press Photographers Ass’n) (internal quotation marks omitted)).

<sup>107</sup> See *Scheier v. City of Snohomish*, No. 07-1925, 2008 WL 4812336, at \*1-3 (W.D. Wash. Nov. 4, 2008); see also Robert L. Jamieson, Jr., *We’ve Seen the Enemy, and He Is Us: Photo Student Experiences the ‘Real Threat’ To America*, SEATTLE POST-INTELLIGENCER, July 14, 2004, at B1, available at LEXIS (reporting that a photography student was detained by police for taking pictures of a tourist attraction at Ballard Locks).

<sup>108</sup> Linda Rothstein, Editor’s Note, *Nuclear Insecurity*, BULL. OF THE ATOMIC SCIENTISTS, Jan.–Feb. 2002, at 2.

straints, and the invocation of catchall statutes interact with law enforcement authority to retaliate against photographers or videographers. To resolve the confrontation, courts must address the status of the emerging medium under the First Amendment. Although many courts have recognized First Amendment protection, their analyses do not effectively respond to other commentators and courts who suggest that image capture lies outside the aegis of the First Amendment. It is to this task that I now turn.

In the last decade, a solid line of courts has recognized that image capture can claim protection under the First Amendment. The First Circuit upheld a damages award against a police officer who arrested an amateur video journalist for recording a conversation between government officials following a public meeting, commenting that the plaintiff's activities involved "the exercise of his First Amendment rights."<sup>109</sup> The Second Circuit determined that the First Amendment protects the right of an art photographer to use nude models for a photo shoot.<sup>110</sup> The Ninth Circuit sustained a cause of action against a police officer who allegedly assaulted an amateur photographer seeking to film a political demonstration, recognizing a "First Amendment right to film matters of public interest."<sup>111</sup> The Eleventh Circuit ob-

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<sup>109</sup> *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999); *see also Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 94-95 (D. Mass. 2002) (finding that producers for a community television channel had "a constitutionally protected right to record matters of public interest" and could not be precluded from recording statements in public without signed consents); *Cirelli v. Town of Johnston Sch. Dist.*, 897 F. Supp. 663, 669 (D.R.I. 1995) (protecting the right of a teacher to videotape health-code violations while on school grounds); *Connell v. Town of Hudson*, 733 F. Supp. 465, 473 (D.N.H. 1990) (finding First Amendment protection for a news photographer taking pictures at an accident scene).

<sup>110</sup> *Tunick v. Safir*, 228 F.3d 135, 137 (2d Cir. 2000); *see also Tunick v. Safir*, 209 F.3d 67, 82 (2d Cir. 2000) ("While there may be classroom hypotheticals that explore the hazy line between nude photography as unprotected conduct and nude photography as artistic expression, this is not such a case."). Lower courts in the Second Circuit have recognized that the First Amendment constrains efforts to interfere with image capture. *See, e.g., Davis v. Stratton*, 575 F. Supp. 2d 410, 421 (N.D.N.Y. 2008) (holding that the activity of a preacher videotaping his presentation on a college campus is protected), *rev'd on other grounds, Davis v. Stratton*, 360 F. App'x 182 (2d Cir. 2010); *Baker v. City of New York*, No. 01-4888, 2002 U.S. Dist. LEXIS 18100, at \*17-19 (S.D.N.Y. Sept. 25, 2002) (determining that a professional photographer offering to photograph passersby could invoke First Amendment protections); *Krukowski v. Swords*, 15 F. Supp. 2d 188, 194-96 (D. Conn. 1998) (acknowledging that the photographer photographing and videotaping sessions of an aspiring model invoked First Amendment protections).

<sup>111</sup> *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *see also Schnell v. City of Chicago*, 407 F.2d 1084, 1085-86 (7th Cir. 1969) (allowing a cause of action by news photographers who covered demonstrations at the 1968 Democratic National Convention in Chicago against the police for "interfering with plaintiffs' constitutional

served that members of the public have “a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct” because “[t]he First Amendment protects the right to gather information about what public officials do on public property.”<sup>112</sup> Federal trial judges in other circuits have come to similar conclusions.<sup>113</sup>

These cases, however, in the main assert, rather than argue for, First Amendment protection,<sup>114</sup> and other authorities question whether pro-

right to . . . photograph news events” (internal quotation marks omitted), *overruled on other grounds*, *City of Kenosha v. Bruno*, 412 U.S. 507 (1973); *Cuviello v. City of Stockton*, No. 07-1625, 2009 U.S. Dist. LEXIS 4896, at \*34-36 (E.D. Cal. Jan. 23, 2009) (holding that animal rights protestors have a First Amendment right to videotape a circus from a public street); *Cuviello v. City of Oakland*, No. 06-5517, 2007 U.S. Dist. LEXIS 59833, at \*7-8 (N.D. Cal. Aug. 14, 2007) (same); *cf. Johnson v. Howe*, 388 F.3d 676, 682-83, 687 n.3 (9th Cir. 2004) (holding that state law “does not criminalize the recording of a ‘police officer in the performance of an official function on a public thoroughfare,’” but declining to reach the First Amendment claim on procedural grounds (quoting *Alford v. Haner*, 333 F.3d 972, 977 (9th Cir. 2003))); *Alford*, 333 F.3d at 976 (same), *rev’d on other grounds*, *Devenpeck v. Alford*, 543 U.S. 146 (2004).

<sup>112</sup> *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *see also Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994) (finding plaintiffs’ interest in filming public meetings may be protected by the First Amendment if the reason for the ban was not “content-neutral”); *cf. Williamson v. Mills*, 65 F.3d 155, 157-59 (11th Cir. 1995) (per curiam) (reversing the district court’s grant of qualified immunity to a police officer who arrested and seized the film of a political demonstration participant who photographed undercover officers).

<sup>113</sup> *See Pomykacz v. Borough of W. Wildwood*, 438 F. Supp. 2d 504, 513 n.14 (D.N.J. 2006) (finding that plaintiff’s “photography . . . was part and parcel of her political activism” and therefore should be analyzed like speech under the First Amendment); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005) (holding that the plaintiff had a First Amendment right to videotape state troopers conducting truck inspections on a public highway); *Lambert v. Polk Cnty.*, 723 F. Supp. 128, 133 (S.D. Iowa 1989) (finding that the plaintiff had a First Amendment right to display and disseminate a videotape he recorded of a street fight occurring while he was present with a video camera); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972) (suggesting that a news photographer at a crime scene has a First Amendment right to be present “in public places and on public property to gather information, photographically or otherwise”); *State v. Graber*, No. 10-0647, 2010 Md. Cir. Ct. LEXIS 7, at \*34 (Sept. 27, 2010) (“Many courts have held that the video taping of public events is protected under the First Amendment. . . . With all due respect to the Maryland General Assembly, it cannot criminalize otherwise protected activity.”).

<sup>114</sup> The same is largely true of commentators. *See, e.g., A. Michael Froomkin, The Death of Privacy?*, 52 STAN. L. REV. 1461, 1511 (2000) (“It is inconceivable, for example, that a ban on capturing all photographic images in public could possibly be squared with the First Amendment . . .”); *cf. WILLIAM GOLDMAN, THE PRINCESS BRIDE: S. MORGENSTERN’S CLASSIC TALE OF TRUE LOVE AND HIGH ADVENTURE* 114 (Harcourt 2007).

A notable exception is the thoughtful work of Diane Leenheer Zimmerman, who has considered in admirable depth the First Amendment protection of photography and the right to gather information more generally. *See Zimmerman, supra* note 76, at

hibitions of image capture should raise First Amendment objections.<sup>115</sup> Even proponents of the virtues of image capture tend to be tentative in asserting its protected status in First Amendment theory and doctrine.<sup>116</sup>

It is therefore important to examine in some detail both the basis for doubts and the reasons that those doubts are ultimately unsustainable.

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1231 (“Reason, and not emotion, ought to drive the development of the law about newsgathering.”); Diane Leenheer Zimmerman, *Is There a Right to Have Something to Say? One View of the Public Domain*, 73 FORDHAM L. REV. 297, 325-32 (2004) (arguing that the right to gather content for speech is a prerequisite to the full exercise of the right to free speech); Diane Leenheer Zimmerman, *Overcoming Future Shock: Estes Revisited, or a Modest Proposal for the Constitutional Protection of the News-Gathering Process*, 1980 DUKE L.J. 641, 653-65 (1980) (arguing that the right to record falls within the general category of “speech” and that different mediums convey different meanings); see also Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097 (1999) (discussing First Amendment implications of antipaparazzi statutes and tort doctrine).

<sup>115</sup> See, e.g., *Kelly v. Borough of Carlisle*, No. 09-2644, 2010 U.S. App. LEXIS 20430, at \*36-37 (3d Cir. Pa. Oct. 4, 2010) (“[T]he cases addressing the right of access to information and the right of free expression do not provide a clear rule regarding First Amendment rights to obtain information by videotaping . . . police officers during traffic stops.”); *Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3d Cir. 2005) (“[V]ideotaping or photographing the police in the performance of their duties on public property may be a protected activity.”); *Banks v. Gallagher*, No. 08-1110, 2010 U.S. Dist. LEXIS 55308, at \*29-37 (M.D. Pa. Mar. 18, 2010) (defendant police officer entitled to qualified immunity due to the lack of “a clearly established right to videotape a police officer”), *adopted by Banks v. Gallagher*, No. 08-1110, 2010 U.S. Dist. LEXIS 45364 (M.D. Pa. May 10, 2010); *Gravolet v. Tassin*, No. 08-3646, 2009 U.S. Dist. LEXIS 45876, at \*11-12 (E.D. La. June 2, 2009) (same); *McCormick v. City of Lawrence*, 325 F. Supp. 2d 1191, 1206 (D. Kan. 2004) (“Even if Plaintiffs have alleged a constitutional violation, however, the court determines that it is not clearly established that destruction of recordings constitutes violation of the First Amendment.”), *aff’d*, 130 F. App’x 987 (10th Cir. 2005); see also cases and authorities cited *infra* notes 116, 118, 119, 139-41, and 179-79.

<sup>116</sup> See Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 255 (2004) (“[T]he Court has created a legal scheme governing a First Amendment right to gather information that is . . . fragmented and inconsistent . . . .”); Wasserman, *supra* note 81, at 614 (“The answers to these questions move us into an uncharted and under-theorized First Amendment realm.”); Zimmerman, *supra* note 76, at 1209 (“[I]t is not obvious whether a tort rule or criminal statute that prohibits recordation of something that can legally be heard or observed is a neutral regulation of an action or a direct restriction on speech.”); Mishra, *supra* note 81, at 1550 (“[T]he First Amendment protects individuals . . . who *distribute* recordings of illegal police conduct. But it probably does not protect individuals . . . who *produce* the recordings.”).

## V. IMAGE CAPTURE AND THE DEFINITION OF “SPEECH”

A. *Images and Messages: “Speech,” “Action,” and “Inherently Expressive” Media*

An initial set of objections begins with the words of the First Amendment: its protection extends only to freedom of “speech” and “the press.”<sup>117</sup> Some discursive acts which convey messages—for example, American Sign Language gestures or tapping keys in Morse code—are clearly recognizable as “speech.” But an image, it is said, is not necessarily “speech”; it “must communicate some idea in order to be protected under the First Amendment.”<sup>118</sup> Image capture, skeptics maintain, records data rather than communicating ideas.<sup>119</sup>

There is a core of force to this objection: it is common currency that not all actions can claim First Amendment protection. As the Court observed, “[I]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one’s friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of

<sup>117</sup> U.S. CONST. amend. I.

<sup>118</sup> *Montefusco v. Nassau County*, 39 F. Supp. 2d 231, 241 (E.D.N.Y. 1999) (citing *Bery v. City of New York*, 97 F.3d 689, 695 (2d Cir. 1996)). *Montefusco* also suggested that photographs captured by a voyeuristic hobbyist contained “no identifiable message sought to be communicated” and therefore were without First Amendment protection. *Id.* at 242, n.7. See *Ramberran v. Dellacona*, No. 07-0304, 2008 U.S. Dist LEXIS 25476, at \*7 (E.D.N.Y. Mar. 31, 2008) (stating that the plaintiff “has not alleged any expressive or artistic purpose for filming students in his mathematics classroom . . . [and therefore] allegations fail to demonstrate any infringement of protected speech”); *Porat v. Lincoln Towers Cmty. Ass’n*, No. 04-3199, 2005 WL 646093, at \*4 (S.D.N.Y. Mar. 17, 2005) (“[I]t is well established that in order to be protected under the First Amendment, images must communicate some idea.”); *Larsen v. Fort Wayne Police Dep’t*, No. 09-0055, 2010 U.S. Dist LEXIS 57955, at \*11 (N.D. Ind. June 11, 2010) (citing and quoting *Porat*); see also *Dreibelbis v. Scholton*, No. 05-2312, 2006 U.S. Dist LEXIS 37217, at \*10 (M.D. Pa. June 7, 2006) (“[A] dispute over child custody or visitation is of private, familial and personal concern. . . . Plaintiff’s videotaping was not a protected activity under the First Amendment . . .”), *aff’d*, 274 F. App’x 183 (3d Cir. 2008); *State v. Wright*, 931 So. 2d 432, 443 (La. Ct. App. 2006) (finding a video voyeurism statute “not overbroad because the challenged statute affects conduct rather than speech”).

