OKLAHOMA CITY UNIVERSITY
LAW REVIEW

VOLUME 48 SUMMER 2024 NUMBER 2

ARTICLE

PUBLIC CONCERNS, PRIVATE CONCERNS, AND THE FUTURE OF THE FIRST AMENDMENT RIGHT TO RECORD

Marc Jonathan Blitz[*]

INTRODUCTION

Consider the following First Amendment puzzle. As a general matter, the Supreme Court staunchly protects speech even when it has nothing to do with politics or public affairs. Although, in its view, "[t]he Free Speech Clause exists principally to protect discourse on public matters, . . . we have long recognized that it is difficult to distinguish politics from entertainment, and dangerous to try."[1] The Court therefore followed up this language by refusing to deny First Amendment protection to "first person" shooter video games where players engage in simulated violence or race cars, even where such games seem to have no

[*] Alan Joseph Bennett Professor of Law, Oklahoma City University School of Law. For invaluable assistance in editing this Essay and preparing it for publication, the author would like to thank the members of the Editorial Board of the Oklahoma City University Law Review: Jill Hilton, Chris Garinger, Ethan Tourtellotte, Landen Logan, Claudia Sánchez-Zavaleta, Erin Gossett, and Katelynn Crain.

1. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011).

political content.[2]

But there are areas of First Amendment law where the Court's doctrine is strikingly different—where, in fact, it insists on drawing the very distinction it has warned "is dangerous to try" to draw.[3] In employee speech law, for example, the Court has not shied away from drawing a constitutionally significant distinction between speech about "matters of public concern" from that which is about "matters only of personal interest."[4] In fact, in First Amendment doctrine on when the government may fire or otherwise discipline a public employee for their speech, such a distinction is central: Speech on matters of public concern is a key part of the First Amendment's scope. Speech about "matters of personal interest" is unprotected.[5]

If the public concern test were confined to employee speech, it would be a relatively minor exception to the Court's refusal to draw a line between "discourse on public matters" and other speech in determining when protection applies. The Court has explained that the employer-employee relationship may—like students' relationship with school authorities—need to be subject to different First Amendment rules than those that apply generally to the relationship between governments and citizens. As the Court emphasized in *Connick v. Myers*, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment" and this remains true even "if the reasons for the dismissal are alleged to be mistaken or unreasonable."[6]

However, the application of the "public concern" test is not so narrow. It has been important in the First Amendment's application to torts involving speech—and torts and crimes involving speech that threaten

2. *Id.*

3. A number of other scholars have taken note of this tension between Justice Scalia's words in Brown v. Entertainment Merchants Association and the court's "public concern test." *See*, e.g., Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 111 (2011); John A. Humbach, *Privacy and the Right of Free Expression*, 11 FIRST AMEND. L. REV. 16, 89 (2012); Eric T. Kasper & Troy A. Kozma, *Absolute Freedom of Opinion and Sentiment on All Subjects: John Stuart Mill's Enduring (and Ever-Growing) Influence on the Supreme Court's First Amendment Free Speech Jurisprudence*, 15 U. MASS. L. REV. 2, 39 (2020); Mary-Rose Papandrea, *Mahanoy v. B.L. & First Amendment "Leeway"*, 2021 SUP. CT. REV. 53, 75 (2021); Francesca L. Procaccini, *Equal Speech Protection*, 108 VA. L. REV. 353, 434 (2022).

4. Connick v. Myers, 461 U.S. 138, 147 (1983).

5. *Id.*

6. *Id.* at 146-47.

privacy. In *Snyder v. Phelps*, for example, the Supreme Court stressed that whether a plaintiff can prevail and recover damages in a suit for intentional infliction of emotional distress "turns largely on whether that speech is of public or private concern[.]"[7] Far from describing this distinction as a dangerous and difficult one to draw, it has said that judges must and can do so—and classify speech as about a "public" or "private" concern—by looking at the "content, form, and context" of the speech.[8] Speech on matters of public concern, it noted, includes speech that can "be fairly considered as relating to any matter of political, social, or other concern to the community" or "is[] a subject of general interest and of value and concern to the public."[9] The distinction has also been important in the Court's evaluation of privacy law. In *Smith v. Daily Mail*, for example, it said that states may not prohibit a newspaper or other media entity from publishing truthful information it has lawfully obtained when that information is "about a matter of public significance[.]"[10] In *Bartnicki v. Vopper*, it likewise found that the First Amendment protects even the dissemination of communications that were illegally obtained (for example, by electronic eavesdropping prohibited by state or federal law)—but again, only when what is shared is "speech about a matter of public concern."[11] Legal scholars have challenged the use of the "public concern test" to limit First Amendment protection of speech in these contexts, but courts continue to use it.[12]

The public concern test is likely to be equally if not more important to an emerging area of First Amendment jurisprudence: the law on a "right to record" with cameras, audio recording devices, and possibly other

7. Snyder v. Phelps, 562 U.S. 443, 451 (2011).

8. *Id.* at 453.

9. *Id.* (quoting Connick v. Myers, 461 U.S. 138, 146 (1983) and San Diego v. Roe, 543 U.S. 77, 84 (2004)).

10. Smith v. Daily Mail Pub. Co., 443 U.S. 97, 103 (1979).

11. Bartnicki v. Vopper, 532 U.S. 514, 535 (2001).

12. *See* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 3 (1990) ("The public concern test will generate, by the inexorable operation of stare decisis, a judicially approved catalogue of legitimate subjects of public discussion. That prospect alone should condemn the entire undertaking, for the Constitution empowers the people, not any branch of the government, to define the public agenda."); Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM. & MARY L. REV. 1985, 2016 (2012) ("Though 'speech concerning public affairs' may indeed be 'the essence of self-government,' the Court has never suggested that all other expressions are subject to suppression. The same should be presumptively true of employee speech[.]").

technology for capturing and preserving data from the surrounding environment. The Supreme Court has not yet issued a holding on the First Amendment status of such recording. But it has made clear that the dissemination of such recording counts as First Amendment speech: It protected dissemination of camera images in *United States v. Stevens*.[13] It there struck down, as inconsistent with the First Amendment, a law that imposed criminal punishment on dissemination of "visual [and] auditory depiction[s]," of animal cruelty, "such as photographs, videos, or sound recordings[.]"[14] It did so as well in *Bartnicki*, where it found unconstitutional a law that imposed civil liability on anyone (such as Vopper, the radio host sued in that case) who shared an audio recording that they had reason to know was illegally intercepted (for example, with illegal eavesdropping).[15]

However, many federal circuit courts of appeals have ruled that *a person's creation* of videos and other recordings is itself protected by the First Amendment from government restriction. They have found, in other words, that the First Amendment not only gives individuals a right to speak or write about the world but also a right to document it with cameras.[16] As the Seventh Circuit Court of Appeals noted in one of the most well-known cases of this kind, audiovisual communications are media of communication: Citizens educate others about the world by posting videos on YouTube or other websites.[17] "The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording [were] wholly unprotected."[18] Federal appellate courts in every federal circuit to have addressed this question have now all reached the same conclusion.[19]

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

14. *Id.* at 468 (quoting 18 U.S.C §48(c)(1)).

15. *Bartnicki*, 532 U.S. at 518-519.

16. *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012); Irizarry v. Yehia, 38 F.4th 1282, 1289 (10th Cir. 2022); Fields v. City of Philadelphia, 862 F.3d 353, 360 (3d Cir. 2017); Turner v. Lieutenant Driver, 848 F.3d 678, 690 (5th Cir. 2017); Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995).

17. *Alvarez*, 679 F.3d at 595.

18. *Id.*

19. *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012); Irizarry v. Yehia, 38 F.4th 1282, 1289 (10th Cir. 2022); Fields v. City of Philadelphia, 862 F.3d 353, 360 (3d Cir. 2017); Turner v. Lieutenant Driver, 848 F.3d 678, 690 (5th Cir. 2017); Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436 (9th Cir. 1995).

Moreover, it is clear that recordings are an essential part of public discourse. The protests that followed George Floyd's killing by Derek Chauvin occurred after Darnella Frazier recorded it and shared the video on social media.[20] In fact, those calling for policy changes of all kinds—from the left, right, center, or somewhere else on the ideological spectrum—have relied heavily on such sharing of video evidence to inform and persuade audiences. Social media sites are filled with videos.

This point was not reached without some judicial debate and disagreement among judges. Some circuits—particularly the Third and Fourth—were initially skeptical of the claim that recording *always* merits general First Amendment protection.[21] The Third Circuit, for example, had specifically raised doubts about whether individuals have a right to record events even where their recording lacks a nexus to communication: A specific plan to show it to others, for example, or a professional commitment (like that of photojournalists) to publish the images they capture.[22] The Third Circuit has now abandoned this position. Like other circuits, it has now embraced the position that the right to record is protected by the First Amendment even without such a showing.[23]

But the most significant challenge for supporters of this emerging First Amendment "right to record" comes not from such judicial skepticism, but from the way that technological developments are transforming the act of recording—and doing so in a way that presents grave threats to privacy. Modern-day cameras are not limited to capturing events in front of the person using them. Provided with capacities for automatic recording, a camera mounted above a street or on a vehicle can record hours of footage while its owner is engaged in other activity. Fitted with digital memory, they can store far more information than cameras of earlier eras. Mounted on drones, and supplemented with powerful zoom technology, they can capture footage of action from the air that is invisible to pedestrians on the street. As a *New York Times* account notes, by hovering near a window or over a person's backyard, drones can "reach into crevices of your home that other technologies cannot."[24] As the Congressional Research Services

20. Aidan J. Coleman & Katharine M. Janes, *Caught on Tape: Establishing the Right of Third-Party Bystanders to Secretly Record the Police*, 107 VA. L. REV. 166, 167 (2021).

21. *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 259-62 (3d Cir. 2010); Szymecki v. Houck, 353 F. App'x. 852, 853 (4th Cir. 2009).

22. *See Kelly*, 622 F.3d at 262.

23. *See Fields*, 862 F.3d at 358.

24. Nick Bilton, *When Your Neighbor's Drone Pays an Unwelcome Visit*, N.Y. TIMES (Jan. 27, 2016), http://www.nytimes.com/2016/01/28/style/neighbors-drones-invade-

noted (in a passage cited by this *New York Times* account), drone image capture can thus be a powerful tool of "stalking, harassment, voyeurism and wiretapping."[25] Consequently, even if courts do protect camera and other recording, it is highly unlikely they will protect *all* recording in every circumstance. What then will serve as a doctrinal limit? For reasons I will set out in Part I, reviving the "expressive purposes" limit once embraced by the Third Circuit[26] is ill-advised.

Considering the prevalence of the "public concern" test in First Amendment jurisprudence, it is possible—in fact, likely—that this test will play a significant role in what we can record. Given the ubiquity of smartphones and smartphone recording, it may no longer be feasible for government to impose such a limit on what individuals choose to capture video of in public places. But courts may still use the public concern test to determine when individuals can record with drones or other less common technology, or in private spaces, where recording will conceivably be subject to more restriction under the First Amendment than in public spaces. In fact, as noted below, the federal circuit courts that have recognized a right to record under the First Amendment have often described it as a right to record matters of "public concern" or "public interest."[27] If this remains a key element of jurisprudence on the right to record, it will become still more important for courts to have a framework for determining what counts as a matter of "public concern"—and apply this framework not only to the content of written or spoken words or their equivalent, but to the somewhat different content of video recordings. And it will be important to consider if courts can do this in a principled way in spite of the Court's warning that "it is difficult to distinguish politics from entertainment, and dangerous to try."[28] As Part II explains, it is possible but problematic to address this challenge by limiting the right to record

privacy.html.

25. *Id.* (citing Alissa M. Dolan & Richard M. Thompson II, Cong. Rsch. Serv., R42940, Integration of Drones into Domestic Airspace: Selected Legal Issues 29 (2013), http://fas.org/sgp/crs/natsec/R42940.pdf [http://perma.cc/SXQ6-LT47]); *see also* Andres Arrieta, *Over-the-Horizon Drones Line Up But Privacy Is Not In Sight*, ELECTRONIC FRONTIER FOUNDATION (Aug. 29, 2022) https://www.eff.org/deeplinks/2022/08/over-horizon-drones-lineup-privacy-not-sight [https://perma.cc/2XSC-T9FW].

26. *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010); Fields v. City of Philadelphia, 862 F.3d 353, 358 (3d Cir. 2017).

27. *See* Askins v. Dep't of Homeland Sec., 899 F.3d 1035, 1043 (9th Cir. 2018); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995); Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1235 (10th Cir. 2021).

28. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011).

only to the recording of activities by government officials.

As Part III then argues, even a broader version of the public concern test is likely to face powerful objections: Not only is it true, as many scholars have argued and the Supreme Court itself has recognized, that it is difficult to distinguish matters of "public" and "private" concern.[29] It is also difficult to justify denying First Amendment protection to recording on a matter of private concern—that is, a matter of personal interest to only an individual or a small group of individuals—where the resulting video or audio recording allows its creator to memorialize and learn from an event that holds deep interest for them.

Thus, an alternative approach—already considered by scholars—is likely to have appeal. This alternative, described in Part IV.A, begins from a different starting point. Instead of beginning by assuming that the right to record is only a right to record matters of public concern, one might instead understand it as a broader right to record *everything*—including events that hold little import or interest for the general public—with *the exception* of the private activity of a kind that would place it off limits to suspicionless government surveillance under the Fourth Amendment, or, perhaps, is defined as "private" in some other way. Our privacy interests, in other words, aren't simply "outside" of the First Amendment interests the right to record protects. Rather, they *override* those interests because our privacy is sometimes important enough to trump the (sometimes significant) First Amendment interests that individuals have even in learning about and recording even those matters that are *not* of public concern.