<sup>119</sup> Professor McDonald, for example, accepts this analysis of free speech protection while arguing for the importance of a separate right to gather information under the press clause. See McDonald, *supra* note 116, at 268 (“Information gathering frequently consists of predominantly non-expressive conduct that is unable to lay claim to the core First Amendment protection accorded to expression itself.”); see also Wasserman, *supra* note 81, at 655 (“[T]he conduct at issue—using cameras, audio and video recorders, and computers to gather information for dissemination—cannot, in itself, be characterized as ‘expressive activity.’” (quoting McDonald, *supra* note 116, at 270)).

the First Amendment.”<sup>120</sup> In determining whether an isolated act is protectable “symbolic speech,”<sup>121</sup> opinions of the Court often give weight to the presence or absence of a “message conveyed.”<sup>122</sup>

In addressing this issue, however, it will not do to place too much emphasis on the words “speech” and “press.” Handwritten letters fall uncontroversially within the protection of the First Amendment, though they are neither “spoken” nor printed on a “press.” The Framers arguably viewed the First Amendment as a metonymic whole: protection of speech, press, and assembly were parts of the same fabric of intellectual autonomy as religion.<sup>123</sup>

In First Amendment doctrine, narrow parsing of the words of the Amendment has not determined its reach. By its terms, the Amendment binds only Congress. Yet the First Amendment applies to actions of the federal executive and judiciary, and the First Amendment constrains the states not by virtue of its text, but because of incorporation through the due process clause.

<sup>120</sup> *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). The Court in this case held that patronizing a dance hall for recreation was not protected speech. *Id.* The Supreme Court has regularly rejected the “view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” *United States v. O’Brien*, 391 U.S. 367, 376 (1968), *quoted with approval in* *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993); *Texas v. Johnson*, 491 U.S. 397, 404 (1989); *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam); *see also* *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965).

<sup>121</sup> *See, e.g., Rumsfeld v. Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 65 (2006) (quoting *O’Brien*, 391 U.S. at 376).

<sup>122</sup> *See, e.g., id.* at 63 (quoting *Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 527 (1995)). The Court also stated that the necessity of explanatory speech to convey the message “is strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection.” *Id.* at 66; *see also, e.g., City of Chicago v. Morales*, 527 U.S. 41, 53 (1999) (“Because the term ‘loiter’ is defined as remaining in one place ‘with no apparent purpose,’ it is also clear that it does not prohibit any form of conduct that is apparently intended to convey a message.”); *Johnson*, 491 U.S. at 404 (“[W]e have asked whether ‘[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.’” (quoting *Spence*, 418 U.S. at 410-11)).

<sup>123</sup> *See, e.g., Resolutions Adopted by the Kentucky General Assembly* (stating that the First Amendment guards “in the same sentence, and under the same words, the freedom of religion, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others”), in 30 *THE PAPERS OF THOMAS JEFFERSON* 551, 552 (Barbara B. Oberg ed., 2003); *see also* Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 *GEO. L.J.* 1057, 1059 (2009) (noting that early courts treated symbolic and verbal expression as “functionally equivalent when it came to speech restrictions”).

More importantly, the requirement of identifying a “message conveyed” is generally applied by the Court only to conduct that is not considered “inherently expressive.”<sup>124</sup> For courses of action that are recognized by social practice as comprising media of expression, the question is not whether a message is conveyed, but whether the conduct in question is a part of that recognized medium.<sup>125</sup> The Court has recognized that “[m]usic, as a form of expression and communication, is protected under the First Amendment”<sup>126</sup> without inquiring into the particular message communicated by the music, if indeed music could be rendered as propositional content. It has acknowledged that dancing “directed to an actual or hypothetical audience,” which “gives expression at least to generalized emotion or feeling,” rather than an articulable “message,” is “inherently expressive.”<sup>127</sup> It has determined that the “protected expression that inheres in a parade is not limited to its banners and songs . . . for the Constitution looks beyond written or spoken words as mediums of expression.”<sup>128</sup> Parades, in our society, are media of expression, like visual art and poetry: “a narrow, succinctly articulable message is not a condition of constitutional protection” for parades any more than it is for the “unquestionably shielded painting of Jackson Pollock, music of Arnold

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<sup>124</sup> *Rumsfeld*, 547 U.S. at 49 (stating that conduct that is not “inherently expressive” does not receive protection under *O’Brien*); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 695 n.22 (2000) (Stevens, J., dissenting) (suggesting that “the simple act of joining the Scouts . . . is not inherently expressive”); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289 (2000) (plurality opinion) (noting that “[b]eing ‘in a state of nudity’ is not an inherently expressive condition” but that nude dancing may be protected depending on “whether the State’s regulation is related to the suppression of expression” (quoting *Johnson*, 491 U.S. at 403)); *Barnes v. Glen Theatre*, 501 U.S. 560, 577 n.4 (1991) (Scalia, J., concurring) (reasoning that nudity is “not normally engaged in for the purpose of communicating an idea or emotion” and therefore is not “inherently expressive,” or, in Justice Scalia’s words, “conventionally expressive”).

<sup>125</sup> Dean Robert Post highlighted this point a decade and a half ago. See Robert Post, Essay, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1253-57 (1995) [hereinafter Post, *Recuperating*]. He reiterated the insight in Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 717 (2000) [hereinafter Post, *Encryption*]. While his precise criteria for “constitutionally recognized media for the communication of ideas,” Post, *Recuperating*, *supra*, at 1256, do not fully capture the relevant case law or considerations, his basic point that First Amendment doctrine borrows from social practice in recognizing “genre[s]” or “media” is profound and important. *Id.* at 1253.

<sup>126</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 790 (1989).

<sup>127</sup> *Barnes*, 501 U.S. at 581 (Souter, J., concurring); see also sources cited *supra* note 124.

<sup>128</sup> *Hurley v. Irish-American Gay, Lesbian, & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995).

Schoenberg, or Jabberwocky verse of Lewis Carroll.”<sup>129</sup> Public monuments constitute protected expression, though “monuments are almost certain to evoke different thoughts and sentiments in the minds of different observers, and the effect of monuments that do not contain text is likely to be even more variable.”<sup>130</sup>

So it is with captured images. In the last two generations, emerging technology and social practice have made captured images part of our cultural and political discourse.<sup>131</sup> Recognizing this development, the Court has treated images as media of communication without inquiring into an illusively specific message. In *Joseph Burstyn, Inc. v. Wilson*, the Court reversed a conclusion reached four decades earlier that movies lie outside of the protection of the First Amendment, commenting that “[i]t cannot be doubted that motion pictures are a significant medium for the communication of ideas[] . . . ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.”<sup>132</sup> In subsequent decisions, the Court regularly confirmed that images in films can claim First Amendment protection whether displayed publicly or reviewed in private, without inquiry into a particular “message conveyed.”<sup>133</sup>

<sup>129</sup> *Id.*

<sup>130</sup> *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1136 (2009).

[I]t frequently is not possible to identify a single “message” that is conveyed by an object or structure . . . . [By displaying] a privately donated monument . . . a city engages in expressive conduct, but the intended and perceived significance of that conduct may not coincide with the thinking of the monument’s donor or creator.

*Id.*

<sup>131</sup> See, e.g., DANIEL J. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 371 (1973) (arguing that “[p]hotography took the first giant step toward democratizing the repeatable experience” and transforming the nature of public discourse); KEVIN MICHAEL DELUCA, *IMAGE POLITICS: THE NEW RHETORIC OF ENVIRONMENTAL ACTIVISM* xi-xiii (1999) (examining the use of “image events” as a political tool); W.J.T. MITCHELL, *PICTURE THEORY: ESSAYS ON VISUAL AND VERBAL REPRESENTATION* 11-34 (1994) (arguing for recognition of the “pictorial turn” defining cultural discourse); Kevin Michael DeLuca & Jennifer Peeples, *From Public Sphere to Public Screen: Democracy, Activism, and the “Violence” of Seattle*, 19 *CRITICAL STUD. IN MEDIA COMMUN.* 125, 127 (2002) (introducing the “public screen” as a necessary supplement to the metaphor of the public sphere for understanding today’s political scene”).

<sup>132</sup> 343 U.S. 495, 501 (1952), *overruling in part* *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230 (1915). The *Joseph Burstyn* Court’s position was prefigured in dictum in *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948), which said, “We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”

<sup>133</sup> See, e.g., *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 826-27 (2000) (invalidating limitations on an “adult oriented” cable channel); *Schad v. Borough of*



The same conclusion has applied to images captured in a single frame.<sup>134</sup> Without inquiry into particular messages, the Court has deployed First Amendment principles to invalidate the prohibition of display in public view of “any motion picture, slide, or other exhibit in which the human male or female bare buttocks” appear,<sup>135</sup> the ban on published illustrations that involve photographs of United States currency which are not “newsworthy,”<sup>136</sup> an injunction against display of “images observable” by women seeking abortions,<sup>137</sup> and a statute prohibiting the production or possession of “any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture” that “appears to be[] of a minor engaging in sexually explicit conduct.”<sup>138</sup>

In the current state of the law and culture of discourse, captured images—like words inscribed on parchment—fall within the protection of “freedom of speech.”

Mount Ephraim, 452 U.S. 61, 65 (1981) (“Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.”); *Stanley v. Georgia*, 394 U.S. 557, 565, 568 (1969) (reversing an obscenity conviction for possession of three reels of eight-millimeter film and stating that “[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch”).

<sup>134</sup> *Kaplan v. California*, 413 U.S. 115, 119-20 (1973) (stating that First Amendment standards apply “to moving pictures, to photographs, and to words in books . . . . As with pictures, films, paintings, drawings, and engravings, both oral utterance and the printed word have First Amendment protection . . . .”); *cf. Massachusetts v. Oakes*, 491 U.S. 576, 591 (1989) (Brennan, J., dissenting) (“Photography, painting, and other two-dimensional forms of artistic reproduction . . . are plainly expressive activities that ordinarily qualify for First Amendment Protection.”); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 376-77 (1971) (plurality opinion) (applying First Amendment-based procedural requirements to the seizure of photographs).

<sup>135</sup> *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 207 (1975) (quoting a city ordinance) (internal quotation marks omitted).

<sup>136</sup> *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984) (plurality opinion).

<sup>137</sup> *Madsen v. Women’s Health Ctr., Inc.*, 512 U.S. 753, 773 (1994).

<sup>138</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 241 (quoting 18 U.S.C. § 2256(8)(B)(2000)) (internal quotation marks omitted); *see also United States v. Stevens*, 130 S. Ct. 1577, 1590 (2010) (invalidating a prohibition of depictions of animal cruelty: “Most hunting videos, for example, are not obviously instructional in nature, except in the sense that all life is a lesson.”); *New York v. Ferber*, 458 U.S. 747, 765 n.18 (1982) (stating that depictions of nudity, “without more,” are protected expression); *cf. Osborne v. Ohio*, 495 U.S. 103, 113 n.9, 115 n.11 (1990) (stating that a statute punishing a parent for giving “a family friend a picture of the parent’s infant taken while the infant was unclothed” would “criminalize[] constitutionally protected conduct,” but observing that, as construed, the statute prohibiting “possession and viewing of child pornography” did not reach that conduct).

### B. “Speech” and the Question of Audience

To conclude that images can comprise constitutionally protected expression does not end the matter. Skeptics raise a second objection. They argue that prohibitions on image capture, as opposed to display, do not constitute prohibitions on “speech” subject to First Amendment protection because the act of capturing images—unlike their display—does not speak to an audience.<sup>139</sup>

As one court put the claim, the act of capturing an image “does not partake of the attributes of expression; it is conduct, pure and simple.”<sup>140</sup> Another court took a similar approach: to establish First Amendment protection, “there must still be (1) a message to be communicated and (2) an audience to receive that message, regardless of the medium in which the message is sought to be ex-

<sup>139</sup> This position emerged early in the second half of the twentieth century. *E.g.*, *Dietemann v. Time, Inc.*, 449 F.2d 245, 249-50 (9th Cir. 1971) (“Privilege concepts developed . . . in privacy actions in which publication is an essential component are not relevant in determining liability for intrusive conduct antedating publication.”); Alfred Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1279 (1976) (“The act of intrusion does not involve communication. There are no problems under the [F]irst [A]mendment when a recovery is granted against the landlord who bugs the bedroom of his tenants . . .”); Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935, 957 (1968) (“Intrusion does not raise [F]irst [A]mendment difficulties since its perpetration does not involve speech or other expression. It occurs by virtue of the physical or mechanical observation of the private affairs of another . . .”).

The idea recurs in contemporary analysis. *E.g.*, *State v. Wright*, 40-0945 (La. App. 2 Cir. 5/19/06); 931 So. 2d 432, 443 (ruling that Louisiana’s video voyeurism statute “is not overbroad because the challenged statute affects conduct rather than speech”); John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1340 (2008) (“[Constitutionally protected] communication occurs [only] when Person A tries to convey a thought—some idea or feeling—to Person B, and Person B can freely *choose* whether to accept that thought.”); McClurg, *supra* note 55, at 995 n.22 (claiming that “the tort of intrusion . . . does not directly implicate the First Amendment because it focuses upon the manner in which information is acquired, rather than the dissemination of such information”).

<sup>140</sup> *D’Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538, 1541 (D.R.I. 1986), *aff’d without opinion*, 815 F.2d 692 (1st Cir. 1987); *see also* *Jones v. Lakeview Sch. Dist.*, No. 06-0630, 2007 WL 2084341, at \*7 (N.D. Ohio July 19, 2007) (ruling that taking pictures on school property “does not partake of the attributes of expression; it is conduct pure and simple” (quoting *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, No. 04-2329, 2006 U.S. Dist LEXIS 40027, at \*10 (N.D. Ohio June 16, 2006) (internal quotation marks omitted)); *Porat v. Lincoln Towers Cnty. Ass’n*, No. 04-3199, 2005 WL 646093, at \*4-5 (S.D.N.Y. Mar. 21, 2005) (denying protection to “purely private recreational, non-communicative photography” taken for photographer’s personal use), *aff’d*, 464 F.3d 274 (2d Cir. 2006).

pressed. . . . [I]f either is lacking, there is absolutely nothing to transmit 'from mind to mind.'<sup>141</sup>

So, too, a thoughtful Third Circuit judge limited protection of video recording, noting that the plaintiff "does not allege the [defendant] Township interfered with its speech or other expressive activity. Rather, the alleged constitutional violation consisted of a restriction on [plaintiff's] right to receive and record information."<sup>142</sup>

To be sure, one element of the freedom of expression that the First Amendment protects is the opportunity to communicate ideas, emotions, experiences, and information to an audience. On analysis, however, the claim that image capture falls outside the First Amendment because it collects rather than disseminates information runs aground.