How might privacy serve as an external limit on the right to record in this way? Courts might deny or limit a right to record (1) intimate conduct or other matters that involve private subjects, (2) in private spaces, or (3) with technologies that defeat our reasonable expectations of privacy by transforming the "architecture" of privacy. First, perhaps a right to record should be weaker when the conduct that a person wishes to record reveals intimate aspects of another person's life—such as a private family matter. Second, that we have a right to record in public streets, parks, and other places does not mean we necessarily have a right to record in privately-owned spaces even if we have a right to be there. Even if we have a right to record events in the streets of a city we live in, for example, that doesn't mean we necessarily have a right to surreptitiously record in the interior

29. *See id.*; *see also* Estlund, *supra* note 12, at 44-45.

of others' private homes or businesses we do not own even if we have been invited into them. Third, that we have a right to record with cameras of the kind most people have in current smartphones doesn't mean we invariably have a right to record with other technologies—such as drone-laden cameras that can capture images from vantage points where the subjects of recording are less likely to be able to know it is occurring. That we can, by recording public activities in a park or street, capture footage of individuals there doesn't mean it would always be permissible to use powerful zoom lenses to capture details of a letter or note a person is reading. Nor might it be permissible to use a powerful microphone to record, or computer technology to amplify, a whispered conversation between friends or family members even when it occurs in a public space. Such use of video and audio recording technologies, I have previously argued, undermines the "privacy-protecting" architecture of public space[30]—and this has relevance for how this kind of technology is analyzed in Fourth Amendment law and also as I will argue here, in First Amendment law.

This then is one solution to the quandaries created by importing the public concern test into the emerging jurisprudence on the right to record: Limit it in order to protect private concerns instead. This essay will partly endorse this move, but with two significant qualifications that it will briefly sketch in Part IV.B—both rooted in the notion that, as Margot Kaminski perceptively argues, courts should not build the right to record on the foundation of "a simple 'private-public binary'" but should instead create different "defaults" for how this right works in public spaces on the one hand and private spaces on the other. More specifically, there should be a presumption *in favor* of finding that citizens have a First Amendment right to record in public spaces (perhaps even when they are recording matters that are not of public concern) and against their having such a right in private spaces without the permission of those spaces' owners, or in a way that otherwise violates reasonable expectations of privacy there. Each presumption, however, can be overridden: Recording in private spaces, although disfavored as a general matter, can sometimes be staunchly protected when it is a key step in creating and sharing evidence on matters of public concern. Recording in public spaces may lose First Amendment shielding (or receive only reduced protection) when it intrudes on private

30. *See* Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World that Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1480-81 (2004).

conduct or conversation, or private realms within public settings.

This double default-based framework highlights two problems with a right-to-record that simply substitutes a private concern-exclusion for a public-concern requirement. First, so long as courts continue to allow *some* recording in private spaces and do so where the recording captures information of public concern, courts will be unable to *entirely avoid* the challenge of defining what constitutes such a matter of public concern. They will *have* to do so in order to make judgments about what kinds of recording topics can override the presumption against recording (unconsented-to by the space's owner or the recording subject) in private spaces.

Second, an analogous problem arises in public spaces: It is, in a sense, the inverse of the problem that arises when we understand the limits of the public concern test. When courts understand that the First Amendment should staunchly protect speech—and audiovisual recording—that is of little interest to the public but holds deep value to a single person or a small group of individuals, they have to grapple with how the right to record can be limited without undervaluing or under-protecting these First Amendment autonomy interests. Respect for individual privacy interests provides an answer to that challenge—but raises a similar challenge of its own: There are privacy interests not only in activity usually regarded as intimate but often in other more mundane features of one's life that (especially in the aggregate) can reveal more about a person than they wish to share with others. There are privacy interests not only in private spaces such as the home but also in what individuals reveal about themselves in the conversations and other conduct they have in public spaces. That, as I and others have argued before, is what makes city-wide camera surveillance by the state worrisome.[31] But if widespread recording by the state threatens privacy even when it occurs in public spaces, and captures non-intimate behavior—then that raises the question of how there can be *any* robust First Amendment right to record events there—other than official government activity—without posing too serious a threat to our privacy.

Part IV.B will therefore sketch a solution to this double-default problem. In both public and private spaces, it will argue, courts should embrace a *narrow* definition of circumstances that will override each default. To assure that individuals can retain and count on the privacy they

31. *See id.* at 1407.

find in private spaces, such as homes, courts should define "public concern" narrowly—even if doing so requires a conception of "public concern" that is somewhat artificial and counterintuitively covers only actions by government officials and private party actions that can be clearly connected to major policy decisions. Speech that is clearly about criticizing government or particular government policies, for example, is easier for courts to identify as within such a category—and thus, at the core of First Amendment protection—than the more vague category of speech that is "a subject of general interest and of value and concern to the public."[32]

To ensure that individuals retain freedom to record, and then share recordings, of events in public spaces, courts should strongly presume such recordings are protected by the First Amendment. They should make exceptions *only* when the recording aims at narrowly-defined categories of intimate behavior or conversation, or captures normally invisible details—especially with magnification, pervasive long-term recording, or other technological enhancement that allows individuals to see far more than they could perceive with unaided observation. In other words, as Part IV.B will explain, each of these methods of overriding defaults in private and public spaces should do so respectively only to promote what have sometimes been called "core" First Amendment or privacy interests. Courts should allow recording in private spaces only when "core" First Amendment interests in political expression, and perhaps in certain autonomy-promoting expression, are at stake—not whenever there is *any* First Amendment value in the recording. Conversely, they should *deny* First Amendment protection to recording in public spaces only when such recording threatens "core" privacy interests—not whenever recording reduces the privacy of those recorded to *any* degree.

I. THE RIGHT TO RECORD WITH AN EXPRESSIVE PURPOSE

Even as courts have recognized that the First Amendment protects recording, the nature of recording has changed. The cameras on cell phones have become more and more powerful. So have the computer storage and internet capacities that permit permanent storage and widespread sharing of video and other captured images, and artificial intelligence and other technology for searching and analyzing captured

32. City of San Diego v. Roe, 543 U.S. 77, 84 (2004).

images. Drones, as mentioned earlier, have made video recording far more threatening to privacy. Justice Sotomayor warned, in a speech in 2014, that use of drones by private actors—not just police—raises significant threats to privacy and significant challenges for law.[33] As Margot Kaminski points out, these developments are leading legislators to enact new privacy laws limiting drone operation.[34] Texas, for example, has enacted a law which (as summarized by the Fifth Circuit) make it "unlawful to use a drone to 'capture an image' of someone or private property with an intent to surveil the subject of the image"—with exemptions for law enforcement, military, and professors or students using drones for an academic purpose.[35] As described below in Part IV, the Fifth Circuit has recently found this Texas law constitutional under the First Amendment.[36]

Transformed in this way by drones and other technology, audiovisual recording becomes a more questionable candidate for First Amendment protection. First, such technological enhancements to image capture weaken its link to expression. Old-fashioned picture-taking is—as scholars have emphasized—a more technologically sophisticated (and accurate) variant of taking notes (or drawing sketches) in a journal.[37] Image capture with new cameras, by contrast, does not merely record one's observations. It makes new kinds of observations possible. It does not merely capture what one sees. Its aerial vantage and power of magnification allow one to see what is normally beyond one's unaided vision. Second, the threat such technological advancements pose to privacy may make judges rethink, or at least strictly limit, the protection the First Amendment provides for recording: While it is quite plausible to say, as the Seventh Circuit did, that the First Amendment includes a right to create records of the experiences we wish to communicate about to

33. *See* Jacob Gershman, *Sotomayor: Americans Should be Alarmed by Spread of Drones*, WALL ST. J. (Sept. 12, 2014, 12:07 PM), http://blogs.wsj.com/law/2014/09/12/justice-sotomayor-americans-should-be-alarmed-by-spread-of-drones.

34. Margot E. Kaminski, *Regulating Real-World Surveillance*, 90 WASH. L. REV. 1113, 1118, 1126 (2015).

35. Nat'l Press Photographers Ass'n v. McCraw, 90 F.4th 770, 777 (5th Cir. 2024).

36. *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 380 (2011) ("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.").

37. *Id.*

others[38]—it is less plausible to say that it encompasses a right to invade the privacy of others' homes or to subject them to close and ongoing surveillance—and perhaps others' private experiences.

What then, should be the source of doctrinal limits? I will ultimately argue that it should be found not simply in a "public concern" requirement, as courts and scholars have thus far emphasized, nor in a "private concern" exclusion, which has received less attention in scholarship and would protect all recording that does not intrude into privacy. Rather, as Part IV.B will explain, it should be found in a particular combination of these two limits on the right to record – one that recognizes only a narrowly-defined right to record matters of public concern (without consent) in private spaces and a narrowly-defined limit to the First Amendment right to record what is observable in public space.

But this Part will first explore an alternative based on a requirement of an expressive purpose. As noted earlier, the Third Circuit was initially skeptical that the First Amendment provides for a broad right to record. It did not reject the existence of such a right entirely in its early cases. Rather, it suggested—in *Kelly v. Borough of Carlisle*—that the First Amendment only protects audiovisual recording where such recording has an "expressive purpose."[39] It has since rejected that expressive purpose requirement, and joined other federal circuits in treating video creation as a form of speech creation even without any showing that the video creator expects to share it as part of a communication.[40] However, given that the Supreme Court has not yet ruled on the First Amendment status of recording—and that there will be pressure on courts to place limits on what kind of recording the First Amendment protects—it is helpful to understand the reasons the Third Circuit, as well as some district or state courts, gave for favoring such an expressive purpose requirement, other reasons that might be offered for it, and why courts should reject those reasons.

At first blush, such an expressive purpose requirement might appear to make sense. The Seventh Circuit, as noted earlier, suggested that video recording is protected by the First Amendment—not because it is inherently expressive—but because it is a necessary condition of the

38. ACLU of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012).

39. *See* Kelly v. Borough of Carlisle, 622 F.3d 248, 260 (3d Cir. 2010); Szymecki v. Houck, 353 F. App'x. 852, 853 (4th Cir. 2009).

40. Fields v. City of Philadelphia, 862 F.3d 353, 360 (3d Cir. 2017).

expression that occurs when we "publish or broadcast" that recording.[41] In short, we cannot communicate by posting videos on YouTube or other websites, or sharing them with friends, unless we first create those videos with cameras. But if video recording receives First Amendment protection only because it is a step on the way to communication, then that protection arguably doesn't make sense when it occurs as a step in some *other* chain of acts—one that is *not* directed to communication. If, for example, someone captures video of an unsuspecting individual engaged in private activity and does not screen it or share it with others, but merely does so to watch it himself, then video technology is not serving as a medium of public discourse, but rather a tool for self-serving voyeurism. Moreover, there are other areas of First Amendment doctrine where a link to speech has often been treated as necessary: The First Amendment's right to receive information and ideas is not a right to receive information from *any* source—for traveling to a foreign country and observing it for example.[42] It is rather a right to receive information from a speaker.[43]

An "expressive purpose" test, however, begs more questions than it answers. For one thing, it is very difficult for courts to rule out such an expressive purpose if, just as they extend the First Amendment's protection to private diary entries or draft essays individuals may never share with the world, they extend it to unshared video recording. One might argue that these private-written reflections merit First Amendment protection because, unlike video recording, writing down one's thoughts is inherently expressive, whether one does it for a public audience or for one's own benefit. It involves use of words to capture and give verbal form

41. *Alvarez*, 679 F.3d at 595.

42. *See* Zemel v. Rusk, 381 U.S. 1, 16-17 (1965) (finding the First Amendment did not give Zemel a right to a visa to travel to Cuba and stating "does not carry with it the unrestrained right to gather information"); *see* Marc Jonathan Blitz, *The Right to Map (and Avoid Being Mapped): Reconceiving First Amendment Protection for Information-Gathering in the Age of Google Earth*, 14 COLUM. SCI. & TECH. L. REV. 115, 121–22 (2012).

43. There are now interesting discussions of whether an artificial intelligence (AI) entity that has no First Amendment rights of its own should nonetheless be regarded as a "speaker" from which a listener has a right to receive information. There have been persuasive arguments that an AI entity should count as such a speaker. *See, e.g.*, Toni M. Massaro & Helen Norton, *Siri-ously? Free Speech Rights and Artificial Intelligence*, 110 NW. U. L. REV. 1169, 1174 (2016); Toni M. Massaro et al., *Siri-ously 2.0: What Artificial Intelligence Reveals about the First Amendment*, 101 MINN. L. REV. 2481, 2482-2483 (2017), 2482; Margot E. Kaminski, *Authorship, Disrupted: AI Authors in Copyright and First Amendment Law*, 51 U.C. DAVIS L. REV. 589, 610 (2017).

to feelings and thoughts—and this is true even where one's only audience is oneself. But why should video recording also not count as inherently expressive in this way? As Seth Kreimer says, image capture has now become "an accepted medium of connection and correspondence:" We live in a world where people routinely communicate by sharing pictures and video clips.[44] Other scholars have similarly explored senses in which video recording may be expressive or inextricably connected with expression the moment it occurs.[45]

Moreover, if an intent to share a video is necessary, just how much sharing is required? Some courts have appeared to hold that video recordings or photographs only receive First Amendment protection when their creators intend to disseminate their footage or images to the public, or some audience other than those in their personal circle. Thus, in *Porat v. Lincoln Community Towers Association*, a federal district court refused to extend First Amendment protection to a person photographing a building's exterior because the picture taker was just a "photo hobbyist," not a professional photographer, and could not demonstrate an intent to share the photos with an audience.[46] In *Larsen v. Fort Wayne Police Department*, another federal court refused to extend First Amendment protection to a man filming his daughter's school choir performance because it was only for "personal archival purposes," that is for a family video album, and not to share with a wider public.[47]

An expressive purpose test thus seems too narrow when it denies First Amendment protection to video that one shoots for one's own subsequent viewing, to share privately with friends. In other cases, the expressive purpose test seems far too broad. Some video that unquestionably *has* an expressive purpose, and thus would qualify for First Amendment protection under the expressive purpose test, faces the same privacy problems that I suggested above would lead courts to worry most deeply about a robust right to record. Even those who have firm plans to share

44. Kreimer, *supra* note 36, at 337.

45. *See, e.g*, Jocelyn Simonson, *Beyond Body Cameras: Defending A Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1573 (2016) ("[B]y visibly challenging authority, the action of filming police officers in public is an expression of dissent."); Scott Skinner-Thompson, *Recording As Heckling*, 108 GEO. L.J. 125, 140 (2019) (stating that "the act of recording expresses a message of resistance at the moment the recording occurs, it is a direct form of speech entitled to First Amendment coverage.").

46. Porat v. Lincoln Towers Cmty. Ass'n, No. 04 Civ. 3199(LAP), 2005 WL 646093, at *5 (S.D.N.Y. Mar. 21, 2005).

47. Larsen v. Fort Wayne Police Dep't, 825 F. Supp. 2d 965, 980 (N.D. Ind. 2010).

with audiences the images they capture from drone-based or other cameras may, in doing so, violate the personal privacy of those they record. Some of them might conceivably be engaged in the "stalking, harassment, voyeurism and wiretapping" that drone cameras, according to the Congressional Research Service, may enable.[48]

More generally, however, there is a significant amount of non-speech conduct performed with an expressive purpose—but that does not make the non-speech conduct "speech" for purposes of First Amendment law. We might, for example, wish to travel to a foreign country in order to write an essay about what we see in such a location. But as the Supreme Court stressed in 1965, such a planned essay would not transform our traveling into First Amendment speech.[49] Nor do scientific experiments—for example, testing of drugs on animals—count as speech simply because scientists typically conduct such experiments in order to publish the findings that emerge from them.[50]

If an expressive purpose nonetheless endows video creation with a First Amendment protection that it does not appear to endow to world travel or scientific experimentation, then we need some account of what is distinctive about video creation. One possibility is that video creation is not merely "an antecedent step" on the way to expression—but a step that has a closer nexus to expression to most non-speech activity. Videos are very often created solely for distribution as part of communicative activity—for example, on social media. By contrast, as Alan Chen and Justin Marceau point out, other activity that contributes to speech creation, such as purchasing gasoline to drive to a political rally, is less likely to be connected to speech because walking or driving is often done for entirely non-expressive purposes.[51] As I have argued, there is also a difference between regulating conduct that is a "condition of some subsequent instance of speech" and regulations that restrict a "practice and

48. *See* Alissa M. Dolan & Richard M. Thompson II, Cong. Rsch. Serv., R42940, Integration of Drones into Domestic Airspace: Selected Legal Issues 29 (2013), http://fas.org/sgp/crs/natsec/R42940.pdf [http://perma.cc/SXQ6-LT47].

49. Zemel v. Rusk, 381 U.S. 1, 16-17 (1965).

50. Gary L. Francione, *Experimentation and the Marketplace Theory of the First Amendment*, 136 U. PA. L. REV. 417, 419-22, 427-30 (1987); *but see* Dana Remus Irwin, *Freedom of Thought: The First Amendment and the Scientific Method*, 2005 WIS. L. REV. 1479, 1522-24, 1532-33 (2005) (arguing that scientific experiments are protected by the First Amendment against being targeted to stop the dissemination of knowledge).

51. ALAN K. CHEN & JUSTIN MARCEAU, TRUTH AND TRANSPARENCY: UNDERCOVER INVESTIGATIONS IN THE TWENTY-FIRST CENTURY 160 (Cambridge University Press 2023).

technology" that "constitute[es] a medium for a large variety of speech acts[,]" such as word processing programs or audio and video recording.[52]

Such an argument certainly has potential but raises many questions. If video creation has a close nexus with speech, does that close nexus also exist when video creation is enhanced by technologies that make it into a powerful surveillance tool that captures much more than we normally see with our own eyes? Presumably, where a camera uses thermal imaging or other "see-through" imaging technology to render visible what is normally concealed by walls, then one might argue one is gathering information in a way that differentiates it from the kind of video creation that many of us engage in (with a SmartPhone).[53] The use of thermal imaging is, at least for the moment, not the kind of activity that social convention has classified as "expressive."[54] But is the same true when individuals capture only light in the visible spectrum (rather than the infrared wavelengths they capture with thermal imagers) and use magnification technology to expose details that would normally be invisible, or that use of drones to capture visible light from a perspective that would otherwise be unavailable? However, when recording is unaccompanied by such technological enhancements, it seems odd to deny that it preserves a record in a medium of expression even when that record remains unshared.

There are also other respects in which the expressive purpose test may undermine First Amendment interests. Consider how writers create a story, poem, or nonfiction essay. They do not intend to share every draft they write. They may not even be sure if they will publish a particular work of writing at all. There are also some types of writing—such as diary entries—where the only intended audience is the person who creates the speech. This could also be true of videos and photographs: A person who captures a video of a family event—such as the individual denied protection in *Larsen v. Fort Wayne Police Department*—often does so only to share those videos with family members. But it is odd to say that means the video has no expressive dimension. It would be similarly odd to say that the First Amendment is not implicated by an ordinance that barred a photographer from taking 500 photographs only intending to select and publish five of them. As the Third Circuit stated when it decided

52. Blitz, *supra* note 42, at 157.

53. *See* Kyllo v. United States, 533 U.S. 27, 29 (2001) ("Thermal imagers detect infrared radiation, which virtually all objects emit but which is not visible to the naked eye.").

54. Blitz, *supra* note 42, at 139-40.

to reject the expressive purpose requirement, "reasoning ignores that the value of the recordings may not be immediately obvious, and only after review of them does their worth become apparent."[55]

There is another point raised in past scholarship on First Amendment protection for recording that justifies extending it even to recording with a non-expressive purpose. The right to record arguably stems not solely from the First Amendment's protection for freedom of speech but from its protection for freedom of *thought*. Intuitively, the First Amendment protects our private diaries from state restriction or punishment even when we have no intention of sharing those entries with anyone. If the First Amendment only protected dialogue and other communication, it would be hard to see how it covers that. But, as Martin Redish has argued, such protection makes sense if one assumes that the First Amendment protects our use of language not just to share our thoughts, but also to record and develop them.[56] The same is arguably true of the video and audio recordings we make for our own benefit. As I have already noted, Chen and Marceau analogize video recording what one sees to taking written notes about one's observations.[57] As Seth Kreimer has noted, many individuals use image capture not to convey ideas, but to form and retain them: "Visual memory," he notes, is notoriously thin and unreliable" and so "camera-phone users ubiquitously capture and archive images to record their experiences for future reference."[58] Travis Gunn similarly argues that video recording replicates and supplements "the natural human methods of observation and recording."[59] It is true, as noted earlier, that some types of image capture go far beyond capturing visual observations: Cameras that capture infrared radiation, or use magnification or aerial photography, to capture details that would otherwise be invisible to us. Yet, if we put such technologies aside for the moment, what remains when we consider cell phone cameras is an activity that we clearly use to supplement and

55. Fields v. City of Philadelphia, 862 F.3d 353, 358 (3d Cir. 2017); *see also* Marc Jonathan Blitz et al., *Regulating Drones Under the First and Fourth Amendments*, 57 WM. & MARY L. REV. 49, 89 (2015).

56. Symposium, *Freedom of Thought as Freedom of Expression: Hate Crime Sentencing Enhancement and First Amendment Theory*, 11 CRIM. JUST. ETHICS 29 (1992).

57. ALAN K. CHEN & JUSTIN MARCEAU, TRUTH AND TRANSPARENCY: UNDERCOVER INVESTIGATIONS IN THE TWENTY-FIRST CENTURY 162, 165 (Cambridge University Press 2023).

58. Kreimer, *supra* note 36, at 342.

59. Travis Gunn, *Knowledge Is Power: The Fundamental Right to Record Present Observations in Public*, 54 WM. & MARY L. REV. 1409, 1440 (2013).

enhance our memory.

Audiovisual records may thus fall within the coverage of freedom of thought even when they are never part of a communication. John Humbach writes that there is a "basic right to observe the world around us."[60] As I have similarly argued, our ability to develop and add to our store of thought and perception "depends not only on our ability to communicate free of government monitors and censors, but also to observe the world free from government-imposed blinders."[61] Given this function of image capture, as Jane Bambauer notes, requiring that photographs be shared with an audience before receiving protection would "den[y] the value of private thought and intellectual growth that scholars and jurists have traditionally endorsed."[62]

II. THE RIGHT TO RECORD AS A RIGHT TO RECORD POLICE OR OTHER GOVERNMENT ACTORS

As noted above, even where video recording counts as "expressive," it is a form of expression that might come at a steep cost to others' privacy. And if it is this kind of privacy threat that has, in the past, caused courts to hesitate before extending the right to recording, that hesitation will likely exist no matter how one conducts the analysis in Part I.

Here then is one possible path courts can take to ensure that a right to record need not come at the expense of individual privacy: The right to record, they may find, is not a right to record anything that may be in front of one's camera, but only a right to record police officers or perhaps other government officials engaged in activity that is a matter of public concern. Moreover, they may find, it is not a right to record from anywhere (for example, from a drone's aerial vantage point) but only to record that which a person can see from where she stands, with her unaided vision. Imposing such limits on the right to record can prevent it from morphing into a constitutional right to monitor others' lives and property.

Such limits also have a plausible foundation in prior First Amendment precedent—particularly, a line of cases (beginning with *Richmond Newspapers v. Virginia*,[63] and given clearer direction in *Press-Enterprise*

60. Humbach, *supra* note 3, at 41-42.
61. Blitz, *supra* note 42, at 182.
62. Jane Bambauer, *Is Data Speech*?, 66 STAN. L. REV. 57, 83 (2014).
63. Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 576 (1980).

v. Superior Court,[64]) in which the Supreme Court has held that individuals have a right to observe the proceedings of trials and other government proceedings that have "historically been open to the press and general public" and where "public access plays a significant positive role in the functioning of the particular process in question."[65] The same government action that is subject to observation under *Richmond Newspapers* and its progeny, courts might hold, should be subject to audiovisual recording where such recording is consistent with "the function[] of the particular process in question."[66] If citizens have a right to observe police in action, they thus might have a right to record them—at least from the ground and in a way that does not interfere with police activity.

It is important to recognize that this account of a First Amendment right to record is different, in significant ways, from one which protects recording because it is a step in the process of creating an expressive work (specifically, a video recording). On the latter account, as I have noted above, courts treat an audiovisual recording—for example, one that is shared with the world on YouTube, Vimeo, or a person's or media entity's own blog or other website—as an act of First Amendment "speech." And then—to borrow the language used by Ashutosh Bhagwat—courts protect not only that speech itself but also the antecedent act of "producing" that "speech."[67] By contrast, when *Richmond Newspapers* and similar cases protect citizens' access to, and ability to observe, a criminal trial, they are not doing so on the assumption that these citizens will predictably (or even likely) make these trial observations the basis of soon-to-be reports. On the contrary, citizens have a right to view a criminal trial, under the First Amendment, even when they have *no* plans to talk or write about it afterward.

Indeed, if the right to observe a trial were justified only as a step allowing citizens to write about it, then it would probably extend not just to trials and similar government proceedings, but also to many other settings that citizens in a democracy have a strong interest in writing and learning about—such as food processing plants that might be flouting safety rules or chemical plants that may be threatening the environment.

64. Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty., 478 U.S. 1, 8 (1986).

65. *Id.*

66. *Id.*

67. *See* Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1029 (2015).

But this is not the rule that *Richmond Newspapers* establishes: It gives citizens a right not to speak, or to produce speech, but rather to gather information about their government—and to do so *even* when all of the government speakers in question (judge, prosecutors, defense attorneys) would prefer that their speech *not* be open to observation. In *Richmond Newspapers* itself, for example, the prosecutors and defense attorneys both asked to close the proceedings to observation, and the trial court judge agreed to do so.[68] The Supreme Court held that criminal trials must nonetheless remain open to citizens in part because people "in an open society" need to have a right to observe and ensure that justice is being done at criminal trials[69]—and because this need is protected by the First Amendment.[70] This case is thus a limited exception to the general First Amendment rule that gives audiences a right to receive information only when such information comes from a "willing speaker," that is someone who agrees to share her speech with that audience (or with the world in general).[71] Citizens have a First Amendment right to view and listen to a criminal trial, by contrast, even if *none* of the trial's participants are willing to have them there.