### 1. Image Capture, Broadcast, and Technological Fortuity

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 true in the case of an image immediately conveyed to a single recipient.<sup>143</sup> As I have noted, sharing quotidian images with friends is an increasingly common use of cell phone cameras, and contemporary technology makes it both possible and attractive for cell phone users to upload images immediately and automatically upon capture to websites accessible to friends and family.<sup>144</sup>

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<sup>141</sup> *Montefusco v. Nassau Cnty.*, 39 F. Supp. 2d 231, 242 (E.D.N.Y. 1999).

<sup>142</sup> *Whiteland Woods, L.P. v. Twp. of W. Whiteland*, 193 F.3d 177, 183 (3d Cir. 1999).

<sup>143</sup> *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("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."); *id.* at 533 (recognizing a First Amendment interest in avoiding chilling private conversations); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985) (recognizing a First Amendment interest in private papers and letters); *Procurier v. Martinez*, 416 U.S. 396, 409 (1974) ("The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him as plain as that which results from censorship of her letter to him."), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989); *cf. Stanford v. Texas*, 379 U.S. 476, 485 (1965) (holding that seizure of books and private correspondence is subject to stringent review rooted in First Amendment protection).

<sup>144</sup> *See, e.g., Help, FLIXWAGON*, <http://www.flixwagon.com/help/index#a1> (last visited Oct. 15, 2010) ("Flixwagon is a mobile phone and web application that allows us-

For audience skeptics, this presumably would suffice to constitute “speech” transmitted “from mind to mind.” Yet it puts undue weight on technological fortuity to distinguish for First Amendment purposes between users who upload their images immediately and automatically, and those who either by choice or because of technological limits pause to edit their captured images before posting them on websites or sending them to correspondents.

We would recognize police seizure of, or prosecution for, drafts of letters or manuscripts as an interference with freedom of expression, even if the seizure occurred before the writer had decided to send or publish them, though no designated “audience” had been deprived of their content. So, too, image capture before the decision to transmit images falls within the scope of the emerging medium.<sup>145</sup> Indeed, the act of delaying publication in order to edit the stream of images seems more manifestly a part of protected expression than the act of automatically disseminating images wholesale.<sup>146</sup>

## 2. Diaries, Internal Dialogue, and Memory

It is simply not the case, moreover, that an external audience is or should be a necessary condition of First Amendment protection. The reversal of Robert Stanley’s conviction for possession of three reels of film containing images deemed obscene by the State of Georgia rested not on any plans to convey the film to other audiences, but on Stanley’s personal right “to read or observe what he pleases . . . in the privacy of his own home.”<sup>147</sup> Had he recorded the material himself, the result would have been no different.

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ers to broadcast and share live videos from their mobile phones to the [I]nternet.”); *Photocopter*, NTELOS WIRELESS, <http://www.nteloswireless.com/popups/photocopter.php> (last visited Oct. 15, 2010) (“Photocopter saves all your pictures to your PC and web albums instantly.”); *Qik Overview*, QIK, <http://qik.com/info/overview> (last visited Oct. 15, 2010) (allowing users to “[c]apture special or spontaneous moments on video using your mobile phone” and to “[s]hare the moments live or anytime later with anyone you choose”); Robin Wauters, *ImageShack Updates iPhone App with Powerful Photo, Video Sharing Options*, TECHCRUNCH (Jan. 12, 2010), <http://techcrunch.com/2010/01/12/imageshack-uploader-iphone-app> (describing an iPhone application with capacity to share directly to YouTube and Twitter in real time).

<sup>145</sup> Cf. Zimmerman, *supra* note 76, at 1208-09 & 1208 n.106 (comparing modern note-taking tools—tape recorders and video cameras—to traditional paper and pen, and suggesting that paper notes are likely to be protected under the First Amendment).

<sup>146</sup> Cf. *Harper & Row*, 471 U.S. at 547-48 (noting that “compilation of pure fact[] entails originality”).

<sup>147</sup> *Stanley v. Georgia*, 394 U.S. 557, 568 (1969); *see also United States v. Williams*, 553 U.S. 285, 288 (2008) (“[W]e have held that the government may . . . not criminal-

It is plain that a statute punishing me when I make an entry in my diary, draft a “memorandum to file,” or put an innocuous picture in my scrapbook would violate the First Amendment. A diary entry begins a process of communicating with an audience of one: my entries are subject to review by my future self. Analogously, many contemporary cell phone users capture images with an eye to future review.<sup>148</sup>

Diaries of words or images need not communicate with outsiders to merit constitutional protection under the First Amendment.<sup>149</sup> From the time that it began to incorporate the First Amendment as a protection against state actions, the Court has recognized that the Amendment’s principles extend to thought and speech—not to speech alone—observing that “freedom of thought, and speech [constitute] . . . the matrix, the indispensable condition, of nearly every other form of freedom.”<sup>150</sup> Nor has the Court abandoned the position in recent years. While continuing to recognize the importance of the First Amendment’s function in protecting communication with audiences, the Court has avowed that “freedom of thought and expression ‘includes both the right to speak freely and the right to refrain

ize the mere possession of obscene material involving adults.”); *United States v. Reidel*, 402 U.S. 351, 356 (1971) (refusing to extend First Amendment protection to distribute obscene materials: “The focus of [*Stanley*] was on freedom of mind and thought and on the privacy of one’s home.”).

<sup>148</sup> See *supra* Section II.A and note 18.

<sup>149</sup> See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 51-54 (1989) (arguing that defining “protected acts of expression” as “acts intended to communicate” is inadequate, as not all speech is intended for an outside audience (emphasis omitted)); *cf. Harper & Row*, 471 U.S. at 559 (concluding that the First Amendment shields “a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect” (quoting *Estate of Hemingway v. Random House, Inc.*, 244 N.E. 2d 250, 255 (N.Y. 1968)) (internal quotation marks omitted)).

<sup>150</sup> *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937), *overruled on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969) and *quoted with approval in Fed. Election Comm’n v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 264 (1986); see *Stanley v. Georgia*, 394 U.S. 557, 565 (1969) (“Our whole constitutional heritage rebels at the thought of giving government the power to control men’s minds.”); *Schneider v. Smith*, 390 U.S. 17, 25 (1968) (“[The First Amendment] create[s] a preserve where the views of the individual are made inviolate.”); *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought . . .” (citations omitted)); see also *United States v. Schwimmer*, 279 U.S. 644, 654-55 (1929) (Holmes, J., dissenting) (“[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought . . .”), *overruled by Girouard v. United States*, 328 U.S. 61 (1946).

from speaking at all.”<sup>151</sup> The Court has twice affirmed that “[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”<sup>152</sup>

Speech is protected not simply as a way of communicating with others, but as a means of defining the speaker’s thoughts, intellect, and memories. As Justice Kennedy observed, “[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”<sup>153</sup>

The government is barred from intermeddling in both speech and thought because both undergird the constitutional commitments to personal autonomy and popular sovereignty.<sup>154</sup> It is not uncommon to find one’s thoughts clarified or indeed formed by the process of writing them.<sup>155</sup> So, too, the capture of images can effectively fix thoughts in the mental universe and make them available for future reflection.<sup>156</sup> It is as much an interference with freedom of thought to punish solitary speech as it is to punish communication to an audience.

If the government were to be magically endowed with the capacity to prevent the retention of solitary memories in the fashion of the neuralizer in the film *Men in Black*,<sup>157</sup> the exercise of that capacity

<sup>151</sup> *Harper & Row*, 471 U.S. at 559 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)); see also *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (“The First Amendment securely protects the freedom to make—or decline to make—one’s own speech . . .”).

<sup>152</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994), quoted with approval in *Eldred*, 537 U.S. at 220; see also *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”).

<sup>153</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002); cf. ANDY CLARK, *SUPER-SIZING THE MIND* 58 (2008) (“[A]s soon as we formulate a thought in words or on paper, it becomes an object, for both ourselves and for others . . . the kind of things we can have thoughts about.”).

<sup>154</sup> See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (“Those who won our independence believed that the final end of the State was to make men free to develop their faculties . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . .”), overruled in part on other grounds by *Brandenburg v. Ohio*, 395 U.S. 444 (1967) (per curiam) and quoted with approval in *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660-61 (2000).

<sup>155</sup> See E.M. FORSTER, *ASPECTS OF THE NOVEL* 43 (1927) (“How can I tell what I think till I see what I say?”), cited in Adam Phillips, *On What We Need: A Celebration of the Work of Emmanuel Ghant*, 11 *PSYCHOLANALYTIC DIALOGUES* 1, 6 (2001).

<sup>156</sup> See VAN DIJCK, *supra* note 19, at 148-69 (discussing the implications of technology with increased memory capacity on the preservation and accessibility of prior experiences).

<sup>157</sup> *MEN IN BLACK* (Columbia Pictures 1997).

would manifestly violate the “freedom of thought” guaranteed by the First Amendment although no audience would be involved.<sup>158</sup> No such device exists, yet.<sup>159</sup> But memories recorded externally are vulnerable to legal and technological interference.<sup>160</sup>

When an individual records her sense impressions or draws sketches in her diary, she constructs the scaffolding of her future thoughts much as interior memories construct the scaffolding of cognition. The same is true of captured images.<sup>161</sup> Human brains are adapted to use physical phenomena as “external storage” to simplify cognitive tasks, and regular consultation of and reliance on notes or diaries are sensibly considered elements of an extended cognitive system.<sup>162</sup> Recorded images can serve the same function. Indeed, there are reports of the use of photographic “life logs” by Alzheimer’s patients as prosthetic memories to retain a sense of their identity.<sup>163</sup>

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<sup>158</sup> See, e.g., Charles Fried, Oliver Wendell Holmes Devise Lecture, *Perfect Freedom, Perfect Justice*, 78 B.U. L. REV. 717, 735 (1998) (“[T]he First Amendment as freedom of thought . . . protects against government interfering with the process of judgment itself . . . .”); Bruce J. Winick, *The Right to Refuse Mental Health Treatment: A First Amendment Perspective*, 44 U. MIAMI L. REV. 1, 17-19 (1989) (describing the Supreme Court’s use of the First Amendment to protect freedom of thought).

<sup>159</sup> But cf. Adam Kolber, *Freedom of Memory Today*, 1 NEUROETHICS 145, 145-47 (2008) (describing memory-erasing effects of drugs, including one anesthetic—propofol—that “frequently ‘erases’ the patient’s memory of events that precede injection by a few minutes”); Adam J. Kolber, *Therapeutic Forgetting: The Legal and Ethical Implications of Memory Dampening*, 59 VAND. L. REV. 1561, 1562 (2006) (“While true memory erasure is still the domain of science fiction, less dramatic means of dampening the strength of a memory may have already been developed.” (footnote omitted)).

<sup>160</sup> Cf. Brad Stone, *Amazon Erases Two Classics from Kindle. (One is ‘1984’)*, N.Y. TIMES, July 18, 2009, at B1 (describing how Amazon.com “remotely deleted” digital editions of two books from the electronic readers on which customers were storing them).

<sup>161</sup> To be sure, sketching and diary entry involve the reduction of sense to symbol but image capture does not. But if an audience is involved, captured images fall within the ambit of the First Amendment. See *supra* Section V.A; cf. *L.A. News Serv. v. Tullo*, 973 F.2d 791, 794 (9th Cir. 1992) (recognizing prior court rulings that have held that photographs express authorship sufficiently to warrant copyright); *Jewelers’ Circular Publ’g Co. v. Keystone Publ’g Co.*, 274 F. 932, 934 (S.D.N.Y. 1921) (holding that photographs can be copyrighted “because no photograph, however simple, can be unaffected by the personal influence of the author” (citing *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903))), *aff’d*, 281 F. 83 (2d Cir. 1922).

<sup>162</sup> See CLARK, *supra* note 153, at 21 (discussing use of “the world as external storage”); *id.* at 41 (noting how the brain uses “environmental structure” and “cognitive artifacts” equivalently to internal storage); *id.* at 76-78 (discussing how externally recorded memories function as an element of cognition); *id.* at 104-09 (arguing for a “cognitive extension” view that considers the brain and external artifacts to be part of a single system).

<sup>163</sup> VAN DIJK, *supra* note 19, at 58-60.

Pervasive image capture allows individuals to record memories. Legal interference with recording abridges such individuals' freedom to reflect effectively on those experiences, truncating the freedom of thought that the principles of the First Amendment guarantee.<sup>164</sup>

### 3. Preconditions and Elements of Communication

Beyond these nonaudience-based roles, the modern process of image capture is an essential element in producing, and ultimately disseminating, photos, videos, and montages which modern First Amendment doctrine solidly recognizes as protected media of communication. The increasing integration of image capture with communication devices ranging from cell phones to iPhones to PDAs makes it clear that contemporary image capture is part of a broader digital ecology of communication. 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.

Paint can be an essential precondition to artistic endeavor; a prohibition on the possession of aerosol spray paint cans was invalidated on First Amendment grounds at the instance of artists who sought to "create graffiti art in lawful venues on lawful surfaces."<sup>165</sup> And though not without controversy, there is wide support for the proposition that reproducing copyrighted images and materials as part of the process

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<sup>164</sup> In the machinations surrounding the Global War on Terror, one clear effect of the rules that precluded legislators from recording the details of the programs to which they were exposed was to make it more difficult to reflect effectively on the information. See Dan Eggen & Walter Pincus, *Varied Rationales Muddle Issue of NSA Eavesdropping*, WASH. POST, Jan. 27, 2006, at A5 (reporting on rules barring legislators from taking notes on briefings regarding an NSA warrantless-surveillance program); cf. *United States v. Cabra*, 622 F.2d 182, 184-85 (5th Cir. 1980) (holding that the district court's prohibition on in-courtroom note-taking was an abuse of discretion); *Goldschmidt v. Coco*, 413 F. Supp. 2d 949, 952-53 (N.D. Ill. 2006) ("A sweeping prohibition of all note-taking by any outside party seems unlikely to withstand a challenge under the First Amendment.").

<sup>165</sup> *Vincenty v. Bloomberg*, 476 F.3d 74, 78 (2d Cir. 2007); see also *United States v. Columbia Broad. Sys., Inc.*, 497 F.2d 102, 106 (5th Cir. 1974) (concluding that sketching in the courtroom is protected by the First Amendment and that a "total ban" on the publication of such sketches is "too broad to withstand constitutional scrutiny").



of personal use in production of subsequent authorial works is protected by the First Amendment.<sup>166</sup>

Dean Robert Post has noted: “If the state were to prohibit the use of [film] projectors without a license, First Amendment coverage would undoubtedly be triggered. This is not because projectors constitute speech acts, but because they are integral to the forms of interaction that comprise the genre of the cinema.”<sup>167</sup> The point holds beyond the physical links in the chain of communication. Almost all media of expression can be broken down into a series of social practices and preconditions that are not themselves expressive. Justice Scalia has observed:

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 organi-

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<sup>166</sup> See, e.g., *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1169 (9th Cir. 2007) (discussing Perfect 10’s claim that “users who link to infringing websites automatically make ‘cache’ copies of full-size images” and reasoning that “even assuming such automatic copying could constitute direct infringement, it is a fair use”); *Duffy v. Penguin Books USA, Inc.*, 4 F. Supp. 2d 268, 274 (S.D.N.Y. 1998) (holding that where an author photocopied a portion of a copyrighted work in the course of her research, the photocopying amounted to fair use and was immune to copyright claims). The Court has suggested that the fair use defense in copyright cases is required by the First Amendment. See *Eldred v. Ashcroft*, 537 U.S. 186, 219-21 (2003).

An array of commentators argue that copying for personal use or as part of authorial transformation to a new work is constitutionally protected. See, e.g., Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1198-1205 (2007); Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1897-1903 (2007); Rebecca Tushnet, Essay, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 545-57 (2004). But see David McGowan, *Some Realism About the Free-Speech Critique of Copyright*, 74 FORDHAM L. REV. 435, 454 (2005) (“To the extent the law treats people as so dependent on culture that they cannot speak without copying, the law has less reason to respect what people say as reflecting a preference of their own.”).

<sup>167</sup> Post, *Encryption*, *supra* note 125, at 717; cf. Zimmerman, *supra* note 76, at 1209 (“The method and the result do not segment . . . conveniently into discrete parts.”).

The Court has put the matter in similar terms. First Amendment scrutiny applies to statutes “based on a nonexpressive activity [that] has the inevitable effect of singling out those engaged in expressive activity” or to sanctions against activity “intimately related to expressive conduct protected under the First Amendment.” *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 n.3, 706-07 (1986). See also *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (“[D]elivery 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.”).

zation presents opportunities: Control any cog in the machine, and you can halt the whole apparatus. . . . The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.<sup>168</sup>

Targeting image capture can provide a similarly effective means for censoring the protected flow of images into public and private discourse. The typical police officer, plaintiff, or complainant in the image-capture cases canvassed above is not concerned with avoiding observation or preserving seclusion simpliciter. She is interested, rather, in assuring that evidence of dubious or potentially embarrassing actions is not credibly conveyed by the observer to a wider audience by transmission of the captured image. There are few cases on record of police officers arresting tourists who capture videos of polite official responses to inquiries for directions. Prohibitions on image capture are deployed to suppress inconvenient truths.<sup>169</sup>

It is precisely this suppression at which the First Amendment is directed. First Amendment doctrine regularly disapproves of legal rules that vest officials with unbridled discretion, because officials are likely to bring legal sanctions to suppress communications they find uncongenial.<sup>170</sup> Broad and malleable prohibitions on image capture are well

<sup>168</sup> *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 251-52 (2003) (Scalia, J., concurring in part and dissenting in part), *overruled by Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010); *see also* *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 97-98 (1982) (finding that disclosure of unpopular minor-party disbursements could cripple the party's viability because those who provide "services rendered scarce by public hostility and suspicion . . . would be . . . vulnerable to threats, harassment, and reprisals . . . and those seeking to harass may disrupt commercial activities on the basis of expenditure information").

Justice Scalia wrote in partial dissent in *McConnell*, but his analysis was adopted by the majority in *Citizens United v. Federal Election Commission*, 130 S. Ct. at 898. *See also id.* ("Government could repress speech by silencing certain voices at any of the various points in the speech process." (citing *McConnell*, 540 U.S. at 251 (opinion of Scalia, J.))).

<sup>169</sup> The 9/11 security cases are only partial exceptions. There is nothing embarrassing about Amtrak trains, but the motivating concern still seems to be the prevention of the transmission of images to notional terrorists.

<sup>170</sup> *See, e.g., Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 133 (1992) (finding that concern with officials "encouraging some views and discouraging others" requires the rule that "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official"); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991) ("The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement, for history shows that speech is suppressed when either the speaker or the message is critical of those who enforce the law." (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58, 361 (1983) and *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974)); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-26 (1990) ("[A] scheme that places 'unbridled discretion in

adapted to this end. Justice Scalia's observation regarding the vulnerability of "cogs in the machine" was made in dissent, but Supreme Court majorities have regularly invoked the First Amendment to invalidate regulations that impose burdens on "actions" without audiences where the targets are essential preconditions to communication.

The point is clear with regard to "actions" involved in the chain of distribution: to forbid handing out leaflets that may end up as litter, placing newsracks on public property, or distributing books to stores may violate the First Amendment, even if drafting, printing, and reading are left undisturbed.<sup>171</sup> But the Court has also struck down regulations that target component "actions" that precede the chain of connection between speaker and audience.

The Court has invalidated the impositions of taxes on ink and paper used in publications, as well as taxes imposed on advertising revenue.<sup>172</sup> It struck down a statute that forbade publishers to pay authors writing about crimes in which they had participated.<sup>173</sup> Although the statute precluded payment rather than either authorship or publication,

Whether the First Amendment 'speaker' is considered to be [the author], whose income the statute places in escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration

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the hands of a government official or agency . . . may result in censorship." (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, (1988)); *City of Houston v. Hill*, 482 U.S. 451, 453, 471-72 (1987) (finding a "municipal ordinance that makes it unlawful to interrupt a police officer in the performance of his or her duties" to be "unconstitutionally overbroad under the First Amendment"); *Saia v. New York*, 334 U.S. 558, 562 (1948) (holding unconstitutional a standardless city ordinance prohibiting the use of sound amplification devices without permission of the chief of police).

<sup>171</sup> *E.g.*, *Lakewood*, 486 U.S. at 762-72 (newsracks); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 n.6 (1963) (circulation of books); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (citing *Schneider v. State*, 308 U.S. 147, 162 (1939)) (literature distribution despite potential for litter); *see also* *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 165-66 (2002) (protecting the right to canvass door-to-door under the First Amendment).

For analysis of the ways in which burdens on intermediaries interfere with constitutionally protected speech, see Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11 (2006).

<sup>172</sup> *See* *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592-93 (1983) (invalidating a tax on ink and paper used in producing publications); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250-51 (1936) (invalidating a tax on newspaper advertisements).

<sup>173</sup> *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

for at least five years, the statute plainly imposes a financial disincentive . . . on speech . . . .<sup>174</sup>

The Court reached a similar conclusion regarding a statute that precluded members of the federal civil service from receiving payment for writing or speaking engagements, stating that although the statute

neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on expressive activity. . . .

The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said.<sup>175</sup>

Furthermore, the Court has recognized that group association is often a precondition for "[e]ffective advocacy of both public and private points of view, particularly controversial ones," and has extended First Amendment protection to the "act" of association as a way of making the "speech" of members effective.<sup>176</sup> Indeed, the Court recognized that privacy may, in turn, be necessary to association; it has protected the "acts" of refusing to disclose the membership lists of political organizations on First Amendment grounds.<sup>177</sup>

Image capture is a precondition for effective participation in the contemporary visual ecology of communication. To post an image from life on Flickr, YouTube, or one's own blog, or to send it to a friend by text message or e-mail, one must first capture the image. A prohibition on image capture is effectively a prohibition on the practice of sharing spontaneous images from life. As Professor Smolla observes, to prohibit capture of public images without consent would violate the First Amendment because it "would cripple communica-

<sup>174</sup> *Id.*

<sup>175</sup> *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468, 470 (1995).

<sup>176</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982) (quoting *NAACP v. Alabama*, 357 U.S. 449, 460 (1958)); *see also* *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 295 (1981) (noting the "importance of freedom of association in guaranteeing the right of people to make their voices heard on public issues").

<sup>177</sup> *See* *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 558 (1963) (finding unconstitutional a legislative inquiry into the membership list of the NAACP); *Shelton v. Tucker*, 364 U.S. 479, 488-90 (1960) (holding unconstitutional a state statute requiring teachers to disclose all organizations to which they belong); *NAACP v. Alabama*, 357 U.S. at 462-63 (determining that forced disclosure of membership lists of an organization engaged in advocacy is unconstitutional).

tion and expression . . . [and it] would effectively give to the actors in human events a quality of ownership over news and history itself.”<sup>178</sup>

Two final reasons caution against placing image capture beyond the protection of the First Amendment. First, images 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.” Participants in public dialogue who are barred from capturing images are at a substantial discursive disadvantage vis-à-vis those who can record from life. Officials engage in virtually unchecked surveillance of public encounters. A rule that bars citizens from capturing images gives unbalanced authority to official framing.

Second, in the modern environment, the marginal cost of the physical composition and transmission of speech has dropped to close to zero; the limiting factor of public discourse is the cost of acquiring the information to disseminate. In such an environment, courts should be particularly reluctant to expand doctrines that allow the state or aggressive plaintiffs to raise selectively the cost of acquiring inconvenient images.

## VI. THE SCOPE OF PROTECTION FOR IMAGE CAPTURE

That image capture falls within the ambit of First Amendment protection does not establish the degree of that protection. A final set of skeptics acknowledges that image capture implicates First Amendment principles but maintains that those principles permit its broad regulation. Some invoke the proposition that constitutionally recognized expression rights do not supersede “generally applicable” rules of tort, contract, or criminal law.<sup>179</sup> Others maintain that the expressive interests in image capture are counterbalanced by the importance of protecting competing interests in privacy or public security.<sup>180</sup> Nei-

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<sup>178</sup> Smolla, *supra* note 114, at 1128.

<sup>179</sup> See, e.g., *Dietemann v. Time, Inc.*, 449 F.2d 245, 249 (9th Cir. 1971) (“The First Amendment is not a license to trespass, to steal, or to intrude by electronic means into the precincts of another’s home or office.”); Neil M. Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149, 1173-74, 1186-87 (2005) (arguing that rules of “general applicability” do not “fall within the scope of the First Amendment”); see also Mishra, *supra* note 81, at 1551 (“[T]he Amendment does not excuse citizens from state liability for recording police, even where citizens allege police misconduct.”).

<sup>180</sup> See Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 983-84 (2003) (arguing that, in balancing freedom of speech against other interests, not all forms of speech are valued as highly as privacy).

ther of these arguments warrants broadly exempting prohibitions of image capture from First Amendment scrutiny.

A. “Generally Applicable Laws” and the Right to Gather Information

Individual Justices have regularly argued in dissent that the First Amendment requires effective accommodations by the government to provide access to information necessary for informed discussion of public affairs.<sup>181</sup> The Court’s majority, however, has rejected an unadorned First Amendment “right to gather information” that supersedes other legal obligations.

The tone was set in 1965 in *Zemel v. Rusk*, in which the Court rejected a claim that the denial of a passport to travel to Cuba interfered with the plaintiffs’ claimed First Amendment right to gather information. The Court commented:

There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen’s opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.<sup>182</sup>

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<sup>181</sup> Justice Stevens, for instance, made this argument in his dissent in *Press-Enterprise Co. v. Superior Court*:

I have long believed that a proper construction of the First Amendment embraces a right of access to information about the conduct of public affairs.

“As Madison wrote:

“A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy . . . .”

478 U.S. 1, 18 (1986) (Stevens, J., dissenting) (quoting 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910)); see also *Houchins v. KQED, Inc.*, 438 U.S. 1, 30 (1978) (Stevens, J., dissenting).

The theme has been sounded as well by Justice Brennan in *Richmond Newspapers v. Virginia*, 448 U.S. 555, 584-89 (1980) (Brennan, J., concurring in judgment); Justice Powell in *Saxbe v. Washington Post Co.*, 417 U.S. 843, 862-64 (1974) (Powell, J., dissenting); Justice Douglas in *Pell v. Procunier*, 417 U.S. 817, 839-842 (1974) (Douglas, J., dissenting); and Justice Stewart in *Branzburg v. Hayes*, 408 U.S. 665, 728 (1972) (Stewart, J., dissenting).

<sup>182</sup> 381 U.S. 1, 16-17 (1965); see also *Wilson v. Layne*, 526 U.S. 603, 612-14 (1999) (holding that media “ride-alongs” could not constitutionally accompany search of a private home); *Branzburg*, 408 U.S. at 691 (“It would be frivolous to assert . . . that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws.”), quoted with approval in *Bartnicki v. Vopper*, 532 U.S. 514, 532 n.19 (2001); cf. *Kleindienst v. Mandel*,

The Court has rejected efforts by media plaintiffs to require prisons to make exceptions to regulations governing prison visits in order to allow interviews of designated inmates or to gain access to prisons to videotape the facilities, declaring that, while “[t]here is an undoubted right to gather news ‘from any source by means within the law,’ . . . that affords no basis for the claim that the First Amendment compels others—private persons or governments—to supply information.”<sup>183</sup> The Court has recognized a limited First Amendment right of access to public trials and proceedings.<sup>184</sup> But it has held that the government is under no obligation to provide copies of tape recordings entered into evidence<sup>185</sup> or of arrest records in its control.<sup>186</sup>

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408 U.S. 753, 769-70 (1972) (upholding denial of entry to a foreign speaker invited to academic conferences on grounds of foreign affairs power).