Since *Richmond Newspapers* was decided in 1980, and *Press-Enterprise II* refined it in 1986 with the aforementioned two-part test, courts have extended these holdings to other kinds of government action.[72] The Ninth Circuit found it applied when a photojournalist wished to view and take pictures of "horse gathers, also known as roundups, in which [the BLM controls overpopulation among horses by] us[ing] helicopters to herd horses toward a temporary gather corral," and then shipping some of the horses to other locales.[73] There is, said the Court, "a qualified right of access for the press and public to observe government activities," and such a right includes government activities generally—and not only criminal trials.[74] The Third Circuit has likewise applied the test in considering whether individuals had a First Amendment right to attend and view

68. Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 555 (1980).
69. *Id.* at 572.
70. *Id.* at 577.
71. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976).
72. *Richmond Newspapers Inc.*, 448 U.S. 555 (1980); Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty., 478 U.S. 1 (1986).
73. Leigh v. Salazar, 677 F.3d 892, 894 (9th Cir. 2012).
74. *Id.* at 898.

government planning commission meetings.[75]

Some might resist rooting a right to record in *Richmond Newspapers* and its progeny, for two reasons. First, these cases were about accessing certain government proceedings: Absent the principle recognized in *Richmond Newspapers*, reporters and others would not have been able to enter the courtroom, let alone observe the criminal trial taking place there. By contrast, the police recording cases are not generally about access: They concern people who are in a street or other public forum, where they (and other citizens) have a right to be—and who want to take action there (making a video recording of police) that government has insisted is illegal.[76] Second, the specific act for which they claim First Amendment protection—that of making an audiovisual recording—is one that cases following *Richmond* have refused to treat as part of the access provided in criminal trials: One has a right to view a trial, but not a recognized right to record it. As Cristina Carmody Tilley writes, "when the press . . . asserted that its role as a proxy for the public's access rights included a right to use mechanical means of perception and communication, the Court suspended the proxy and excluded the camera or audiotape device."[77]

Still, one might argue that the underlying logic of a "right to observe" and the "right to record" case law should be the same. If the First Amendment right of access and observation extends only to "government activities," so too, one might argue, should a right to make an audiovisual recording of activities that one can already access and observe. In both cases, the First Amendment is shielding activity that is not inherently expressive: Observing or recording of a kind that may or may not lead to communication or other expression. And by extending First Amendment protection to at least non-expressive information gathering in this way, Barry McDonald points out, the First Amendment would be increasingly likely to constitutionally shield activities that "clash with other legally recognized interests such as rights in property, privacy, confidentiality, or security."[78] Both observing and recording, for example, can substantially

75. Whiteland Woods, L.P. v. Township of W. Whiteland, 193 F.3d 177, 180-81 (3d Cir. 1999) (holding that citizens have a right to access planning commission meetings).

76. ACLU of Ill. v. Alvarez, 679 F.3d 583, 598-99 n.7 (7th Cir. 2012).

77. Cristina Carmody Tilley, *I Am Camera: Scrutinizing the Assumption that Cameras in the Courtroom Furnish Public Value by Operating as a Proxy for the Public*, 16 U. PA. J. CONST. L. 697, 718-19 (2014).

78. 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, 262 (2004).

undermine privacy. In both cases, the argument might continue, First Amendment jurisprudence should thus shield *only* that information-gathering that—perhaps even, in the absence of such a speech nexus—serves important First Amendment values, such as providing citizenry with the information they need to monitor, and where necessary, speak out and mobilize, against government abuses. Under the second of these two foundations for free speech protection, the First Amendment might give individuals guaranteed access to criminal trials and other government proceedings—whether they intend to write about those trials or not—because open trials are essential to democratic accountability, and the criminal justice process needs to remain under citizens' watchful (and sometimes skeptical) gaze, just in case there is a need for citizens to question and discuss how government wields coercive power there.

Similarly, the First Amendment might provide individuals with a right to record police activity—and might do so even where the recorder lacks any existing plans to post or disseminate the recording—simply because, as the Seventh Circuit notes, the "liberties of speech and press, were [for the foundation generation, and remain for us,] intimately connected with popular sovereignty and the right of the people to see, examine, and be informed of their government."[79] Other cases on the right to record have similarly emphasized this justification for the First Amendment to specifically protect the recording of government officials.[80] In *Irizarry v. Yehia*, for example, the Tenth Circuit specifically found that "First Amendment principles show that *filming the police performing their duties in public* is protected activity" and noted that "[f]ilming the police and other public officials as they perform their official duties acts as "a watchdog of government activity . . . and furthers debate on matters of public concern."[81] In *Turner v. Lieutenant Driver*, the Fifth Circuit likewise noted that, although it found that there was a "broader right to film . . . the principles underlying the First Amendment support the particular right to film the police."[82] "Filming the police," it said, "contributes to the public's ability to hold the police accountable, ensure

79. *Alvarez*, 679 F.3d at 599.

80. As noted later in the essay, it is not clear this means this court would limit the right to record solely to recording police officers in public places. Rather, they are pointing out that in addition to arguments that might justify a more general right to create the speech in videos, there are particular arguments for allowing individuals to share information about the activities of government officials.

81. Irizarry v. Yehia, 38 F.4th 1282, 1289 (10th Cir. 2022) (citation omitted).

82. Turner v. Lieutenant Driver, 848 F.3d 678, 689 (5th Cir. 2017).

that police officers are not abusing their power, and make informed decisions about police policy."[83] This then is one benefit that derives from this *Richmond Newspapers*/*Press-Enterprise-II*-based justification for a First Amendment right to record: Its logic helps explain why and how the First Amendment can apply to certain categories of non-expressive information gathering—namely, those about government actions citizens need to monitor. To be sure, these cases *also* stressed that recording is a key means of speech creation—and did not clearly indicate that such speech creation would have First Amendment protection *only* when it captured the conduct of government officials.[84] But the democracy-promoting features of such recordings appeared to be key parts of each court's analysis.

There is also a second advantage in this account—one that arises, in particular, from applying the second prong of *Press Enterprise II's* two-pronged test. As I have noted above, this test supports a right of access to criminal trials and other government proceedings that have "historically been open to the press and general public" and where "public access plays a significant positive role in the functioning of the particular process in question."[85] Under the second prong of this test, courts might insist that even where individuals have a right to observe and memorialize a trial or some other government process, the *way* they do so must be compatible with "the functioning of" the government process they observe and document. Thus, even though citizens have a First Amendment right to observe criminal trials, and perhaps take notes there, this does not necessarily mean they also have a right to video record them. Indeed, the Court has resisted recognizing any right to video record criminal trials: Two years prior to its decision in *Richmond Newspapers*, it had said, in *Nixon v. Warner* that "there is no constitutional right to have [trial] testimony recorded and broadcast."[86] It repeated this statement after *Richmond Newspapers*, in *Chandler v. Florida*, a case where it refused to find that television broadcasting of a trial was inherently a violation of due

83. *Id.*

84. See, e.g., *Yehia*, 38 F.4th at 1289 (noting that "videorecording is 'unambiguously' speech-creation, not mere conduct"); *Turner*, 848 F.3d at 688-689 (stating that "the First Amendment protects the act of making film"—because it creates speech-creation and not just speech).

85. Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty., 478 U.S. 1, 8 (1986).

86. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 610 (1978).

process.[87] Its stance on recording in the courtroom has thus remained agnostic. It has not insisted cameras be barred from the courtroom. But nor has it found that those who have a right of access to trials have a right to bring cameras with them, especially given its concerns that at least in some circumstances, televising of trials could inject unfairness into them.[88] In short, where journalists and other citizens can ensure trials function fairly simply by observing them, and doing so without video recorders, and where the presence of video records would not only be unnecessary for a fair trial, but—on the contrary—harmful to it, then the First Amendment might establish a right to be present and a watch a trial, but not to record it.

The same argument might constrain the right to record: Just because one has a right to record police encounters with a cell phone from a public street does not necessarily mean one can record them (perhaps surreptitiously) from a drone or with other advanced technology. Indeed, this account of the right to record might make sense of what would otherwise be a very puzzling argument about drone recording recently set out by a federal district court: The judge in that case held that police had qualified immunity when they barred an individual from using a drone to record police activity at an accident scene. One reason for this qualified immunity, he said, was that "[e]ven if recording police activity were a clearly established right . . . , [drone image capture] is beyond the scope of that right as it has been articulated by other circuits."[89] That was because a right to record police from the ground, according to the court, does not include a right to record them from the air.[90]

As noted in a prior article (that this author co-wrote with James Grimsley, Stephen Henderson, and Joseph Thai), such an argument makes little sense if, as the Seventh Circuit wrote, a First Amendment right to record arises because it is an "antecedent" step required to publish a recording.[91] This is as true of a drone video as a cell phone video: One cannot publish an aerial drone's eye-view footage of police unless one can

87. Chandler v. Florida, 449 U.S. 560, 569, 578-80 (1981).

88. *See, e.g.*, Estes v. Texas, 381 U.S. 532, 544-545 (1965). *Estes* was decided fifteen years before *Richmond Newspapers* and the Court, in *Chandler v. Florida*, rejected the argument that *Estes* had found broadcasting of trials to be an inherent violation of the Due Process Clause.

89. Rivera v. Foley, No. 3:14-cv-00196 (VLB), 2015 WL 1296258, at *10 (D. Conn. Mar. 23, 2015).

90. *Id.*

91. Blitz et al., *supra* note 55, at 86.

first record it. Nor would a limit on drone-based recording make sense if the First Amendment protected all recordings on "matters of public concern," since such protection would cover footage of protests shot from the air as well as from the ground. Such a limit makes more sense, however, if the right to record is a right to gather *only as much* information about government activity (whether it occurs in trial or in police action) as is necessary to assure a certain level of democratic accountability, and *only in* ways that do not undermine that activity (for example, by making a trial unfair or rendering police protection ineffective).

But if a *Richmond Newspapers*-based right to record leaves significant room for privacy, it does so by arguably securing too little room for important First Amendment activity. It is not only when individuals record the police that they advance public discourse, but also when they record a multitude of other activities. Aerial camera footage, for example, reveals information of public interest when it exposes pollution by an industrial plant, provides information about the aftermath of a tornado or other natural disaster, or educates individuals about the natural or built environment. And, intuitively, government officials seem to flout First Amendment values not only when government seeks to hide its own use of coercive power, but also when they seek to monopolize (without strong justifications) other information.

Consider, for example, the kind of reporting that the University of Missouri's drone journalism lab had been conducting in capturing aerial footage of fracking and bird migration.[92] The FCC insisted at the time that the University of Missouri ceased its use of drones—unless and until it was able to obtain a waiver from the FCC's ban. It would seem odd for courts to quickly conclude that no First Amendment interests are at stake when the government shuts down this kind of journalism, especially if its motive is not to prevent the safety threats that arise from use of drones, but rather to keep journalists or other citizens in the dark about an issue of potential interest or importance.

Perhaps for this reason, there are now multiple court decisions that protect recording of matters of public concern—even when they record the operations of private businesses rather than public officials. Perhaps the most well-known of these are cases where animal rights activists posing

92. *See FAA grounds journalism school drones at MU and Nebraska*, KAN. CITY STAR (Aug. 23, 2013, 6:43 PM), http://www.kansascity.com/news/local/article325896/FAA-grounds-journalism-school-drones-at-MU-and-Nebraska.html [http://perma.cc/B44A-DUN4].

as job applicants have been hired to work in agricultural facilities, and then took advantage of the access they had there to video record—and then publicize—examples of animal abuse. In *Wasden v. Animal Legal Defense Fund*, for example, the Ninth Circuit found it was unconstitutional for Idaho to ban all "audio or video recordings of the conduct of an agricultural production facility's operations" "without the facility owner's express consent or pursuant to judicial process or statutory authorization[.][93] The Ninth Circuit said that a ban on all such videos clearly violated the First Amendment: Its precedent, it said, had recognized that there is a "First Amendment right to film matters of public interest."[94] "It defies common sense," it continued citing *Alvarez v. ACLU*, "to disaggregate the creation of the video from the video or audio recording itself. The act of recording is itself an inherently expressive activity; decisions about content, composition, lighting, volume, and angles, among others, are expressive in the same way as the written word or a musical score."[95]

III. THE RIGHT TO RECORD—ON MATTERS OF PUBLIC CONCERN

Faced with this objection that there is much we should be able to record—free of censorship—besides governments, courts could respond by recognizing a more capacious right to record, one that embraces not simply public officials, but all events or facts that have public importance. Such a move would sever the line of support that the right to record might receive in *Richmond Newspapers*' right of access to government proceedings. But, in doing so, it would link it to another well-established strand of First Amendment doctrine: Namely, that doctrine which gives certain types of speech strong insulation against government interference, but only when that speech is about "a matter of public concern."

Consider, for example, the First Amendment case law discussed in the introduction on the speech of government employees: It begins from the premise that—like other employers—government employers cannot run an effective workplace unless they have significant leeway to discipline or even fire employees for workplace conduct that the employer deems detrimental to getting the job done well. This leeway necessarily includes

93. ALDF v. Wasden, 878 F.3d 1184, 1191 (9th Cir. 2018) (quoting IDAHO CODE §18-7042(1)(a)-(d)).

94. *Id.* at 1203 (quoting Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995)).