<sup>183</sup> *Houchins*, 438 U.S. at 11 (plurality opinion) (quoting *Branzburg*, 408 U.S. at 681-82); see also *id.* at 15 (noting that the First Amendment does not mandate “a right of access to government information or sources of information within the government’s control”); *Pell*, 417 U.S. at 834 (denying media plaintiffs access to interview particular inmates); *Saxbe*, 417 U.S. at 849-50 (holding that prohibiting interviews of particular inmates does not violate the First Amendment).

*Pell* and *Saxbe* were 5-4 decisions. Due to recusals in *Houchins*, Chief Justice Burger’s plurality spoke for only himself and two others. Justice Stevens was joined by two Justices in dissent. Justice Stewart’s concurrence in the judgment, which was necessary to form a majority, rejected a categorical “right of access to information generated or controlled by government.” *Houchins*, 438 U.S. at 16. But Justice Stewart also determined that, since the public was granted personal access to prison tours, the First Amendment required that media visitors be allowed to bring “cameras and recording equipment for effective presentation to the viewing public.” *Id.* at 18. Although Justice Stewart’s opinion is technically determinative, many subsequent cases and commentators have treated the plurality as stating the law. See e.g., *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999); *Thornburgh v. Abbott*, 490 U.S. 401, 411 n.10 (1989).

<sup>184</sup> E.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 501-05 (1984); *Richmond Newspapers*, 448 U.S. at 581 (plurality opinion). The Court has not, however, recognized a right to photograph trials that are required to be open to the public. Cf. *Chandler v. Florida*, 449 U.S. 560, 574-75 (1981) (acknowledging that the television broadcast of a trial may sometimes violate due process but declining to adopt an absolute ban on coverage); *Estes v. Texas*, 381 U.S. 532, 534-35 (1965) (holding that televising trial proceedings infringed on the right to a fair trial); *In re Sony BMG Music Entm’t*, 564 F.3d 1, 9 (1st Cir. 2009) (limiting webcasts of civil nonevidentiary motion hearings); *Rice v. Kempker*, 374 F.3d 675, 679-80 (8th Cir. 2004) (holding that “the Media Policy banning the use of video cameras and other cameras in the execution chamber does not burden any of [Plaintiff’s] First Amendment rights” and citing other relevant cases for support).

<sup>185</sup> See *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 609 (1978) (rejecting a claim that “copies of the White House tapes—to which the public has never had *physical* access—must be made available for copying”).

<sup>186</sup> See *United Reporting Publ’g Corp.*, 528 U.S. at 40 (“This is not a case in which the government is prohibiting a speaker from conveying information that the speaker al-

The Court rebuffed an argument that a First Amendment right to gather information required an exception to the law of promissory estoppel where a newspaper published the name of a source to whom it had promised confidentiality. The majority in *Cohen v. Cowles Media Co.* declared:

[G]enerally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news. . . . The press may not with impunity break and enter an office or dwelling to gather news. . . . “The publisher of a newspaper has no special immunity from the application of general laws.”<sup>187</sup>

Citing these cases, some commentators maintain that because prohibitions on recording of information are “generally applicable,” they raise no First Amendment concerns.<sup>188</sup> This is not, and should not be, the law. To derive the claim that every “generally applicable” limit on the flow of information is immune from First Amendment scrutiny is to detach the decided cases from the facts and principles in which they are rooted.

The Court’s cases reject a claimed right to “compel[] others . . . to supply information.”<sup>189</sup> They deny an “unrestrained right to gather” information by engaging in conduct beyond mere inquiry or observation.<sup>190</sup> But prohibiting the capture of images that photographers can observe with their own eyes and ears does not protect against “compelled” disclosure of information; rather, it prohibits recording information that has already been voluntarily released. A statute that forbade reporters from interviewing sources or observing public activities and recording their notes would manifestly violate First Amend-

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ready possesses. . . . California could decide not to give out arrestee information at all without violating the First Amendment.”).

<sup>187</sup> 501 U.S. 663, 669-70 (1991) (quoting *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937)).

<sup>188</sup> See, e.g., Richards, *supra* note 179, at 1187-90. To be fair, Professor Richards acknowledges that “[o]ne can imagine science fiction-style hypotheticals that would bring information collection rules within [First Amendment protection]—for example, a law forbidding the keeping of records or outlawing cameras.” *Id.* at 1189. It may be that reality is overtaking science fiction.

<sup>189</sup> *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (plurality opinion); see also *Fla. Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (“To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition . . .”).

<sup>190</sup> See *Zemel v. Rusk*, 381 U.S. 1, 17 (“The right to speak and publish does not carry with it the unrestrained right to gather information.”); see also *Branzburg v. Hayes*, 408 U.S. 665, 683-85 (1972) (listing limitations on news gathering).



ment constraints.<sup>191</sup> Given the role that image capture plays in the emerging ecology of digital visual communication, the effect of blanket prohibitions on image capture raises similar concerns.

Prohibitions of image capture are not directed against the “gathering” of information from unwilling sources; they bar the act of recording for future review impressions already gathered by observers. The exemption of “generally applicable” regulations from First Amendment scrutiny does not extend to regulations that have “the inevitable effect of singling out those engaged in expressive activity” or rules that prohibit activity “intimately related to expressive conduct protected under the First Amendment.”<sup>192</sup> Image capture is such an activity. Laws that prohibit the capture of images by definition interfere with the individual practice of preserving experience for future

<sup>191</sup> See *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103-04 (1979) (“[R]espondents relied upon routine newspaper reporting techniques . . . . A free press cannot be made to rely solely upon the sufferance of government to supply it with information.”); *Branzburg*, 408 U.S. at 681 (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”); cf. *Houchins*, 438 U.S. at 11 (recognizing “a First Amendment right to receive letters from inmates criticizing jail officials and reporting on conditions,” “to interview those who render the legal assistance to which inmates are entitled,” and “to seek out former inmates, visitors to the prison, public officials, and institutional personnel”) (citations omitted)).

<sup>192</sup> *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 n.3, 707 (1986); see also *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 640-41 (1994) (plurality opinion) (discussing the danger of laws that “single out the press” in justifying heightened scrutiny).

Since *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Court has recognized that, in prosecuting groups’ efforts to instruct “terrorist organizations” in humanitarian law, a “generally applicable” prohibition of “material support” raises First Amendment issues. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2722-30 (2010). It applied First Amendment scrutiny, albeit of a more forgiving variety, to “generally applicable” prohibitions of public nudity applied to erotic dancing. *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289, 296 (2000) (plurality opinion); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 571-72 (1991) (plurality opinion). And it rejected the proposition that the “generally applicable” copyright system was “‘categorically immune from challenges under the First Amendment.’” *Eldred v. Ashcroft*, 537 U.S. 186, 221 (2003) (quoting *Eldred v. Reno*, 239 F.3d 372, 375 (D.C. Cir. 2001)); see also *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 522, 524 (2002) (holding that the First Amendment prohibited sanction of employers for violating the National Labor Relation Act’s “generally applicable” prohibition on “restraining, coercing, or interfering with employees’ exercise of rights related to self-organization” by bringing a lawsuit (citing the National Labor Relations Act, 29 U.S.C. §§ 157, 158(a)(1) (2000)).

Indeed, as Professor Volokh has noted, many of the classic First Amendment cases from *Schenck v. United States*, 249 U.S. 47 (1919), *Frohwerk v. United States*, 249 U.S. 204 (1919), and *Debs v. United States*, 249 U.S. 211 (1919), through *Cohen v. California*, 403 U.S. 15 (1971) involved “generally applicable” criminal statutes applied to speech. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1287-94 (2005).

review, reflection, and expression—a practice that is entitled to protection under the First Amendment.

*Bartnicki v. Vopper* illustrates the point. In *Bartnicki*, the Court reviewed application of a statute that imposed liability for “disclosure” of the contents of an illegally intercepted wire or oral communication.<sup>193</sup> The Court concluded that the statute “is in fact a content-neutral law of general applicability.”<sup>194</sup> But rather than forgoing First Amendment review, it went on to find that the prohibition on disclosure violated the First Amendment as applied both to a radio commentator who broadcasted the contents of a telephone conversation intercepted by an anonymous source, and to the citizen who received the recording from that source and conveyed it to the commentator.<sup>195</sup> The Court assumed that the act of “obtaining the relevant information unlawfully” could be subject to sanction,<sup>196</sup> but it determined that “the naked prohibition against disclosures is fairly characterized as a regulation of pure speech.”<sup>197</sup> As a “regulation of pure speech”—applicable by its terms against recognized media of expression—it was subject to the First Amendment precept that publication of “lawfully obtain[ed] truthful information about a matter of public significance” may not be punished “absent a need . . . of the highest order.”<sup>198</sup> The Court weighed the interests advanced by the prohibition and ultimately found them wanting.

Legal interventions that target image capture go beyond protection against “compelling” unwilling parties to “supply” information. The images in question have already been “supplied” to the observer who seeks to record them, and indeed, in many cases, to the world at large. Emerging efforts to constrain image capture do not target actions collateral to expression—they sanction the disposition of information itself. Like prohibitions on sketching, taking notes, or memorializing observations in a diary, they bar individuals who have already

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<sup>193</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 517 (2001). The statutes at issue were 18 U.S.C. § 2511 (2000) and 18 PA. CONS. STAT. § 5725(a) (2000).

<sup>194</sup> *Bartnicki*, 532 U.S. at 526.

<sup>195</sup> *Id.* at 526-27.

<sup>196</sup> *Id.* at 532 n.19.

<sup>197</sup> *Id.* at 526; *see also id.* at 527 (reasoning that the relevant subsection of the federal statute was “not a regulation of conduct”); *id.* at 527 n.11 (“[W]hat gave rise to . . . liability . . . was the information communicated on the tapes”); *id.* at 530 n.13 (distinguishing “mail theft and stolen property,” which do not “involve prohibitions on speech”).

<sup>198</sup> *Id.* at 528 (alteration in original) (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979)).

acquired information from preserving it for future review, reflection, and dissemination. As such, they are not “generally applicable” regulations of conduct that adventitiously interfere with speech; rather they are targeted regulations in which the very definition of violation involves interference with a medium of expression. They are fully subject to scrutiny under the First Amendment.

### B. *Image Capture, Privacy, and First Amendment Limits*

To conclude that the constraints on image capture are not “generally applicable” laws free of First Amendment scrutiny, of course, does not establish that they are invalid. A final set of commentators maintains that despite incursions on the exercise of free expression, efforts to protect privacy by precluding image capture invoke sufficiently weighty interests to overcome First Amendment constraints.<sup>199</sup>

The Court has carefully avoided broad resolution of the balance between claims of privacy and the interests of free speech.<sup>200</sup> Nor has the Court directly addressed the more precise First Amendment status of image capture.<sup>201</sup> In *Bartnicki v. Vopper*, the Court stated that the interest in privacy supported punishing “private wiretapping” which “obtain[ed] . . . information unlawfully.”<sup>202</sup> But it wrote narrowly, limiting its discussion to the particular facts presented.<sup>203</sup>

Nonetheless, guidelines emerge from more general First Amendment principles. The Court has upheld rules that constrain expression

<sup>199</sup> *E.g.*, Solove, *supra* note 180, at 983-94, 1028-29.

<sup>200</sup> *See Fla. Star v. B.J.F.*, 491 U.S. 524, 530, 533 (1989) (“[T]he sensitivity and significance of the interests presented in clashes between First Amendment and privacy rights counsel relying on limited principles that sweep no more broadly than the appropriate context of the instant case.”). In *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001), the Court approved the approach of *Time, Inc. v. Hill*, 385 U.S. 374, 387-88 (1967), which “reserve[d] the question whether truthful publication of private matters unrelated to public affairs can be constitutionally proscribed.”

<sup>201</sup> *Cf. Devenpeck v. Alford*, 543 U.S. 146, 156 (2004) (declining to reach First Amendment claims on procedural grounds); *Estes v. Texas*, 381 U.S. 532, 539-40 (1965) (discussing freedom of the press to access court proceedings without discussing the act of filming).

<sup>202</sup> 532 U.S. at 532 n.19 (quoting *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972)); *see also id.* at 529 (“We assume that those interests adequately justify the prohibition . . . against the interceptor’s own use of information that he or she acquired by violating [the wiretapping statute].”); *cf. Fla. Star*, 491 U.S. at 534 (“To the extent sensitive information rests in private hands, the government may under some circumstances forbid its nonconsensual acquisition . . .”).

<sup>203</sup> *Bartnicki*, 532 U.S. at 529 (“Our refusal to construe the issue presented more broadly is consistent with the Court’s repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.”).

in recognized media under doctrines of copyright, defamation, and obscenity, but it has imposed distinctive First Amendment limits on each.<sup>204</sup> So, too, image capture may be subject to constraints imposed to vindicate weighty privacy interests, but only within the boundaries of First Amendment principle and practice. Those boundaries substantially narrow the legitimate scope of prohibitions on image capture.

Three general principles set initial boundaries. First, where image capture is regulated to protect privacy, the state cannot rely on inchoate invocations of that interest; a countervailing claim of privacy must be firmly grounded in the facts of the case in which it is invoked. Second, regulation must follow established legal rules that authoritatively recognize the scope of the privacy interest at stake and tailor the response to meet concerns of constitutional magnitude. Catchall statutes and administrative retaliation invoked on the basis of standardless discretion do not meet this requirement. Nor do claims of street-level bureaucrats who maintain a right to discharge their duties in public without being recorded, nor those of private parties who seek to remove from the public domain images they have revealed to the public gaze. Finally, where legal rules constraining image capture legitimately seek to protect the privacy of intimate venues, analysis of the actual magnitude of the competing interests is required before liability can be sustained.

### 1. Retaliation and Catchall Statutes

Where the government seeks to suppress image capture in the interests of privacy, at a minimum the intervention must be framed by legal rules that limit the intervention to the scope of an authoritatively defined public interest and that provide adequate standards for official decision.<sup>205</sup>

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<sup>204</sup> For copyright, see *Eldred v. Ashcroft*, 537 U.S. 186, 218-21 (2003), and *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985). For defamation, see *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 522-23 (1991), *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 22 (1990), *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 763 (1985), and *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283-85 (1964). For obscenity, see *Jenkins v. Georgia*, 418 U.S. 153, 160-61 (1974), and *Miller v. California*, 413 U.S. 15, 36-37 (1973). Compare *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383 (1992), which found that while obscenity and libel can be regulated, they are not “categories of speech entirely invisible to the Constitution.”

<sup>205</sup> *Cf. Fla. Star*, 491 U.S. at 536 (“Even assuming the Constitution permitted a State to proscribe receipt of information, Florida has not taken this step.”); *Miller*, 413 U.S. at 23-27 (holding that prohibitions of obscenity must involve images or descriptions of sexual conduct “specifically defined by the applicable state law”); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940) (finding that “in the absence of a statute narrowly drawn to define

Obviously, raw exertion of official power does not meet this standard; use of official discretion to retaliate for the exercise of an activity protected by the First Amendment is itself a constitutional violation.<sup>206</sup> Arrests in retaliation for image capture constitute violations of First Amendment rights. This is no small point, for, as discussed in Section III.C above, one growing source of litigation is the tendency of police officers to arrest photographers on trumped-up charges both as a way of preventing the spread of inconvenient truths and as a response to free-floating anxiety about individuals who remind officials of terrorists.

The constraints of First Amendment doctrine also preclude the use of broadly worded statutes that give unbridled authority to law enforcement officers to sanction image capture. In *City of Houston, Texas v. Hill*, the Court held that a statute that punished those who “oppose, molest, abuse or interrupt any policeman in the execution of his duty” could not be constitutionally applied to “verbal interruptions of police officers.”<sup>207</sup> Justice Brennan observed for the majority: “The Constitution does not allow such speech to be made a crime. The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state.”<sup>208</sup> Allowing statutes that prohibit “interfering with an officer” or “disobeying an officer” to punish inconvenient image capture puts police officers in the constitutionally impermissible position of censoring critical expression with unconstitutional impunity.<sup>209</sup>

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and punish specific conduct as constituting a clear and present danger to a substantial interest of the State,” the plaintiff could not be convicted of disturbing the peace).

<sup>206</sup> See, e.g., *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (“Official reprisal for protected speech ‘offends the Constitution’ . . . and the law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.” (citations omitted) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998))).

<sup>207</sup> 482 U.S. 451, 455, 461 (1987) (quoting Houston’s Code of Ordinances) (internal quotation marks omitted) .

<sup>208</sup> *Id.* at 462-63 (footnote omitted).

<sup>209</sup> See *supra* note 170 (citing examples of First Amendment strictures against vesting law enforcement officials with limitless discretion); cf. *Smith v. Goguen*, 415 U.S. 566, 572-73 (1974) (“[T]he due process doctrine of vagueness . . . requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent ‘arbitrary and discriminatory enforcement.’” (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972))); *Grayned*, 408 U.S. at 108-09 (condemning delegation of “basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis” as “impermissibl[e]”); *Cox v. Louisiana*, 379 U.S. 536, 558 (1965) (“[T]he practice . . . [of] allowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades and meetings” violates the First Amendment.”); *Cantwell*, 310 U.S. at 308 (“[A] statute sweeping in a great variety of

## 2. Torts and Statutes Protecting Privacy and Dignity

In contrast to cases of retaliation or catchall statutes, targeted legal rules that constrain image capture of intimate interactions potentially invoke justifications of constitutional magnitude. Again, *Bartnicki v. Vopper* is the most recent and illuminating case.<sup>210</sup> Each of the opinions in *Bartnicki* recognized the potential importance of privacy of communication in “encouraging the uninhibited exchange of ideas and information among private parties.”<sup>211</sup> And each invoked privacy as an “interest[] of the highest order.”<sup>212</sup>

For the *Bartnicki* dissenters, the conjunction of these interests was more than sufficient to survive First Amendment scrutiny. In Justice Breyer’s determinative concurring opinion, the application of the wiretap statutes required “a reasonable balance between their speech-restricting and speech-enhancing consequences” because “important competing constitutional interests are implicated.”<sup>213</sup> For Justice Breyer, “[a]s a general matter” that balance would sustain prohibitions on wiretapping against First Amendment attack, although “as applied” to the republication at issue, the statutory prohibitions “do not reasonably reconcile the competing constitutional objectives.”<sup>214</sup> Even the *Bartnicki* majority emphasized the “important interests to be considered on *both* sides of the constitutional calculus” and left open the possibility of sanctioning “most violations of the statute without offending the First Amendment.”<sup>215</sup>

These justifications often suffice to justify bans on peeping Toms with cameras or surreptitious image capture of intimate conduct.

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conduct under a general and indefinite characterization . . . [left] to the executive and judicial branches too wide a discretion in its application.”)

<sup>210</sup> 532 U.S. 514 (2001).

<sup>211</sup> *Id.* at 532 (quoting Brief for the United States at 27, *Bartnicki*, 532 U.S. 514 (Nos. 99-1687, 99-1728)); *see also id.* at 537 (Breyer, J., concurring) (observing that statutes that enhance privacy also “encourage conversations that otherwise might not take place”); *id.* at 543, 547, 553 (Rehnquist, C.J., dissenting) (arguing that privacy statutes “further the First Amendment rights of the parties to the conversation”).

<sup>212</sup> *See id.* at 518 (majority opinion); *id.* at 536, 538 (Breyer, J., concurring); *id.* at 544 (Rehnquist, C.J., dissenting); *cf.* *Fla. Star v. B.J.F.*, 491 U.S. 524, 533 (1989) (“[P]ress freedom and privacy rights are both ‘plainly rooted in the traditions and significant concerns of our society.’” (quoting *Cox Broad. Corp. v. Connecticut*, 420 U.S. 469, 491 (1975))); *Time, Inc. v. Hill*, 385 U.S. 374, 383 n.7 (1967) (discussing the conflict between the right of privacy and the rights of the press).

<sup>213</sup> *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring).

<sup>214</sup> *Id.* at 537-38.

<sup>215</sup> *Id.* at 533 (majority opinion).

They are, however, inapplicable to many of the restraints on image capture canvassed above.

a. *Privacy, Dignity, and Public Officials*

Officials who invoke protections for privacy to justify punishing those who monitor public conduct mistake their own anxieties for constitutional justification.

The privacy interests recognized in *Bartnicki*, like privacy interests that many commentators argue counterbalance the interest in free expression,<sup>216</sup> guard free discourse by private citizens who use the shelter of privacy to “think and act creatively and constructively.”<sup>217</sup> When privacy functions to underpin democratic society, the interests in free expression may balance one another. Suppression of free expression on the part of those who capture information may protect the freedom to converse of those whose words and images are captured.

But officers confronting demonstrators, motorists, or the subjects of arrest—like other street-level bureaucrats providing services—neither engage in dialogue by which they define their private identities nor in discourse that contributes to public deliberation. Many of the official subjects of image capture are not engaged in discourse of any sort. Those who speak do so not as autonomous citizens working out their own thoughts and destiny, but as public servants carrying out their duties. The Court recently emphasized that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes” and can claim scant protection under guarantees of free expression designed to shield the discourse of citizens.<sup>218</sup> A fortiori, they can claim no compelling right as citizens to shield that speech from being recorded. Nor can public actors claim a right to preserve their personal dignity against public inspection when they carry out their duties. Justice Breyer noted in his concurrence in *Bartnicki* that protections against wiretapping not only “encourage conversations that

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<sup>216</sup> See, e.g., Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 389 (2008) (“The ability to freely make up our minds and to develop new ideas . . . depends upon a substantial measure of intellectual privacy.”); Solove, *supra* note 180, at 990-97 (considering the effect of privacy on autonomy and “democratic self-governance”).

<sup>217</sup> *Bartnicki*, 532 U.S. at 533 (quoting THE PRESIDENT’S COMM. ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 202 (1967) (internal quotation marks omitted)); see also *id.* at 543 (Rehnquist, C.J., dissenting) (same).

<sup>218</sup> *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

otherwise might not take place,” but they also protect opportunities for intimacy: “[T]hey resemble laws that would award damages caused through publication of information obtained by theft from a private bedroom.”<sup>219</sup> A police officer investigating a crime can assert no comparable right to intimacy with her suspects; still less can a public official engaged in her duties on a public street.<sup>220</sup> Certainly, law officials have no constitutionally cognizable or legitimate expectation that their actions remain unrecorded; on the contrary, the actions of public officials are by definition a matter of public concern.<sup>221</sup>

#### b. *Privacy and Dignity in the Public Sphere*

The Supreme Court has suggested that the goal of protecting dignity and autonomy interests against intrusion justifies some limits on free expression. Lower courts have upheld efforts to sanction non-consensual image capture of private parties in intimate situations under both appropriately tailored video voyeurism statutes and privacy torts against First Amendment challenges.<sup>222</sup>

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<sup>219</sup> *Bartnicki*, 532 U.S. at 537 (Breyer, J., concurring).

<sup>220</sup> See, e.g., *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1219 (10th Cir. 2007) (“[A] law enforcement officer’s actions while performing his public duties . . . do not fall within the activities to be protected under the Comment [h] to § 652D of Restatement (Second) of Torts as a matter of ‘personal privacy.’” (quoting *Cowles Publ’g Co. v. State Patrol*, 748 P.2d 597, 605 (Wash. 1988))); *Hornberger v. ABC, Inc.*, 799 A.2d 566, 594 (N.J. Super. Ct. App. Div. 2002) (“[P]olice officers do not have a reasonable expectation of privacy when they are interacting with suspects.” (citing *Angel v. Williams*, 12 F.3d 786, 790 (8th Cir. 1993) and *State v. Flora*, 845 P.2d 1355, 1357 (Wash. Ct. App. 1992))); cf. *Bartnicki*, 532 U.S. at 540 (“[T]he subject matter of the conversation at issue here is far removed from that in situations where the media publicizes truly private matters.”); *Jean v. Mass. State Police*, 492 F.3d 24, 30 (1st Cir. 2007) (“[The] interest in protecting private communication . . . is virtually irrelevant . . . where the intercepted communications involve a search by police officers of a private citizen’s home . . .”).

The court in *Commonwealth v. Hyde*, which upheld a wiretap prosecution for recording a police encounter, concluded that no First Amendment values were implicated because “[t]he defendant was not prosecuted for making the recording; he was prosecuted for doing so secretly.” 750 N.E.2d 963, 969 (Mass. 2001). That conclusion, as argued above, is simply erroneous.

<sup>221</sup> See *Time, Inc. v. Pape*, 401 U.S. 279, 284, 289 (1971) (recognizing that a police officer was a “public official” and holding that he was not entitled to damages for a press report that failed to include qualifying statements about his “official conduct”).

<sup>222</sup> Compare *State v. Stevenson*, 613 N.W.2d 90, 95 (Wis. 2000) (holding a video voyeurism statute unconstitutionally overbroad), and *State v. Glas*, 54 P.3d 147, 153 (Wash. 2002) (en banc) (limiting a voyeurism statute to private places, because contrary construction “would sweep constitutionally protected conduct within the statute’s penumbra because it could encompass simply looking at someone appreciatively or desirously in a public place, such as a restaurant or a bar”), with *State v. Townsend*, No.



But allowing criminal or tort actions in the case of dissemination of a videotape of sexual assaults or intimate sexual interactions is a far cry from banning spontaneous image capture by the holders of cell phones in public venues or granting the subjects of such image capture broad authority to censor the memorialization of their images. Extant tort doctrine requires as a general matter that image capture constitute intrusion on “seclusion” or “private affairs or concerns” that is “highly offensive to a reasonable person” before a plaintiff may recover damages.<sup>223</sup> Prevailing doctrine generally precludes recovery for images captured in public, so long as the subjects of the images are “exhibited to the public gaze.”<sup>224</sup>

Once we recognize that image capture is protected by principles of free expression, proposals to impose liability without observing the established limitations of privacy torts—either by common law innovation or by statute—raise serious constitutional questions. Such liability would facilitate interference with efforts by private individuals to preserve their observations for future review, reflection, and dissemination without any actual demonstration to a court of substantial countervailing privacy interests.<sup>225</sup>

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06-2637, 2007 Wisc. App. LEXIS 1007, at \*5-6 (Wis. Ct. App. Nov. 21, 2007) (per curiam) (noting that the statute narrowed to covert depictions of nudity “while that person is nude in a circumstance in which he or she has a reasonable expectation of privacy” survives First Amendment scrutiny (quoting WIS. STAT. ANN. § 942.09(2)(am)(1) (West 2008))) and *Gilmer v. State*, 244-KA-02236-SCT (¶ 29) (Miss. 2007) (declaring that a voyeurism statute which bars recording a person without consent “with a lewd intent . . . [in] a protected location” does not violate First Amendment).

For examples of cases upholding sanctions against intimate image capture, see *supra* note 58. See also *Toffoloni v. LFP Publ’g. Grp.*, 572 F.3d 1201, 1213 (11th Cir. 2009) (finding that the publication of nude photographs of a female wrestler in *Hustler* after her sensational death did not qualify for the “newsworthiness exception to the right of publicity”).