95. *Id.*

the authority to restrict or punish speech, both of the kind that is integral to the job (a law firm might part ways with an associate whose briefs or trial arguments are insufficient in its eyes) and speech that is about personal issues but has an adverse effect on the work environment (an organization may fire a worker who is insulting or demeaning in personal conversations and is undermining other employees' morale). But although workplace decision-making is therefore, in some respects, a First Amendment-free zone, even in government workplaces that ceases to be true when a public employee's speech is not simply about work or personal issues but deals with a "matter of public concern."[96] Whereas public employers are, as a default matter, free from constitutional limits when they regulate their employees' speech, they face a strong First Amendment force field when the employee speech they target is speech made as a citizen about important public issues. Thus, in the leading case of *Pickering v. Board of Education*,[97] the Court found a public school could not—consistent with the First Amendment—fire a teacher in retaliation for a letter that the teacher wrote to a local newspaper criticizing the school's spending on athletics.[98] This was, said the Court, because—as in cases placing First Amendment limits on state defamation laws—First Amendment law gives extraordinary weight to preserving "free and unhindered debate on *matters of public importance*."[99]

This area of free speech law provides a possible model for the right to record: Speech, or speech-generating activity, that does not get First Amendment protection *automatically*—perhaps because it often causes problems government has to have a free regulatory hand to address—might receive such protection when it focuses on a matter of public concern. Employers normally need, and receive, free rein to regulate their employees' conduct (including their speech). But when doing so deprives the public of valuable information, the First Amendment demands that their speech restriction meet heightened scrutiny—or, more specifically, that the restriction of speech survive a balancing test ("*Pickering* balancing") in which a court "balance[s] . . .the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public

96. Connick v. Myers, 461 U.S. 138, 147 (1983).
97. Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563 (1968).
98. *Id.* at 570-71.
99. *Id.* at 573 (emphasis added).

services it performs through its employees."[100]

Similarly, government will be able to protect our privacy unless the First Amendment leaves room for it to place limits on how, when, and where we gather information about each other. But when an information-gathering restriction keeps citizens in the dark about matters of public importance, First Amendment interests might stand in the way.

This model of the right to record also receives significant support in the case law. First of all, even many of the cases that specifically dealt with filming of police officers described the right to record such officers as one instance of a larger right to record matters of public interest. In the *Askins v. U.S. Department of Homeland Security*, for example, the Ninth Circuit addressed a claim by individuals that a Customs and Border Protection rule preventing them from video recording "impose[d] unconstitutional restrictions on their First Amendment right to photograph and record CBP officers engaging in the public discharge of their official duties."[101] Yet it began its First Amendment analysis not by discussing a specific right to film only police officers but rather by noting that "The First Amendment protects the right to photograph and record *matters of public interest*."[102] In doing so, it cited a 1995 Ninth Circuit case, *Fordyce v. City of Seattle*, in which the Ninth Circuit had described the right using the same broad language.[103] Courts have also found that individuals have a right to record matters of public concern even when their recording does not involve recording government officials of any kind. In *Western Watersheds Project v. Michael*, for example, the Tenth Circuit found unconstitutional a Wyoming statute that imposed civil and criminal penalties on anyone who entered "private land" for "the purpose of collecting resource data."[104] The prohibited acts included "taking handwritten notes about habitat conditions, making an audio recording of one's observation of vegetation, or photographing animals."[105] And the Tenth Circuit said such acts "constitute[d] the protected creation of speech" and that the plaintiffs

100. *Id.* at 568.

101. Askins v. U.S. Dep't of Homeland Sec., 899 F.3d 1035, 1043 (9th Cir. 2018).

102. *Id.* (emphasis added).

103. Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (finding "a genuine issue of material fact does exist regarding whether Fordyce was assaulted and battered by a Seattle police officer in an attempt to prevent or dissuade him from exercising his First Amendment right to film matters of public interest").

104. Western Watersheds Project v. Michael, 869 F.3d 1189, 1193 (10th Cir. 2017).

105. *Id.* at 1195.

"use[d] the speech-creating activities at issue to further public debate."[106]

As noted earlier, courts have also found states violate the First Amendment when they enact "ag-gag" laws barring recording on food production facilities. In a recent book on undercover investigations, Alan Chen and Justin Marceau canvas these cases and note that they have generally "conclude[d] that there is a First Amendment right to record matters of public concern even on private property."[107] In *Animal v. Legal Defense Fund v. Kelly*, for example, the Court held that Kansas could not prohibit recording of commercial food operations on the basis of harms to those companies' reputations "arising out of true speech on a matter of public concern."[108]

There are, however, some problems with this model for the right to record. Perhaps the most serious problem has to do with defining what counts as "a matter of public concern." The Supreme Court has said that "a matter of public concern" "is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[109] It also said that it includes "any matter of political, social, or other concern to the community."[110] Courts must, according to its precedent in this area, decide if a matter is a matter of public concern by inquiring into its "content, form, and context."[111]

The Supreme Court's cases and lower court cases have refined this test to some extent—by describing how they apply each factor. For example, in *Egger v. Phillips*,[112] the Seventh Circuit said that, in analyzing the content of speech to determine if it weighs in favor of finding it to be of public concern, courts place speech in this category if it "implicates broader interests with societal ramifications."[113] Thus, said a district court in a subsequent case, "it appears that the content of an employee's speech must be a matter of importance to society at large and not to the employee alone if that speech is to be considered protectable under the first

106. *Id.* at 1197.

107. ALAN K. CHEN & JUSTIN MARCEAU, TRUTH AND TRANSPARENCY: UNDERCOVER INVESTIGATIONS IN THE TWENTY-FIRST CENTURY 168 (Cambridge University Press 2023).

108. ALDF v. Kelly, 9 F.4th 1219, 1235 (10th Cir. 2021).

109. Snyder v. Phelps, 562 U.S. 443, 452-53 (2011) (quoting San Diego v. Roe, 543 U.S. 77, 83-84 (2004)).

110. Connick v. Myers, 461 U.S. 138, 146 (1983).

111. *Id.* at 147.

112. Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983).

113. *Id.* at 316.

amendment."[114]

In *Regulating Drones under the First and Fourth Amendments*, we identified some of the significant challenges that arise when courts try to apply this definition:

> How large a portion of the community must have an interest or potential interest in the subject? The fate of a local park's hiking trail, for example, might be of intense interest to only the few individuals in a neighborhood who make regular use of it. The fate of an old building with historical significance might interest only a small group of conservationists. Would drone footage illustrating the threats posed to such a hiking trail or building by new development count as involving a "matter of public interest?" Moreover, does the interest in the subject of someone's speech (or drone recording) have to exist at the time that speech or recording takes place? Some issues might generate little interest from the community at one time but take on much greater importance later on-after someone presents the footage and comments on a previously ignored feature of it.[115]

Some cases, to be sure, have suggested that even an issue of interest to a small group of people might count as a matter of public concern. In *Urofsky v. Gilmore*, for example, the Fourth Circuit repeated the Supreme Court's statements that "[s]peech involves a matter of public concern when it involves an issue of social, political, or other interest to a community."[116] But it didn't say what can count as a "community" and it added that "[a]n inquiry into whether a matter is of public concern does *not* involve a determination of how interesting or important the subject of an employee's speech is."[117]

Focusing on form and context may add some guidance. Courts have said that speech is less likely to be of public concern when it is made in a forum where it reaches only a few people. In *Connick v. Myers*, the Supreme Court emphasizes that "Myers did not seek to inform *the public*

114. Shafer v. City of Fort Wayne, 626 F. Supp. 1115, 1122 (N.D. Ind. 1986).
115. Blitz et al., *supra* note 55, at 105-106.
116. Urofsky v. Gilmore, 216 F.3d 401, 406-407 (2000).
117. *Id.* at 407.

that the District Attorney's office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases."[118] The questionnaires she was fired for distributing were shared only with co-workers.[119] However, it is unclear exactly how this could apply to video surveillance where the video creator—at the time of capturing the video—is often acting alone, and then can keep it confidential, share it with only a single person, or post it where millions can view it. Trying to distinguish which of these is likely would seem to recreate the expressive purpose test discussed in Part I—and bring with it the problems that led the Third Circuit to abandon it and the other concerns described earlier.[120]

One solution to the kind of definitional problem, for courts faced with the vagueness of the term "public concern," is to refine the test more carefully in their case law. Thus, Chen and Marceau acknowledge that there are "administrability problems [in] this area of First Amendment doctrine."[121] However, they add, "[o]ther areas of First Amendment doctrine have provided robust protection for speech even where the boundaries of the right are not crystal clear" and they argue that "[o]n balance . . . the value in permitting these distinctions to be drawn outweighs the uncertainty that might accompany a public concern limitation."[122] In Part IV.B, below, I will argue that this argument has significant force: Unless courts entirely rule out First Amendment protection for nonconsensual recording in private spaces, they will need to recognize some ground that can allow for such recording, and Chen and Marceau are right that it should be some version of the public concern test.

Still, it is not clear that the needed refinement in the public concern test can be achieved without going considerably further than the Court's guidance in *Snyder v. Phelps* and other existing precedent. In an article closely analyzing the Supreme Court's above-described guidance on the public concern test in *Snyder v. Phelps*, Clay Calvert provides an illuminating analysis of the test's uncertainties.[123] He notes the Court's

118. Connick v. Myers, 461 U.S. 138, 148 (1983).

119. *Id.*

120. *See* Fields v. City of Philadelphia, 862 F.3d 353, 360 (3d Cir. 2017).

121. Alan K. Chen & Justin Marceau, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1040 (2016); *see also* ALAN K. CHEN & JUSTIN MARCEAU, TRUTH AND TRANSPARENCY: UNDERCOVER INVESTIGATIONS IN THE TWENTY-FIRST CENTURY 172-73 (Cambridge University Press 2023).

122. Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1040 (2016).

123. Clay Calvert, *Defining "Public Concern" After Snyder v. Phelps: A Pliable*

statement that in order to be on a matter of public concern, the issue must be "of concern to the community" and asks "who comprises the community by which a matter is to be judged?"[124] It might, for example, be a geographic community—and if it is, could be local or national and there can be debate over who is a part of it.[125] Or, he notes, it could be an online community.[126] He also notes other ambiguities in the Court's guidance: He notes the Court's statement that a matter of public concern could describe "any matter of political, social, or other concern" and asks if "other" includes *any* other types of concern—or whether there are "certain limitations on its scope."[127]

Another solution, which I will partially defend and explore more closely in Part V, is to instead use a proxy for this concept with sharper boundary lines. They might, for example, protect recording of all matters relevant to existing political disputes or policy discussions. A photograph or video recording of fracking activities would count. A photo relevant to a property dispute between two neighbors might not.

To be sure, this would mean that some topics that people unquestionably have First Amendment protection to discuss, in a face-to-face discussion or in print (such as the just-mentioned local property dispute), are not topics that have a First Amendment right to take photographs or record videos about. And it would lead to the odd scenario that while dissemination of such videos on YouTube or elsewhere is expression protected by the First Amendment, the creation of such videos would be a fair target for government censorship.

A sophisticated answer to such concerns comes from an approach set forth by Ashutosh Bhagwat in his article, *Producing Speech*. This approach extends *greater* First Amendment protection to video recording on matters of public concern than to other types of video recording.[128] It does the same for other conduct that constitutes an "act of creating" or "of producing . . . communication" rather than speech itself: Conduct such as making or obtaining ink or paper, operating or obtaining the services of a tattoo parlor, or viewing or investigating evidence that provides the background for a news story would all likely be protected by the First

Standard Mingles with News Media Complicity, 19 VILL. SPORTS & ENT. L.J. 39, 55 (2012).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Bhagwat, *supra* note 67, at 1035 (arguing that the protection of speech production methods should not be "as strong as the protections accorded to actual communication").

Amendment.[129] However, this does not mean that other kinds of video recording receive no First Amendment protection at all. On the contrary, where government targets video recording on the basis of its content, such targeting triggers First Amendment scrutiny whether the content has public significance or not.[130] If, for example, the government forbade a person from video recording a particular neighborhood picnic, the First Amendment would require the government to then explain why its restriction is *not* aimed at undermining the speech's "communicative impact" on potential audiences of that video. If the government failed to provide such an explanation, it would be subject to strict scrutiny.

In Bhagwat's account of regulation of actions that produce speech, the "public concern" test is thus relevant where government is targeting something *other than* the communicative impact of such a video. In that case, government would have to meet intermediate scrutiny of the kind typically applied to "content-neutral" speech restriction, but only if the video recording was on a matter of public concern.[131] Video recording on other matters could be freely restricted by government, as long as such restriction was not aimed at silencing or burdening the communication that such videos make possible. Moreover, where a restriction on video recording was not aimed at video recording at all, but was simply an incidental result of it—for example, the consequence of a law that grounds drones to avoid safety hazards, whether such drones carry cameras or not—then government could impose such a law (subject only to rational basis review) even if it happened to burden speech regarding matters of public concern.

So, for example, a law that prevented drones from flying above and video recording "Black Lives Matter" protests in Ferguson, Missouri would likely be (1) subject to strict scrutiny if the government failed to explain why its restriction had nothing to do with suppressing subsequent communications about those protests, (2) subject to intermediate scrutiny if it generally prevented drone-based image capture to protect citizens' privacy, but only in this case because the protests that were the subject of the recording are likely a matter of public concern, and (3) subject to only rational basis review if the law said nothing about image capture (or any other process of speech production) and simply prevented drone flight over populated settings in order to protect the safety of those below.

129. *Id.* at 1033-34.
130. *Id.* at 1061-63.
131. *Id.* at 1064-65.

In two respects, Bhagwat's framework gives the government more room to protect individuals' privacy than does the "expressive purpose" test analyzed in Part I. First, it does not automatically count video recording as First Amendment "speech," with all of its attendant constitutional protection, even where such recording indisputably has an expressive purpose. Even when someone creates a video with a firm and detailed plan to post it on YouTube, she is—on Bhagwat's model—not yet speaking, but rather "producing speech," and as such entitled only to the First Amendment shielding that is merited by the latter type of conduct. This shielding does not, for example, give production of speech constitutional protection against the incidental restrictions that it gives to speech itself. Second, unlike the expressive purpose test, this framework specifically distinguishes between—and accords different treatment to—matters of public and private concern. Under the expressive purpose test, a video that *has* an expressive purpose seems to receive the same level of First Amendment protection whether it is capturing information about a public protest, or about personal and intimate matters.[132] By contrast, under Bhagwat's test, this is true only where the government's aim is to prevent audiences from receiving and reacting to what the video shows. Where it is instead to prevent some non-communicative or pre-communicative feature of the video creation process (for example, to prevent the insecurity that individuals feel as they are being recorded), then government is constrained by the First Amendment only where such a non-ideological restriction of video recording happens to burden speech on matters of public concern.[133]

That does not mean this framework is in all respects less protective of video recording than the "expressive nexus" alternative discussed earlier. On the contrary, there is one respect in which it offers more robust First Amendment protection for audiovisual recording: Under the expressive purpose test, video recording receives no First Amendment protection at all when it lacks an expressive purpose. As mentioned earlier, other cases have applied such an analysis to completely deny free speech protection to photographers who were hobbyists rather than professionals, or to individuals filming school events for their own archives. By contrast, Bhagwat seems to suggest a categorical analysis: Since video recording is a means of producing speech, it will always receive some First Amendment protection (albeit less than speech itself). And it will receive

132. *See* Kelly v. Borough of Carlisle, 622 F.3d 248 (3d Cir. 2010).

133. Bhagwat, *supra* note 67, at 1064-65.

such protection even where the person doing the video recording is neither in the business of publishing her footage nor able to provide any other evidence of a specific expressive purpose.

This account of the right to record thus gives individuals a right to record more than just police officers and other public officials—and it does so while still leaving space for the government to protect privacy from pervasive use of cell phone cameras, or drone-mounted cameras. Moreover, while it is not at all clear—in current First Amendment case law—what counts as a matter of First Amendment concern, courts can provide such clarity themselves: They can, for example, announce that they will presume that political issues or subjects at the heart of a public policy controversy fit the bill, while other issues do not. The latter strategy, however, comes with a price: For many users of drone cameras, for example, their value lies not in their ability to capture a vivid record of protests or other newsworthy events, but rather in creating a record of the videographer's personal life or the objects of their personal interests. Individuals use them to create surfing videos or to capture (and replay) some of the thrill-seeking in extreme sports activities. Nature enthusiasts use them to shoot videos of animals that would flee, or perhaps, attack a nearby photographer, but will be compliant video subjects for an unseen drone camera. And others—from travel enthusiasts, to architecture buffs, to real estate agents—use drone cameras to capture stunning views of the natural and physical environment. Such uses of drones may well be less likely to draw the attention of government censors than use of cameras to film (potentially embarrassing) government activity, or protests against such activity. But it is sometimes hard to predict what kind of image capture officials will seek to suppress: As noted earlier, the photographer in the case of *Porat v. Lincoln Tower* was barred from taking pictures of a building's exterior.[134]

This highlights another problem with the public concern test that I have written about in earlier scholarship, and mentioned briefly in Part I: The value of recording and the speech it makes possible is not limited to providing material for democratic deliberation. It is also invaluable for the role that video recording and other mediums for recording facts or ideas has in contributing to individual knowledge and promoting individual autonomy. In a previous article, I therefore noted that the right to create

134. Porat v. Lincoln Towers Cmty. Ass'n, No. 04 Civ. 3199(LAP), 2005 WL 646093, at *5 (S.D.N.Y. Mar. 21, 2005).

and access images might be understood as "autonomy-promoting."[135] Considering the images that contribute to creating a virtual map or image-based guide, I argued that the function of such images may not be "to enlighten the public about a particular issue of importance to the community or some large portion of it, but rather to find a specific destination for an individual visit, or in some cases, to understand the nature, or simply admire the beauty, of an environment that might be of interest to few others."[136] These individual interests, I argued, should receive some shielding from a First Amendment right to access or create information, I argued, whether or not they are of public concern.

This problem with the public concern test also follows from the role that camera and audio recording play in allowing us to exercise—and strengthen—freedom of thought and intellectual inquiry. If, as noted earlier, recording can be viewed as a high-tech method of memorializing one's observations and safeguarding memory, this is valuable not just for political discourse but also for the thinking we do about other topics. An individual may wish to record mundane events in their own lives in order to better remember interactions with family members or to understand and alter their own behavior. Government measures that interfere in individuals' use of technology for intellectual inquiry, memory, and self-understanding should thus face First Amendment barriers even when the recordings they target have little to do with "a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public."[137]

IV. THE RIGHT TO RECORD (FROM DRONES)—EXCEPT WHERE THERE IS A "REASONABLE EXPECTATION OF PRIVACY"

A. Private Concern or Privacy Harm Limitation on the Right to Record

Rather than save space for privacy by reserving the right to record only for speech on public matters, courts might do so by withdrawing free speech coverage from private or sensitive matters. Instead of having to meet a "public concern" litmus test, in other words, video recording would be protected whenever it steers clear of invading private spaces (or

135. Blitz, *supra* note 42, at 121–22.

136. *Id.*

137. Snyder v. Phelps, 562 U.S. 443, 453 (2011).

capturing sensitive topics). Thus, Margot Kaminski argues that "the contours of the protected right to record are defined by the privacy harms that the right potentially causes" and to "understand the right to record . . . we must understand the privacy harm" recording can cause.[138]

Such an approach has the advantage of extending First Amendment protection not only to individuals who record video (from drones or cell phones) to report news or capture other events of public interest, but also to those who do so to create art or tell stories, review and improve upon a skill, or record events in the nature or social world that are of personal rather than political interest. It allows the right to record to cover image capture that is valuable to individual autonomy—because it can protect privacy without artificially limiting this right only to images on matters of public concern.

On this account, the only space where a First Amendment right to record should easily give way—where citizens might find their power of observation and recording of observation blocked by government bans—is in roughly the same space where government encounters constitutional limits on its own power to watch or record citizens: The area that routinely counts as a Fourth Amendment "search." Under the prevailing test for what action counts as a Fourth Amendment "search," this would mean that individuals would lack a First Amendment right to record where the recording violated another's reasonable expectation of privacy.[139]

In a sense, this argument is a variation of the argument contained in the article *Regulating Drones under the First and Fourth Amendments*. In that piece, we observed that "police typically need not 'shield their eyes' from what other citizens in fact freely and lawfully observe," and that therefore if "the First Amendment keeps open a certain avenue of aerial observation to private citizens, it may also—at least as a default matter—keep that avenue open to law enforcement."[140] However, perhaps the legal

138. *See* Margot Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 170-171 (2017). Note that, as in Bhagwat's model, the fact that First Amendment protection exists does not mean that protection is absolute. Rather, the State may regulate if it can meet strict scrutiny (for content-based regulation of recording) or intermediate scrutiny (for content-neutral regulation). My focus here is on whether the right applies in the first place and not on how scrutiny would apply when it does.

139. *See* United States v. Katz, 389 U.S. 347, 361 (Harlan, J., concurring) (noting that the protections of the Fourth Amendment extend to conduct which meets "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable") (internal quotations omitted).

140. Blitz et al., *supra* note 55, at 71.

influence should also go in the other direction: Not only should police capacity to engage in warrantless aerial recording from drones (under the Fourth Amendment) depend, in part, on what people actually exercise their right to record (under the First)—perhaps the contours of the First Amendment right to record should mirror, or borrow from, those in the Fourth. This would also help ensure that private individuals do not severely undermine their neighbors' privacy under the cover of the Constitution, and by doing so, undermine the constitutional rules that keep police from entering, at will, into the same private spaces.[141]

What would this mean in practice? First, it would likely mean that any First Amendment right to engage in unconsented-to recording presumptively does not reach into the interior of the home and would—at the very least—be subject to limits when it is aimed at areas of a home's curtilage that the homeowner has made reasonable efforts to enclose or otherwise protect from observation. Second, it would also mean that the right to record vanishes, or weakens considerably, in some other private spaces where police surveillance would constitute a search: For example, the interior of a private business office or building.[142]

Perhaps, as Chen and Marceau suggest, the presumption that government may bar recording in such private space would be rebutted where a court concludes that the conduct captured in the recording is "on a matter of public concern"—and, perhaps, where there are other circumstances that make recording especially important to public debate. Where a business or public figure is using their privacy to hide activity that could cause significant harm to public safety or health, for example, and investigators have no alternative way of revealing the information,

141. Margot E. Kaminski has also written a nuanced and sophisticated analysis which advocates for certain privacy protections in applying the right to record where the privacy protections do not just arise from the fact that protection on "matters of public concern" leaves some recording unprotected, but rather from shaping the law to prevent privacy harms and conceiving of privacy as "physically situated." *See* Kaminski, *supra* note 138, at 167.

142. Margot Kaminski emphasizes this point in her persuasive analysis of how a framework for reconciling the right to record with privacy should take account of spatial boundaries. *See id.* The "right to record," she writes, "will be different in different kinds of spaces. In a public forum, courts should acknowledge that the right to record exists, regardless of whether the subject of the recording is a matter of public concern." *Id.* at 232. "In a nonpublic setting, I propose that the right to record should not exist unless the subject of the recording is a matter of public concern that trumps the interests of the recorded individual in managing her environment." *Id.*

surreptitious recording may merit First Amendment protection. But courts' starting point would be to presume such spaces aren't spaces where the First Amendment allows unregulated information-gathering.

Third, it may also mean that to the extent individuals are protected—against police use of parabolic microphones, GPS tracking, or other close observation even in public—government should also be permitted by the First Amendment to give individuals protection against similar invasions of privacy by private individuals who would use drones or other technology to stalk, surveil, or harass.

Each of these proposed limits on a right to record raises questions. First, while it is quite clear that a person would not have a First Amendment right to record in another's home or curtilage (without that person's permission), it is less clear which features of a home or its surroundings would be within an individual's right to record from an adjacent space outside. There has been disagreement among courts regarding whether police conduct a search under the Fourth Amendment when they record a homeowner's back or front yard over an extensive period of time.[143] A trio of Supreme Court opinions in the 1980s found that law enforcement did not engage in a search when they observed or photographed curtilage of a home, or the external environment of a private business, from helicopters or planes.[144] But two of these cases contained dicta indicating that recording that was more intrusive, or unusual, may well constitute a search.[145] Thus, how the right to record applies to this question requires more analysis. I have previously suggested that how the right to record applies to images of homes captured from public space depends on what the image shows: Unlike "close up views of homes that

143. *Compare, e.g.*, United States v. Tuggle, 4 F.4th 505, 511 (7th Cir. 2021) (finding that recording of defendant's residence from a pole camera over a period of nearly eighteen months did not constitute a search under the Fourth Amendment), *with* People v. Tafoya, 2021 CO 62, ¶ 49, 494 P.3d 613, 615, 623 (pole camera surveillance of front yard, backyard, and driveway over three months did constitute a search).

144. California v. Ciraolo, 476 U.S. 207 (1986); Dow Chem. Co. v. United States, 476 U.S. 227 (1986); Florida v. Riley, 488 U.S. 445, 452 (1989).

145. *See, e.g.*, *Dow Chemical*, 476 U.S. at 239 n.5 (noting that the case may have been decided differently if the surveillance had captured "any identifiable human faces or secret documents captured in such a fashion as to implicate more serious privacy concerns"); *Riley*, 488 U.S. at 455 (O'Connor, J. concurring) (noting that while the helicopter surveillance in that case wasn't a search, "public use of altitudes lower than that—particularly public observations from helicopters circling over the curtilage of a home—may be sufficiently rare that police surveillance from such altitudes would violate reasonable expectations of privacy, despite compliance with FAA air safety regulations").

reveal not only the permanent appearance of [a] house[,]" images that reveal the "ephemera of day-to-day life" and reveal more "about individuals' personal behavior . . . should be allowed to be shielded from regular high-tech monitoring."[146]

In any event, such a framework need not hold that the private space that is insulated against a First Amendment right to record must be synced so tightly with Fourth Amendment law that its scope changes with each lower court decision on whether a particular instance of police surveillance constitutes a search. A more workable rule might simply give legislators (and regulators) the leeway to bar or restrict a right to record as long as such a restriction is substantially related to protecting the privacy of the home, the curtilage of the home, and the environment of other areas—such as schools or daycare centers—where needs of privacy or security require blocking unrestrained surveillance by others. Such a framework would leave government with leeway not only to restrict recording that occurs inside of a home or another private environment—but also one which does equal damage to privacy from the outside, for example, by using high-powered magnification equipment and drone-based cameras to take pictures of what is normally invisible to onlookers. In short, while Fourth Amendment law provides a rough guide to what kind of private space might permissibly be made safe against video recording, this does not mean the First and Fourth Amendments need to protect privacy from private and government surveillance in precisely the same way or to precisely the same degree.

This point also helps save this proposed "private concern" test from the circularity that would plague it if the scope of a citizen's right to record and the scope of a police officer's right to conduct warrantless surveillance were defined with reference to each other. First Amendment law would allow government to craft rules substantially related to protecting private environments and would, in doing so, sometimes allow it to protect individuals against drone image capture even where the latter has been found to be a non-search by certain courts.