<sup>223</sup> RESTATEMENT (SECOND) OF TORTS § 652B (1977).

<sup>224</sup> *Id.* at cmt. c (“Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye . . . .”); cf. *Wilkie v. Robbins*, 551 U.S. 537, 553 (2007) (“The videotaping of ranch guests during the 2000 drive, while no doubt thoroughly irritating and bad for business, may not have been unlawful, depending, among other things, upon the location on public or private land of the people photographed.”); *Daily Times Democrat v. Graham*, 162 So. 2d 474, 478 (Ala. 1964) (“One who is a part of a public scene may be lawfully photographed as an incidental part of that scene in his ordinary status.”).

<sup>225</sup> See *Fla. Star v. B.J.F.*, 491 U.S. 524, 539 (1989) (“Unlike claims based on the common-law tort of invasion of privacy, civil actions based on [a Florida statute] require no case-by-case findings that the disclosure of a fact about a person’s private life was one that a reasonable person would find highly offensive.” (citation omitted)).

The exclusion of images “exhibited to the public gaze” from the domain of the actionably private is no adventitious common law relic. First, release of information is often plausibly taken to waive rights to bar further dissemination. Cases that refuse to impose liability on image capture either civilly or criminally often emphasize that appearance in a public venue waives any legitimate expectation that one’s image will remain private.<sup>226</sup> The act of recording material available to the naked eyes and ears—and, a fortiori, words spoken to the listener as part of a conversation in public—cannot be said to involve the untoward acquisition of information by the observer. The information was proffered by the target.

This account is incomplete since expectations of privacy depend in part on background legal principles. If it is illegal to record an image of the pudendum of an individual who appears unclothed in public, perhaps nude public appearances should not constitute a voluntary waiver of the expectation of shelter from recording.<sup>227</sup> The adoption of a legal prohibition on image capture, therefore, could be argued to establish the expectation of privacy that justifies its enforcement.

*Florida Star* is premised on the proposition that the information in question was “lawfully acquired.” *Id.* at 535. Once information has been released into the public sphere, however, a prohibition of recording cannot make it “unlawfully acquired.” Statutory prohibition of recording cannot define lawfulness of acquisition. Otherwise a law that simply says “close your eyes” could justify suppression of anything seen.

<sup>226</sup> *E.g.*, *Daily Times Democrat*, 162 So. 2d at 476-77 (discussing exceptions to the “right of action for invasion of privacy”). In *United States v. White*, 401 U.S. 745 (1971) (plurality opinion), the Court made a similar point.

Concededly a police agent who conceals his police connections may write down for official use his conversations with a defendant and testify concerning them, without a warrant authorizing his encounters . . . For constitutional purposes, no different result is required if the agent instead of immediately reporting and transcribing his conversations with defendant, either (1) simultaneously records them with electronic equipment which he is carrying on his person; (2) or carries radio equipment which simultaneously transmits the conversations . . .

*Id.* at 751 (citations omitted).

<sup>227</sup> *Cf. Deibler v. State*, 776 A.2d 657 (Md. 2001).

We are all familiar with the legend of Lady Godiva who, in response to a commitment by her husband, Leofric, Earl of Mercia, to repeal onerous taxes levied on the people of Coventry if she dared to ride naked through the town, supposedly did so. Part of that legend, added some 600 years after the event, was that one person in the town, a tailor named Tom, had the temerity to glance upon the noblewoman as she proceeded on her mission and was immediately struck either blind or dead. This probably-mythical tailor became known to history as Peeping Tom.

The waiver account gains force, however, when we notice that protection of privacy is linked to the protection of dignity. When information is wrested from private control, the dignity of the subject is uniquely affronted: she and only she has been denied the right to be let alone accorded to her fellows. She has been subjected to a disadvantage which uniquely lowers her in the social order. If the affront is “outrageous,” as extant tort doctrine requires, recording of information may in turn be held to impinge on “interests of the highest order.”<sup>228</sup> But when the subject releases information into an uncontrolled environment, the question of dignity looks quite different. If everyone on the street is regularly subject to having their foibles recorded, the capture of an image of me picking my nose in public may embarrass me, but it does not deny my equal dignity. Social practice rather than law establishes the relevant baseline of equal dignity. The right to privacy does not encompass a dignity interest sufficient to prohibit recording the public face that every member of society discloses to others.<sup>229</sup>

Indeed, once information is released, it becomes an element of the lives of those who observe it as well as part of the lives of those who produce it. The experience of viewing the arrest of my neighbor, or of seeing her wear an embarrassing party hat while strolling in public, is an element of my lived reality; likewise, the experience of hearing

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*Id.* at 658.

<sup>228</sup> *Bartnicki v. Vopper*, 532 U.S. 514, 518 (2001); see also *supra* note 212 and accompanying text (describing how each of the opinions in *Bartnicki* used this concept).

<sup>229</sup> See *Bartnicki*, 532 U.S. at 534 (“Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.” (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967))); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975) (“The plain, if at times disquieting, truth is that in our pluralistic society . . . ‘we are inescapably captive audiences for many purposes.’ Much that we encounter offends our esthetic, if not our political and moral, sensibilities.” (quoting *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 736 (1970))); cf. *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 813 (2000) (“Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails . . .”).

In *Hill v. Colorado*, 530 U.S. 703 (2000), the Court accorded constitutional stature to the unwilling listener’s “right to be let alone” in upholding a prohibition of “counselors” who approach within eight feet of patients outside of medical facilities. *Hill*, 530 U.S. at 707-08, 710, 716-17 (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)) (internal quotation marks omitted). But the interest recognized involved avoiding personal confrontation, “persistence, importunity, following and dogging,” *id.* at 717 (quoting *Am. Steel Foundaries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 204 (1921)) (internal quotation marks omitted), rather than a right to “privacy” in public.

her berate me or lie to me is as much my own as it is hers.<sup>230</sup> A legal regime which gives my neighbor the right to preclude recording those experiences impinges on my control of my own recollections. Exposure of information to the public gaze provides public viewers a legitimate stake in the information that was absent before the exposure.<sup>231</sup>

Once information is released into the public sphere, moreover, it becomes a part of the stock of experience from which public discourse and common culture are constructed.<sup>232</sup> In the field of intellectual property, constitutional challenges attend legal innovations that contract the sphere of publicly available information.<sup>233</sup> It is fair

<sup>230</sup> Cf. *Butterworth v. Smith*, 494 U.S. 624, 632 (1990) (explaining that a witness could lawfully “divulge information of which he was in possession before he testified before the grand jury”); *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“Those who see and hear what transpired [in court] can report it with impunity.”); *Stilp v. Contino*, 613 F.3d 405, 406, 408 (3d Cir. 2010) (enjoining the state from imposing civil or criminal sanctions against a citizen who disclosed that he filed an ethics complaint against a public official); *Cooper v. Dillon*, 403 F.3d 1208, 1211-12 (11th Cir. 2005) (declaring a state statute that prohibits disclosure of information obtained during a government investigation an unconstitutional abridgement of free speech); *Kamasinski v. Judicial Review Council*, 44 F.3d 106, 110-11 (2d Cir. 1994) (holding that citizens may reveal their own speculations about judicial misconduct, but not the fact that a complaint was filed); *First Amendment Coal. v. Judicial Inquiry & Review Bd.*, 784 F.2d 467, 479 (3d Cir. 1986) (clarifying that witnesses may not disclose contents of proceedings before a judicial review board, with the exception of their own testimony).

<sup>231</sup> Cf. *People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd.*, 895 P.2d 1269, 1281-82 (Nev. 1995) (“By observing Berosini through the eye of his video camera . . . Gesmundo’s purpose was not to eavesdrop or to invade into a realm that Berosini claimed for personal seclusion. Gesmundo was merely memorializing on tape what he and others could readily perceive.”); *Tarus v. Borough of Pine Hill*, 916 A.2d 1036, 1045 (N.J. 2007) (“Today, hand-held video cameras are everywhere—attached to our computers . . . and even built into recent generations of mobile telephones. The broad and pervasive use of video cameras at public events evidences a societal acceptance of their use in public fora.”).

<sup>232</sup> Cf. *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 234 (1918) (“[T]he information respecting current events contained in the literary production—is not the creation of the writer, but is a report of matters that ordinarily are *publici juris*; it is the history of the day.”), quoted with approval in *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 354 (1991).

The Court has, however, acknowledged some authority to limit commercial exploitation of otherwise available information. See, e.g., *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575-76 (1977); *Int’l News Serv.*, 248 U.S. at 241.

<sup>233</sup> See *C.B.C. Distrib. & Mktg., Inc. v. Major League Baseball Advanced, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007) (“[T]he information used in CBC’s fantasy baseball games is all readily available in the public domain, and it would be strange law that a person would not have a [F]irst [A]mendment right to use information that is available to everyone.”); cf. *Golan v. Holder*, 609 F.3d 1076, 1083 (10th Cir. 2010) (concluding that First Amendment interests were overcome by substantial international copyright concerns); *Golan v. Gonzales*, 501 F.3d 1179, 1194 (10th Cir. 2007) (“[O]nce the works at issue became free for anyone to copy, plaintiffs in this case had vested First

use to copy an image as part of the creation of new transformative works of authorship, and an effort to dilute that protection meets constitutional objections.<sup>234</sup> So, too, a legal doctrine which seeks to suppress the recording of images of public action raises First Amendment concerns that do not infect a doctrine that prevents others from seizing or compelling initial disclosures.

A doctrine punishing capture of public images would vest in the plaintiff or prosecutor the right to truncate recollection and discussion of matters experienced by the community, and to effectively edit the community's memory. Given the emergence of pervasive image capture, such a doctrine is unlikely to broadly inhibit the practice of recording public occurrences for most Americans. Lior Strahilevitz notes that the impact—if impact there is—of the original privacy tort is most likely on “legally sophisticated parties,” like media defendants.<sup>235</sup> As a broad array of Americans begin as a matter of course to pervasively document their lives with image capture, most subjects of prohibition are not sophisticated legal actors. They are unlikely to be

Amendment interests in the expressions . . . .”); *FMC Corp. v. Capital Cities/ABC, Inc.*, 915 F.2d 300, 305 (7th Cir. 1990) (“ABC is free to retain copies of any of FMC’s documents in its possession . . . in the name of the First Amendment.”).

<sup>234</sup> See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 219-21 (2003) (explaining that fair use is part of the “traditional contours of copyright protection” necessary to harmonize the copyright regime with the First Amendment); *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (finding that the reproduction of a photographic image by a painter to comment on its meaning was “transformative,” satisfying the requirement for fair use); *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 822 (9th Cir. 2003) (holding that the use of thumbnail reproductions by a search engine to provide search capability was fair use); *L.A. News Serv. v. CBS Broad., Inc.*, 305 F.3d 924, 942 (9th Cir. 2002) (finding fair use of a video clip used in an opening montage); *Núñez v. Caribbean Int’l News Corp.*, 235 F.3d 18, 23 (1st Cir. 2000) (determining that “transformation” of modeling photos “into news . . . weigh[ed] in favor of fair use”).

Similar defenses apply to other intellectual property claims regarding use of images. See, e.g., *United States v. Martignon*, 492 F.3d 140, 153 (2d Cir. 2007) (remanding for analysis of a First Amendment challenge to a federal statute prohibiting nonconsensual recording of live musical performances); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 938 (6th Cir. 2003) (allowing a First Amendment defense to a federal trademark action for an artistic lithograph of plaintiff’s picture); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1189 (9th Cir. 2001) (concluding that a magazine was entitled to a First Amendment defense against an action seeking damages for alteration of the plaintiff’s image); *Cardtoons, L.C. v. Major League Baseball Players Ass’n*, 95 F.3d 959, 962 (10th Cir. 1996) (allowing a First Amendment defense to a federal trademark action and right of publicity action for parody baseball cards using caricatures of plaintiffs).

<sup>235</sup> See Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 926 (2005) (“It is through the regulation of these legally sophisticated parties that tort law may have a strong, albeit indirect, effect on ordinary people’s expectations of privacy.”).

informed of their potential liability, and the effect in establishing a norm protecting against allegedly problematic image capture is likely to be small. But punishments of image capture are well adapted to selective enforcement against political outsiders and those who annoy subjects with sufficient resources to mount litigation. The editing of collective discursive resources that results from aggressive legal innovations is thus likely to be of a sort particularly uncongenial to the flourishing of “wide-open” and “robust” public discussion.<sup>236</sup>

### C. Image Capture in Nonpublic Venues

#### 1. Participant Recording and Single Party Consent

Matters become more complicated when legal doctrines address participants in smaller circles of interaction. When I seek covertly to capture the images of my conversation with an acquaintance, or an investigator seeks to capture images of a target suspected of illicit activities in private, the claims of the subject of image capture are stronger. The subject has done nothing to reveal herself to the public gaze, and the capture and dissemination of her image singles her out for an impingement on her privacy and dignity. Moreover, by entering into private dialogue with their interlocutors, or entering demonstrably private property, potential recorders strengthen the argument that they themselves have waived their First Amendment rights to capture images.<sup>237</sup>

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<sup>236</sup> N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); cf. L.A. Police Dep’t v. United Reporting Publ’g Corp., 528 U.S. 32, 42 (1999) (Scalia, J., concurring) (leaving open the question of whether a policy “that *allows* access to the press . . . but at the same time *denies* access to persons who wish to use the information for certain speech purposes, is in reality a restriction upon speech rather than upon access to government information”); *id.* at 43 (Ginsburg, J., concurring) (“[O]nce a State decides to make such a benefit available to the public, there are no doubt limits to its freedom to decide how that benefit will be distributed. California could not, for example, release address information only to those whose political views were in line with the party in power.”); *id.* at 45-46 (Stevens, J., dissenting) (arguing for appropriateness of constitutional challenge “when the State makes information generally available, but denies access to a small disfavored class . . . because the State’s discrimination is based on its desire to prevent the information from being used for constitutionally protected purposes”); Legi-Tech, Inc. v. Keiper, 766 F.2d 728, 731, 736 (2d Cir. 1985) (holding that the state violated the First Amendment if it permitted the public to access a state-maintained database of pending legislation, but refused access to “those entities which offer for sale the services of an electronic information retrieval system which contains data relating to the proceedings of the legislature” (quoting 1984 N.Y. Laws c.257, § 21(c), at 1821)).