Such an approach might also leave room for government to protect against some intrusions that cameras might make into privacy, even in public space. To be sure, neither tort law protections of our privacy nor Fourth Amendment law has traditionally shielded observable activity we engage in public spaces. The Supreme Court, for example, noted in the

146. Blitz, *supra* note 42, at 193.

seminal 1967 case of *Katz v. United States* that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."[147] The same has been true in tort law. As one district noted of common law privacy protections, "courts have consistently refused to consider the taking of a photograph as an invasion of privacy where it occurs in a public fora."[148] However, in 2018, in *Carpenter v. United States*, the Court made clear that even monitoring of individuals' observable movements in public space counts as a search subject to Fourth Amendment constraints when it involves use of technology that allows the government to carefully reconstruct that person's movements over a long period.[149] Government, the Court said, could not obtain cell-site location information (CSLI) from a phone company covering months of a person's past movement because that would provide the government with a "detailed, encyclopedic, and effortlessly compiled" archive of a person's past locations[150] and effectively allow police to "retrace a person's whereabouts" through large stretches of their past.[151] That decision followed a 2012 Supreme Court decision in *United States v. Jones*[152] in which five Supreme Court Justices all expressed the view (albeit in separate concurrences) that long-term tracking of individuals with GPS devices—even on public roadways—would violate an individual's reasonable expectation of privacy and threaten Fourth Amendment values.[153]

Like the information generated by cell phones and GPS devices, camera recording can also allow government to retrace individuals' past movements and activities.[154] Drone cameras may likewise threaten

147. Katz v. United States, 389 U.S. 347, 351 (1967). A related Fourth Amendment doctrine would have severely undercut reasonable privacy expectations if imported into right-to-record jurisprudence: The doctrine does not have Fourth Amendment protection in what one voluntarily shares with a third party—even when the latter is a false friend who surreptitiously records private conversations. *See* United States v. White, 401 U.S. 745, 751-53 (1971). As Justice Harlan said in his dissent in that case, surreptitious *recording* of a conversation represents a far graver threat to privacy than exists when a person shares it without leaving a transcript of their precise words. *Id.* at 787 (Harlan, J., dissenting).

148. United States v. Vazquez, 31 F. Supp. 2d 85, 90 (D. Conn. 1998) (citation omitted).

149. Carpenter v. United States, 585 U.S. 296, 309-310 (2018).

150. *Id.* at 309.

151. *Id.* at 312.

152. United States v. Jones, 565 U.S. 400 (2012).

153. *Id.* at 413-18 (Sotomayor, J., concurring); *id.* at 418-31 (Alito, J., concurring).

154. *See* Stephen E. Henderson, *Fourth Amendment Time Machines (and What They Might Say About Police Body Cameras*, 18 U. PA. J. CONST. L. 933, 934-936 (2016)

individuals' privacy by tracking them over large stretches of public space, or using high-powered magnification to record details of their lives normally invisible to others (such as a text they are writing on a SmartPhone). The Fourth Amendment may well prevent unrestrained police surveillance using such methods. After all, it protects individuals against unreasonable searches not only of their homes, but also their "persons, . . . papers, and effects"[155] all of which people bring with them into public space (for example, when they stroll through a public park carrying a SmartPhone and using it to read a document they received from a friend via e-mail). Government restrictions that are substantially related to protecting privacy from this kind of tracking or magnification should thus be measures for which a suitably defined right to record leaves room.

Kaminski provides another reason that government should have some leeway to protect individuals against being recorded in public space. If, as she argues, the key harm that arises from privacy invasion is the way it disrupts individuals' management of boundaries,[156] this is a disruption that can occur in a public setting. While social boundaries we raise to create space against observation (by everyone, or by certain actors) consist in home walls or barriers to entry, others are more subtle: When we confide in a friend at an outdoor café, for example, we rely on knowledge about how far our voice carries, how easily we can be seen from a distance (or in darkness), and the improbability that we will be overheard by an acquaintance (or co-worker) with whom we are unwilling to share that conversation.[157] Such features of the public environment's privacy-protection architecture have already been threatened, in some urban spaces, by wide-scale public camera systems,[158] and are likewise

(describing pervasive camera recording as one kind of "Fourth Amendment time machine" technology that allows investigators to engage in a kind of "time travel" whereby they can study a subject's past movements).

155. U.S. CONST. amend. IV.

156. Kaminski, *supra* note 34, at 1135-39.

157. *Id.* at 1138-39; *see also* Harry Surden, *Structural Rights in Privacy*, 60 SMU L. REV. 1605, 1607 (2007) (examining the ways that legal protection for privacy rely on (and sometimes strength or replace) "structural constraints" such as "technological or physical barriers in the world."); Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227, 1240-41 (2003) (noting how privacy protections implicit in information systems resemble the "architecture of buildings and the layout of cities").

158. Blitz, *supra* note 30 at 1429-32 (discussing the ways that wide-scale camera systems can erode the architecture of privacy in public space).

threatened by drone imaging and other emerging technology.[159] As Kaminski points out, while the privacy provided by the home and other private spaces is invaluable, this does not mean that courts must simply rely on a "private-public binary," wherein government is deemed to have an interest in restricting surveillance in our homes (or other private premises) and none at all in restricting surveillance in streets or public squares.[160]

B. Some challenges for Public and Private Concern Test – and the Need for Nuanced Doctrine

In Parts II and III, I explained why there are problems with relying on the public concern test to limit the right to record and preserve room for privacy. First, the boundaries are unclear in part, because as the Supreme Court itself has noted, it is difficult to distinguish speech that has public importance from speech that does not. The guidance the Court has provided in cases such as *Snyder v. Phelps*—describing such a concern as "relating to any matter of political, social, or other concern to the community" or "of general interest and of value and concern to the public"—is vague.[161]

Moreover, there are problems both with defining "public concern" narrowly and defining it broadly in defining the scope of a First Amendment right to record. If it is defined narrowly, to cover only recording of government officials or activities, then First Amendment protection will be unavailable for recording of conduct by private businesses that can be as consequential for public welfare as most of what government does. As Chen and Marceau point out, undercover investigations have exposed widespread racial discrimination in housing, abuse of animals, and significant threats to the environment.[162] Reporting and other speech on those issues is staunchly protected by the First Amendment and it seems counterintuitive that the creation of records of those issues—whether in notes or video recordings—would not be.

On the other hand, if "public concern" is defined more broadly, it is

159. Kaminski, *supra* note 34, at 1138.

160. *Id.*

161. Snyder v. Phelps, 562 U.S. 443, 453 (citations omitted).

162. ALAN K. CHEN & JUSTIN MARCEAU, TRUTH AND TRANSPARENCY: UNDERCOVER INVESTIGATIONS IN THE TWENTY-FIRST CENTURY 17-32 (Cambridge University Press 2023)

hard to specify a limit on what it shields. There are innumerable matters that might be of concern to the community or of interest to the public. Even gossip may have such value, whether it is about the affairs of one's neighbors or of prominent community members. As Diane Zimmerman writes, "gossip is a basic form of information exchange that teaches about other lifestyles and attitudes" and it is not surprising that "[i]nterest in the details of one another's lives seems universal."[163] She thus expresses skepticism that a "private-facts tort" which bars disclosure of certain aspects of life can or should make it legally off limits for us to exercise a "freedom to dissect one another's lives and characters."[164] If even gossip about the details of each others' lives is of public concern, it is unclear what would not be—or how such a public concern test would justify preventing recording of particular forms of conduct.

And whether it is defined narrowly or broadly, a "public concern" test misses the value that speaking—or creation of visual records in recording—has for individuals when they create videos or other expression in order to pursue an idiosyncratic interest central to their own lives or to that of a very small community. A "private concern" or private space limitation may seem, at first, to provide an answer to these problems by placing certain subjects or spaces outside of a First Amendment right to record—even if such recording can be said to capture something of "public concern" (broadly defined). But such a private concern test is characterized by problems analogous to those that plague the public concern test.

First, the boundaries of what counts as a private concern or private space are uncertain—especially in the wake of *Carpenter v. United States* and when one considers certain differences between the way privacy is protected by the Fourth Amendment and the way it is protected by tort law. As noted above, *Carpenter* extends Fourth Amendment privacy protection to observable conduct that occurs in public space—at least against certain law enforcement uses of technology. But courts have not said exactly what "privacy in public" consists in—or what types of recording or other surveillance it might protect against. When, for

163. Diane L. Zimmerman, *Requiem for A Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 334 (1983); *see also* Humbach, *supra* note 3 at 69 ("For ordinary people in their ordinary daily lives, knowing about the activities, choices and, ultimately, the character of those who live around them can have enormous personal consequence for both their private and 'public' decisions.").

164. *Id.* at 336.

example, would it cover recording that, unlike the CSLI data request in *Carpenter* itself, is not aimed at gathering information about a particular person, but just captures activity in public near where the person recording happens to be, and in the process captures individuals who can later be identified in the footage? Should courts make a judgment about whether certain activities in public have an intimate character that should make recording of those activities less permissible than recording of other activities in public? Would such recording count as a Fourth Amendment violation when done by law enforcement, or recording outside the bounds of a First Amendment right to record when performed by private actors, only if it used technology that altered what I have previously described as "the privacy-protecting" architecture of public space—by using facial recognition technology to deprive individuals of anonymity, amplification of sound, or magnification of images to expose normally invisible details, or to use ongoing recording capacities (combined with massive storage) to create a searchable historical *archive* of others' lives rather than snapshots or brief video clips of them?

Lower federal courts, state courts, and legal scholars have begun to formulate tests for determining when a particular surveillance method constitutes a Fourth Amendment search under *Carpenter*. Matthew Tokson summarizes some of the factors proposed by scholars, noting they have measured how "revealing" a method is in terms of its "tendency to disclose sensitive or intimate details about an individual's life[,]" the amount of data collected, "the number of people affected[,]" the "inescapability" of the surveillance, the extent to which data is disclosed automatically, and the cost the government has to sustain to conduct the surveillance.[165] At least three of these factors, writes Tokson, have characterized lower courts' application of *Carpenter*: "the revealing nature of the data captured, the amount of data captured, and whether the data was disclosed to a third party automatically."[166] Such factor-based tests, however, will often leave uncertainty both about how the factors are to be balanced against each other and how to assess each factor. Moreover, even to the extent that such factors can be applied categorically to law enforcement access to certain sources of data, it is not clear how such factors might translate to individual recordings made by a private individual or organizations in public space that may then be combined—

165. Matthew Tokson, *The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law, 2018-2021*, 135 HARV. L. REV. 1790, 1801-04 (2022).

166. *Id.* at 1831-32.

at a later time—with recordings for other sources. Tokson, for example, notes that the courts have found that internet browsing histories can reveal sensitive information about "medical, social, and sexual practices" and that CSLI data can likewise reveal sensitive data about who one associates with—in activities protected by the First Amendment, political or religious life, family life, and sexual encounters.[167] But it is not clear how evaluation of such a factor would apply to recordings made by individuals of discrete conduct—which *might* capture evidence of such activities but *might also* capture information that is less sensitive.

Moreover, it is hard for an individual recording activities involving strangers in public places to know if the activity they are capturing is sensitive—for example, if a conversation they capture at an outdoor café shows nothing more than two colleagues chatting or, because of the interlocutors' identities, provides clues about political or religious activities. And, as I have written before, some activity that might generally seem intimate might nonetheless be sensitive for a particular person.[168]

Consider the example of a person walking into the offices of a particular business—such as a firm that engages in law, accounting, banking, or architecture. That may normally not be sensitive. A person recording such a site may simply wish to capture an aesthetically interesting structure in the city or the ebb and flow of pedestrian traffic nearby. But such a recording could also reveal when the employee at another firm enters the offices of their employer's competitor for confidential job interviews—and a potential change in employment. For this reason, I have argued in the past that Fourth Amendment limits on public video surveillance should not only protect against surveillance of activity that is widely regarded as particularly intimate. Just as I have argued above that the First Amendment interest in observing and documenting the world extends to a person's idiosyncratic interests—and not simply those subjects likely to interest "the public" or a large community—so one can argue that we have an interest in keeping private not just the activities that most people regard as intimate or sensitive, but also a range of other conduct we don't want to be easily discovered by anyone in our community.

Such a broadened conception of privacy, however, generates a problem that is the inverse of the problem with a broad public concern test, or an autonomy-based argument that extends First Amendment protection

167. *Id.* at 1801.

168. *See* Blitz, *supra* note 30, at 1414-15, 1424-25.

beyond matters of public concern: The latter extends the right to record too far—shielding individuals against state restriction as they record all manner of conduct, including others' private affairs. The former, by contrast, threatens to restrict the right to record by classifying too much activity, even in public spaces, as the potential subject of a legitimate privacy concern.

How then should courts defining the scope of the right to record address these challenges? First, the answer is not to treat the right to record as absolute in certain settings and non-existent in others. That would establish a simple "private-public binary" that Kaminski rightly rejects and criticizes. Rather, as she argues, distinguishing the strength of a right to record in public and private spaces can establish

> defaults, not drive foregone conclusions. Speech receives a stronger thumb on the scale in public settings, where recording "is speech" or is salient regardless of its subject matter. And the framework puts a heavy thumb on the privacy side when the setting is not a public forum and asks for balancing of privacy with the value of the speech at issue.[169]

Other scholars work with similar defaults.[170] As I have noted earlier, Chen and Marceau accept that a right to record in private spaces can normally be restricted when one doesn't have a property owner's consent.[171] Yet they argue that this default negation of a right to record

169. Kaminski, *supra* note 138, at 223.

170. I have considered how a similar system of defaults might work in understanding the Fourth Amendment's application to various technologies: Courts, I argued, might apply "to public space a rebuttable presumption modeled on that which *Katz* provides in more familiar settings for private activity, such as the home. Rather than assuming that every activity in a home is private, *Katz* held that '[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection . . . . One way courts might recognize a right of privacy even in public and observable activities is by transforming the assumption that a public and observable activity is unprotected into a rebuttable presumption as well. This would allow people to show, for example, that while an activity took place in a park or street, it took place under conditions which made it reasonable to expect it would not be observed or videotaped (or used as a foothold by which authorities could gain a deeper view of an individual's life)." Blitz, *supra* note 30, at 1438.