<sup>237</sup> This is the argument of Andrew J. McClurg, *Kiss and Tell: Protecting Intimate Relationship Privacy Through Implied Contracts of Confidentiality*, 74 U. CIN. L. REV. 887, 916-17 (2006), and Neil M. Richards and Daniel J. Solove, *Privacy’s Other Path: Reco-*

The interest in assuring that our private words and images are not conveyed against our will to a public audience is constitutionally cognizable.<sup>238</sup> And in some situations, that interest is sufficient to justify prohibition of image capture. The constitutional magnitude of that interest, however, is constrained in three dimensions.

First, we must distinguish between the capture and the distribution of images. The interest in avoiding outside observation depends primarily on the distribution of captured images. An invited observer who records images of her own interactions for her own future review has not subjected private occurrences to unconsented public examination. Recording the image preserves memories of the observer's own life, and in most situations it is implausible—and of dubious constitutionality—to imply an agreement to forgo her own memory.<sup>239</sup> It is only when and if the images are transmitted to others to whom the subject has forbidden distribution that cognizable invasions of privacy occur. A prohibition on image capture is an indirect means of avoiding this contingent harm. Since image capture is protected by the First Amendment, justifying its prohibition as a means of preventing certain sorts of subsequent dissemination runs afoul of First Amendment doctrine's established hostility toward suppressing expression in order to interdict future harms that may be prosecuted directly. As the Court recently reiterated, “[t]he normal method of deterring un-

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*vering the Law of Confidentiality*, 96 GEO. L.J. 123, 177-80 (2007). See also *United States v. Aguilar*, 515 U.S. 593, 606 (1995) (“As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards . . . .” (citing *Snepp v. United States*, 444 U.S. 507, 509 & n.3 (1980) (per curiam))); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36-37 (1984) (finding no First Amendment right to disseminate matters obtained in discovery); cf. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671-72 (1991) (enforcing a promise to hold information confidential).

<sup>238</sup> See *Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (“[T]he disclosure of the contents of a private conversation can be an even greater intrusion on privacy than the interception itself.”); cf. *Estes v. Texas*, 381 U.S. 532, 547, 549 (1965) (holding that the presence of television cameras in a courtroom denies due process because “[t]he impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable” and because courtroom television subjects the defendant to a “form of mental—if not physical—harassment”), *limited as to due process holding by Chandler v. Florida*, 449 U.S. 560, 581 (1981).

<sup>239</sup> Matters would differ, of course, if the information were initially obtained without direct and invited observation—as by wiretapping or technologically enhanced surveillance. Video voyeurism statutes that target nonconsensual image capture in places and circumstances in which the victim has “a reasonable expectation of privacy” are consistent with this concern. See, e.g., TENN. CODE ANN. § 39-13-605 (Supp. 2001) (making it “an offense for a person to knowingly photograph . . . an individual, when such individual is in a place where there is a reasonable expectation of privacy”).

lawful conduct is to impose an appropriate punishment on the person who engages in it.”<sup>240</sup>

Second, with respect to participant image capture in limited-audience situations, most courts enforcing common law privacy constraints acknowledge that it is only “offensive” intrusion into private matters that warrants sanction. Particularly salient public concern for the information at issue may provide a First Amendment basis for limiting relief. These concerns are often incorporated into the “offensiveness” element of tort actions for “intrusion on seclusion”<sup>241</sup> and the “newsworthiness” defense in actions for dissemination of private facts.<sup>242</sup> To the extent that targeted statutes or new torts barring image capture fail to incorporate such elements, they do not comport with constitutional requirements.<sup>243</sup>

Third, the Court itself has concluded that distribution of recorded first-person observations does not impinge on the subject’s legitimate expectations of privacy for Fourth Amendment purposes.<sup>244</sup> This conclusion does not itself determine the weight of such expectations in First Amendment analysis, and some states have recognized legitimate

<sup>240</sup> *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) (quoting *Bartnicki*, 532 U.S. at 529); *see also* *Schneider v. State*, 308 U.S. 147, 162 (1939) (invalidating a statute punishing distributors of leaflets as a way of discouraging littering by recipients).

<sup>241</sup> *See, e.g.*, *Sanders v. ABC, Inc.*, 978 P.2d 67, 77 (Cal. 1999) (finding that defendants in the media may “negate the offensiveness element” by showing that their intrusion was for purposes of news-gathering); *Shulman v. Group W Prods., Inc.*, 955 P.2d 469, 493 (Cal. 1998) (arguing that given the public interest in news, some intrusion that might “otherwise be considered offensive” may be justified); *cf.* *Hernandez v. Hill-sides, Inc.*, 211 P.3d 1063, 1079-80 (Cal. 2009) (considering justification and “offensiveness” for video surveillance). Video voyeurism statutes that incorporate an element of lewd intent also respond to this concern.

<sup>242</sup> *See, e.g.*, *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1216-17, 1220-22 (10th Cir. 2007) (refusing to find that the tort of public disclosure of private facts precluded the release of police officers’ identity in connection with sexual assault allegations).

<sup>243</sup> In *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977), the Court found recovery for publication of images consistent with First Amendment constraints where

petitioner’s state-law right of publicity would not serve to prevent respondent from reporting the newsworthy facts about petitioner’s act . . . [and] neither the public nor respondent will be deprived of the benefit of petitioner’s performance as long as his commercial stake in his act is appropriately recognized. Petitioner does not seek to enjoin the broadcast of his performance; he simply wants to be paid for it.

*Id.* at 574, 578.

<sup>244</sup> *See* *United States v. White*, 401 U.S. 745, 751 (1971) (plurality opinion); *see also*, *e.g.*, *United States v. Nerber*, 222 F.3d 597, 603-04 (9th Cir. 2000) (distinguishing between video images captured while informants are in the room and those captured in apparent privacy and citing relevant cases).



expectations of nonrecording and nondistribution of images observed as a matter of state privacy law.<sup>245</sup> But to the extent that states do not recognize such expectations as legitimate and instead continue to allow law enforcement officials and government informers to record and distribute their observations without constraint, it becomes more difficult for such states to claim that immunity to private image capture is an interest “of the highest order.”<sup>246</sup>

## 2. Consensual First-Party Image Capture and “Sexting”

Recording one’s own image usually risks no legal liability. However, as digital image capture capabilities encounter teenage hormones and impulsiveness in an increasingly sexualized environment, those technologies have unsurprisingly been turned to the service of teen-aged sexual transgression. Surveys indicate that the practice of “sexting” sexually provocative self-images captured on cell phones or digital cameras to friends and romantic partners is widespread among teenagers.<sup>247</sup> Prosecutors scandalized by graphic records of teen sexual liaisons have begun to deploy statutes prohibiting the production of child pornography and obscenity against teenagers who memorialize their sexual interactions with photographic images or who capture sexualized self-portraits and convey them to friends.<sup>248</sup>

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<sup>245</sup> See 2 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 11.04(6) (4th ed. 2006 & Supp. 2010) (identifying states rejecting the Court’s holding in *White*); THE PENNSYLVANIA CONSTITUTION: A TREATISE ON RIGHTS AND LIBERTIES § 11.4(a) (Gormley et al. eds., 2004) (“[T]he Pennsylvania Courts have given the reasonable expectation of privacy concept a . . . robust interpretation.”); Melanie L. Black-Dubis, *The Consensual Electronic Surveillance Experiment: State Courts React to United States v. White*, 47 VAND. L. REV. 857, 865-73 (1994) (discussing states that have provided constitutional protection against participant recording).

<sup>246</sup> See *supra* note 212 and accompanying text.

<sup>247</sup> See *supra* note 7 (surveying statistics on the transmission of sexually explicit images by teens).

<sup>248</sup> See *supra* notes 8, 70, 71. For a thoughtful recent investigation of the First Amendment issues with respect to minors, see John A. Humbach, ‘Sexting’ and the First Amendment, 37 HASTINGS CONST. L.Q. 433 (2010). See also Clay Calvert, *Sex, Cell Phones, Privacy, and the First Amendment: When Children Become Child Pornographers and the Lolita Effect Undermines the Law*, 18 COMM.LAW CONSPECTUS 1 (2009).

So too, recordkeeping regulations designed to suppress child pornography, which might apply to limit sexting between adults, raise First Amendment concerns. See *Free Speech Coal. v. Holder*, No. 09-4607, 2010 WL 2982985, at \*38-41 (E.D. Pa. July 27, 2010) (declining to address application of federal recordkeeping statutes 18 U.S.C. §§ 2257 & 2257A to adult sexting because the federal government disavowed intent to prosecute private and noncommercial expression).

“Sexting” usually manifests deplorable judgment on the part of the teenager involved. The volatility of digital images raises the risk of potential embarrassment—and indeed trauma—if recipients retransmit images. But child pornography prosecutions against teenagers who take or send sexualized pictures of themselves raise substantial First Amendment questions.

In its initial determination that, unlike obscenity, production and possession of “child pornography” can be prosecuted without reference to the images’ potentially redeeming value, the Court observed that “laws directed at the dissemination of child pornography run the risk of suppressing protected expression by allowing the hand of the censor to become unduly heavy.”<sup>249</sup> In *Osborne v. Ohio*, the Court acknowledged that it was the special harms of the sexual abuse of children that justified the exception to First Amendment protections. If “a parent gave a family friend a picture of the parent’s infant taken while the infant was unclothed,” prosecution of either the parent or the recipient would “criminalize[] constitutionally protected conduct.”<sup>250</sup>

In contrast to images obtained by subjecting a child to sexual abuse, teenage sexting—at least where there is no statutory prohibition against the underlying conduct recorded—like the computer-generated images protected in *Ashcroft v. Free Speech Coalition*, “records no crime and creates no victims by its production.”<sup>251</sup> Personal communication between actual or prospective romantic partners can claim protection under the First Amendment.<sup>252</sup> Notwithstanding the reactions of scandalized prosecutors, teenagers who email or text a nude picture of themselves to a boyfriend or a girlfriend should be treated no differently for purposes of the First Amendment than teenagers a generation

<sup>249</sup> *New York v. Ferber*, 458 U.S. 747, 756 (1982).

<sup>250</sup> 495 U.S. 103, 113 n.9 (1990); *see id.* at 115 n.11 (“We do not concede . . . that the statute as construed might proscribe a family friend’s possession of an innocuous picture of an unclothed infant.”).

<sup>251</sup> 535 U.S. 234, 250 (2002); *see id.* at 249 (stating that the “child pornography” exception to First Amendment doctrine rests on the proposition that the material in question is “the product of child sexual abuse”).

<sup>252</sup> *See Bartnicki v. Vopper*, 532 U.S. 514, 533 (2001) (noting the importance of private conversations); *Procurner v. Martinez*, 416 U.S. 396, 409 (1974) (finding the private correspondence between a prison inmate and his wife protected by the First Amendment), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401; *Redmond v. United States*, 384 U.S. 264, 264-65 (1966) (*per curiam*) (granting the Solicitor General’s motion to vacate and remand with instructions to dismiss obscenity prosecution of a husband and wife who mailed “undeveloped films of each other posing in the nude to an out-of-state firm for developing”); *cf. Stanford v. Texas*, 379 U.S. 476, 486 (1965) (holding that there must be heightened protection against searches of private correspondence and literary materials under a general warrant).

ago who handed a lover a nude self portrait in charcoal or oil paint, or a Polaroid photo.

There is, to be sure, much more to be said to fully analyze the problem of sexting. Further dissemination of images by recipients, for example, may raise different issues, both because the subjects have not consented to the distribution, and because potential harms rise exponentially as material disperses over the Internet. A teenager who engages in commercial distribution of his or her sexualized image can legitimately be subject to strictures against commercialized pandering that would apply to his adult counterpart. And where images capture activities prohibited under statutory rape laws, further concerns would arise. But such justifications must meet the threshold for regulation of expression: sexting, like other forms of image capture and distribution, cannot be treated as conduct invisible to the First Amendment.

### CONCLUSION

Justice Kennedy's recent majority opinion in *Citizens United v. Federal Election Commission* observed that "television networks and major newspapers owned by media corporations," which have become our society's "most salient media," are a form unimagined by the Framers of the First Amendment.<sup>253</sup> But, he continued, "that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted."<sup>254</sup>

With the diffusion of digital image technology in the last decade, pervasive image capture and sharing has become an increasingly "salient" medium of expression both in public and in private. In public, pervasive image capture grants authority to a range of unofficial voices; it provides a means of holding the conduct of the powerful to account. Pervasive image capture provides important elements of public discourse both in the "networks and major newspapers owned by media corporations," and in the listservs, blogs, and social networking websites that Justice Kennedy's opinion identified as the dynamic successors of currently established media.<sup>255</sup> In private, it lays the basis of interpersonal connection in a centrifugal age. Image capture memorializes personal experience and enables us to remember and reflect upon our lives. As culture critic Susan Sontag has observed, "In an era

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<sup>253</sup> 130 S. Ct. 876, 906 (2010).

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* at 913.

of information overload, the photograph provides a quick way of apprehending something and a compact form for memorizing it.”<sup>256</sup> When we recognize these propositions, it follows that the First Amendment protects the right to record images we observe as part of the right to form, reflect upon, and share our memories.

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<sup>256</sup> SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 22 (2003).