171. ALAN K. CHEN & JUSTIN MARCEAU, TRUTH AND TRANSPARENCY: UNDERCOVER INVESTIGATIONS IN THE TWENTY-FIRST CENTURY 165 (Cambridge University Press 2023).

ceases to apply where the subject an individual wishes to surreptitiously record is a matter of public concern.[172]

This is a good starting point. But in order to more fully address the challenges the right to record raises, courts will need to be able to identify more clearly when each default is overcome. The protection one might have against surreptitious recording in the home or other private area will be a tenuous one if someone wishing to override it can easily do so by convincing a court that what they recorded is a matter of public concern. Or the right to record in public spaces could be on uncertain ground—and easily chilled—if individuals with a camera could often find themselves devoid of First Amendment protection, and subject to punishment, if officials (and possibly judges) characterize as "private" activity a significant amount of the activity that occurs around them in public space.

I will therefore end this essay by proposing that another presumption be added to the right-to-record defaults that apply to public and private spaces respectively—and that is that it is only a fairly narrow or "core" conception of either public or private concerns that should generally be able to override the default for each kind of space. This additional presumption is necessary to ensure the defaults remain defaults—and aren't swallowed by exceptions—that is, that we don't easily lose the freedom to document our surroundings in public spaces or lose our privacy in the home and other spaces that are supposed to provide shelters from surveillance. The conception of a "core" area of different rights is something which has been a part of the way the Court discusses First and Fourth Amendment rights.[173] It generally describes the places where the insulation that the right provides against government interference is understood by courts to be at its height. The Court, for instance, has often described the central focus of First Amendment protection as "core political speech."[174] As noted earlier, the Court has, in most cases,

172. *Id.*

173. *See* Marc Jonathan Blitz, *Freedom of Thought and the Structure of American Constitutional Rights*, in THE LAW AND ETHICS OF FREEDOM OF THOUGHT (Marc Jonathan Blitz & Jan Christoph Bublitz eds. 2021).

174. *See, e.g.*, Meyer v. Grant, 486 U.S. 414, 421-22 (1988) (stating that "the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech'"); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 347 (1995) (stating that "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest").

provided no less protection to speech about personal matters than it has to speech about politics. But it has, in other cases, treated political speech as more central: "[S]peech on public issues," it stressed in *Dun & Bradstreet v. Greenmoss Builders*, "occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection."[175] "In contrast," said the Court, "speech on matters of purely private concern is of less First Amendment concern."[176]

The Court has also spoken of Fourth Amendment rights in similar terms: At the "very core" of the Fourth Amendment, it said in 1961, "stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion."[177] Moreover, each of these two areas of constitutional jurisprudence has often been defined to leave space for the core value of the other: Thus, in *Bartnicki v. Vopper*, the Court cited a key Fourth Amendment case on the dangers of eavesdropping, *Berger v New York*, and noted the strength of our interest in private communication.[178] But it stressed that "privacy concerns give way when balanced against the interest in publishing matters of public importance[,]" because of the "overriding" First Amendment "commitment" to the principle that "[t]hat debate on public issues should be uninhibited, robust, and wide open."[179] On the one hand, it has also defined First Amendment interests in a way that leaves the government with leeway to protect the privacy of the home. In *Frisby v. Schultz*, it stressed that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[180] A town, it found, could adopt a content-neutral ordinance banning picketing in front of private residences.[181]

In order to reconcile these two core interests, however, courts must define each narrowly enough that they can, in most circumstances, exist in separate spheres. I have already suggested how they might do so in developing the "public concern" test: By using certain proxies or rules-of-thumb that identify certain paradigmatic issues as issues of public concern,

175. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)).

176. *Id.*

177. Silverman v. United States, 365 U.S. 505, 511 (1961).

178. Bartnicki v. Vopper, 532 U.S. 514, 522-23 (2001).

179. *Id.* at 534-35.

180. Frisby v. Schultz, 487 U.S. 474, 484 (1988) (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).

181. *Id.* at 488.

and then perhaps proceeding by analogy beyond them. Courts, for example, might start with the rule regarding the right to record that many have already derived from and grounded in *Richmond Newspapers v. Virginia*: When public officials perform their duties in public spaces, that is a clear example of a matter of "public concern." It will likely be more difficult for courts to identify when recording of private businesses' activities in privately-owned spaces constitutes a matter of public concern that provides grounding for a right to record. But courts should in this case err on the side of providing a more cautious and narrow answer to the question of what issues count as being of sufficient interest to a larger community to count as matters of public concern: To be subject to a right to record, the facts uncovered should be facts they can clearly connect to some existing public policy or ethics debate.

Identifying specific categories of public concern may also require analogical reasoning. One particularly relevant consideration in such analysis could be the difference between the expectation of privacy in home life and in business settings. As William Heffernan explains, an important factor in Fourth Amendment law is how "technology" used in law enforcement investigation "impinges on the sources of personal vulnerability."[182] In certain cases, such as *United States v Dow Chemical*, he writes, warrantless surveillance that magnifies details of a property to detect unlawful conduct by a business might be proper—even if similar surveillance aimed at a home would not be—because "the government's technology . . . [is] being used to examine objects with no connection to personal relationships."[183]

Courts should similarly adopt a narrow conception of what constitutes a "privacy harm" sufficient to override the default level of strong protection for the right to record in public spaces. Protection for intimate activities, for the privacy of the home, and for our ability to retain anonymity and find space for private conversation even in public shouldn't require a pervasive privacy right that undermines the freedom that individuals generally have to document our shared public spaces. One model for defining private rights in this way can be found in Justice Kennedy's recent analysis of First Amendment rights to make false statements of fact in *United States v. Alvarez*.[184] Kennedy's plurality

182. William C. Heffernan, *Fourth Amendment Privacy Interests*, 92 J. CRIM. L. & CRIMINOLOGY 1, 101 (2002).

183. *Id.*

184. United States v. Alvarez, 567 U.S. 709 (2012).

opinion argued that while lies could sometimes cause harms, such harms can't *always* give the government a basis for bypassing First Amendment freedom.[185] As Chen and Marceau point out, harms of a certain sort *always* accompany deception in the sense that almost "every lie, if believed, causes some reliance by the listener and produces some combination of benefits and harms."[186] Thus, Justice Kennedy says, it is only "legally cognizable" harms—those that have traditionally provided the basis for a cause of action in American law, such as fraud, defamation, or perjury—that remove false statements of fact from the coverage of the First Amendment.[187] Courts could similarly begin by turning to tradition to understand what kinds of privacy harms might place recording outside of the First Amendment, even when it occurs from a public vantage point—and I have already discussed in Part IV.A how the core privacy protections that Fourth Amendment law provides for the home and other private places might play a role in limiting the right to record.

With respect to privacy in public, however, tort law or social tradition can only be a starting point. Some privacy harms may not be the subject of tort law or other traditional limits because it is only very recently that technology has made such harms possible. If there is no cause of action against being pervasively tracked in public spaces, or being subjected to facial recognition technology there, this might be because those threats have not existed. Rather than a long-standing social tradition protecting our privacy against such threats, it has instead been a long-standing feature of the architecture of physical space: We could count on being anonymous, at least in larger urban settings, because it has been unlikely we would be constantly identified and recognized there. We have been able to speak or read privately, even in public spaces, because others lacked technology to record and amplify conversations or magnify and read letters and books from others who could respectively hear or see them.[188] Courts must thus take into account our reliance on these privacy-protecting features of the environment—and not merely traditional legal protections for privacy, or those provided by social norms—in defining what constitutes a core privacy interest.

In a sense, this is what the Fifth Circuit recently did in its decision in

185. *Id.* at 726.

186. Alan K. Chen & Justin Marceau, *Developing a Taxonomy of Lies under the First Amendment*, 89 U. COLO. L. REV. 655, 677 (2018).

187. *Alvarez*, 567 U.S. at 719.

188. *See* Blitz, *supra* note 30, at 1480-81.

National Press Photographers Ass'n v. McCraw.[189] In that case, it found that Texas did not violate the First Amendment when it enacted a law that made it "unlawful to use a drone to 'capture an image' of someone or private property with an intent to surveil the subject of the image."[190] The Fifth Circuit found that such a law was content-neutral rather than content-based because, although its law placed limits on the *content of the images* a person could capture with a drone, this was not—the court said—a limit on the *content of any speech the that journalists or others capturing such images might engage in*. The State's restrictions "classify images as lawful or unlawful based not on what is in the picture, but on the basis of how the picture is taken," said the Court.[191] It thus applied intermediate scrutiny and found that the State's significant interest in protecting individual's privacy were sufficient to support such a limit on drone image capture (and narrowly-tailored to this interest). The Court's focus in applying this intermediate scrutiny test, however, was in protecting what it appeared to characterize as core privacy interests: "Though most drone operators harbor no harmful intent," it stressed, "drones have singular potential to help individuals invade the privacy rights of others because they are small, silent, and able to capture images from angles and altitudes no ordinary photographer, snoop, or voyeur would be able to reach."[192] Thus, its central basis for recognizing a limit on the First Amendment right to record seemed to be based not on "content neutrality", but rather on the fact that, unlike more rudimentary methods of recording in public space, drone recording circumvents physical barriers to surveillance that individuals have traditionally been able to rely upon to protect their privacy.

Unlike the Fourth Amendment, a First Amendment right to record would not automatically incorporate and provide protections for such privacy in public. Rather, it would leave legislatures with space to enact laws that do so free from the First Amendment constraints that, in other circumstances, give individuals a right to document public space. It may also include some content-based exceptions to protection for certain types of recording subjects normally regarded as an example of "intimate" activities. It may be the case, for example, that the First Amendment will give government more leeway to bar drone image capture or ongoing recording of patients entering a medical facility or students entering a

189. *National Press Photographers Ass'n v. McCraw*, 90 F.4th 770 (5th Cir. 2024).
190. *Id.* at 777.
191. *Id.* at 791, 794.
192. *Id.* at 794.

school than it does of pedestrians in other locations.

As courts develop a First Amendment right to record then, they should not only begin with default assumptions about the strength of the right to record in public and private spaces. They should also carefully define and circumscribe the kinds of core expressive and privacy interests that will justify exceptions to these defaults—recognizing robust rights for recording in public spaces only for recording that has a clear connection to government action or to conduct within private business (and, in some cases, other types of public property) that has a clear connection to the formulation of public policy. In public spaces, where individuals normally have First Amendment freedom to document shared public space, there should be exceptions only for traditional harms, to safeguard well-recognized spheres of intimacy, or to prevent technological weakening or circumvention of features of public space that allow individuals to find some measure of privacy there.

It is possible that courts should sometimes allow government to restrict recording even where such privacy interests are not involved. As I have written in earlier scholarship, even then "our right to photograph or film our environment might understandably be subjected to *O'Brien*-style limits, where such limits are necessary to allow government to achieve substantial interests of a particular kind."[193]

CONCLUSION

The First Amendment does not just give individuals a right to speak. It gives them a right to *create* speech and, in an age of social media and sharing of video recordings, such speech includes video recording. This is the conclusion of every federal circuit to have addressed the issue. But unlike a right to speak, a right to capture vivid visual or audio records of the world raises a threat to the privacy of those it records. Where then are courts to draw the dividing line between what the First Amendment allows individuals to record and what privacy concerns should block?

One answer, as Part I explained, is to identify a limit on recording as lying in what part of it counts as "conduct" rather than "speech"—and classify recording as the latter only when it is performed with an expressive purpose. But such an answer is untenable in a world where even unshared video recordings are often valuable as supplements to thought

193. Blitz, *supra* note 42, at 197.

and memory—and are often made with uncertainty about whether and when they can be shared. Another answer is the focus of Parts II and III and, as the introduction explained, is perhaps the most common judicial answer to the need to draw limits within the scope of free speech law to preserve room for other interests, such as employer discretion or protection of reputation and privacy: The purpose of the First Amendment's free speech protection, courts often say, is first and foremost to protect speech that further discussion of matters of public concern. So recordings on other matters—including areas where individuals expect personal privacy—may not be covered. But shielding privacy in this indirect way—by extending free speech only to the non-private realm of robust discussion of public matters—brings its own problems. Its premise that matters of personal interest are unimportant, and unworthy of staunch protection in discussion or as subjects of recording, is doubtful. Moreover, the public concern test is vague and can seemingly encompass numerous subjects.

If privacy protection against surreptitious recording dissolves when "matters of public concern" are in the camera's target, then they could not survive if "public concern" is defined broadly enough to encompass conversations or actions that arise in our lives on an everyday basis. If our homes and backyards are frequently a site for events that count, under the First Amendment, as "matters of public concern," then they will rarely be spaces where we can find freedom from potential surveillance. Consequently, while it might make sense for public concerns to override privacy in cases on the right to record, such a public concern override requires a well-defined and limited definition of what counts as a "public concern."

In understanding how the right to record is to be limited, it ultimately makes sense to go beyond relying on the public concern test. As Margot Kaminski points out, if the main damage caused by unconstrained recording is to privacy, then it is these privacy harms that should define "the contours of the protected right to record."[194] If the most significant concern we have about the right to record is that it threatens privacy, the best doctrinal answer is to respond with a legal shield for that privacy. Here, First Amendment protection can borrow from a place where that shield is more developed, namely Fourth Amendment law and perhaps privacy tort law. In short, where government is prevented by the Fourth Amendment from monitoring citizens without a warrant—especially in

194. *See* Kaminski, *supra* note 138 at 170.

homes and private premises, but also in public circumstances where people have a right to expect some freedom from ongoing surveillance—it should presumptively be able to protect them from being subjected to close or ongoing surveillance by other actors.

However, here too it is essential for courts to exercise care in defining this limit on a right to record—especially when it applies in public space. While individuals have privacy rights under *Carpenter v. United States* in being tracked and identified within public space, these privacy rights have to be understood in a way that does not define them so broadly so that they undercut the right the document public space where it should be strongest.