INFORMATION GATHERING OR SPEECH CREATION: HOW TO THINK ABOUT A FIRST AMENDMENT RIGHT TO RECORD

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INTRODUCTION

As recording technology has become omnipresent in American life over the last several decades, and recordings of police conduct have become an essential element of contemporary public discourse, courts have increasingly confronted the important constitutional question of whether individuals possess a First Amendment "right to record." The Supreme Court has yet to consider the issue; however, there is a growing consensus among the circuits holding that individuals "have a First Amendment right to record law enforcement [officials]."[1]

However, with the exception of the Seventh Circuit's in-depth analysis in *ACLU v. Alvarez*,[2] the courts of appeals have largely declined to comment on the scope or nature of the right, leaving the contours of the right to record unenumerated.[3] This lack of clarity has particular importance when confronting the question of reasonable regulations of recording public officials, especially in the context of non-law enforcement officials because different analytical frameworks would impart relatively broader or narrower discretion on government to regulate recording. While most of the circuits that have recognized a right to record have stated that governments may impose reasonable restrictions, only the First Circuit has elaborated on what sorts of restrictions might be appropriate.[4] And even then, that case dealt specifically with the right to record law enforcement activities.[5]

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[1] Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. REV. DISCOURSE 230, 236 (2016) (citation omitted).

[2] *See* 679 F.3d 583, 608 (7th Cir. 2012) (holding that the ACLU had a "strong likelihood of success on the merits of its First Amendment claim" that Illinois eavesdropping status was unconstitutional).

[3] *See* Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1042–43 (2015) ("There is thus a substantial body of case law granting First Amendment protections to the recording of public officials in public places, albeit . . . based on fairly cursory analysis.").

[4] *See* Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014) ("Reasonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them. . . . The circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure—for example, a command that bystanders disperse—that would incidentally impact an individual's exercise of the First Amendment right to film.").

[5] *See id.* at 5.

Scholars have proposed several ways of thinking about the right to record, each of which would have significant consequences for the contours of the right and the extent to which the states can impose restrictions on the right.[6] There are two principal theories. First, recording could be seen as an act of creating speech.[7] Placing the act of recording in the category of speech creation would categorize the right to record as a type of non-expressive activity inextricably bound up with expression and, therefore, part of the core of the free speech right and consequently subject to relatively limited restrictions.[8] Second, recording could be seen as principally a form of information gathering.[9] This would place the right to record in the category of "predicates" to speech or "structural elements" necessary for speech and therefore subject to broader restrictions.[10]

Whether the right to record is seen as creating speech or gathering information would likely have little effect on the right to record law enforcement activity in public. However, the nature of the right could have significant implications for the right to record other sorts of public officials. Information gathering has been subject to a more flexible and contextual standard then has speech creation, which is treated as essentially inseparable from speech itself.[11] While recording police activity is of particular interest to the public, recording other public officials may not be seen as vital under an information gathering construction.[12] Additionally, the competing frameworks

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[6] *See* sources cited *infra* notes 7–9.

[7] *See* Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57, 87 (2014).

[8] *See* Ashley Billam, *The Public's Evolution from News Reader to News Gatherer: An Analysis of the First Amendment Right to Videorecord Police*, 66 U. KAN. L. REV. 149, 153–54 (2017); Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991, 1013–14 (2016); Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 N.C. L. REV. 1313, 1337 (2018); *see also* Kelly-Ann Weimar, *A Picture Is Worth a Thousand Words: Tattoos and Tattooing Under the First Amendment*, 7 ARIZ. SUMMIT L. REV. 719 (2014) (arguing that tattooing is expression, not conduct, and should be protected as such).

[9] *See* David Murphy, Comment, *"V.I.P." Videographer Intimidation Protection: How the Government Should Protect Citizens Who Videotape the Police*, 43 SETON HALL L. REV. 319, 325–26 (2013) (analogizing videography to writing, thereby affording the same protection from government interference).

[10] *See* Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061–62 (9th Cir. 2010) (finding the process of expression through a medium indistinguishable from the expression itself).

[11] *See* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 257 (2004).

[12] *See* Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1570 (2016) ("This Article assumes . . . the baseline concept that video or audio recording of police officers in public is protected activity under the First Amendment. Many federal courts to address the matter have assumed this to be true, some without much discussion at all about if or how filming is a form of speech.").

rest on different assumptions about the nature of the act of recording, which have important implications for the viability of the frameworks in the long term.[13]

This Note argues that the right to record is best understood as speech creation, inextricably tied to expressive activity itself. This framework better captures the realities of recording in the modern era, where instantaneous and near-instantaneous transmission of recordings is increasingly the norm. An information-gathering framework, on the other hand, rests on inflexible assumptions about the temporal relationship between gathering and dissemination that does not accommodate these technological innovations. Additionally, this Note argues that the importance of recording public officials to modern political discourse supports an understanding of the right to record as speech creation.

Under a speech creation framework, recording of public officials would be afforded substantial protection under a time, place, and manner test.[14] However, under an information-gathering framework, government would have much greater leeway to impose direct and indirect restrictions on speech.[15] Courts would be asked to make value judgments about the relative social value of recording different officials and to weigh the interests of the recorder against those of the recorded.[16] This framework would lead to a narrow and, more importantly, inconsistent right to record. This Note first reviews the current state of the right to record in each of the courts of appeals which has found such a right. It then discusses the two doctrines of information gathering and speech creation and the tests that courts apply to analyze restrictions on these rights. It also considers which of these frameworks better captures the realities of recording in the modern era. Finally, it addresses policy concerns over the right to record and concludes that the speech creation framework is the better fit for recording in the modern era.

I. CURRENT RIGHT TO RECORD CASE LAW

Following the Third Circuit's ruling in *Fields v. City of Philadelphia*,[17] a total of six circuits have explicitly found a First Amendment right to record.[18] This Part reviews the current case law regarding the right to record and discusses the justifications

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[13] *See id.*

[14] *See* Glik v. Cunniffe, 655 F.3d 78, 84 (1st Cir. 2011); *cf.* Simonson, *supra* note 12, at 1577; Vincent Nguyen, Note, *Watching Big Brother: A Citizen's Right to Record Police*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 637, 641–58 (2018).

[15] *See* Simonson, *supra* note 12, at 1570.

[16] *See id.* at 1564, 1569–70, 1575.

[17] 862 F.3d 353 (3d Cir. 2017).

[18] Nguyen, *supra* note 14, at 650–51 ("The First, Third, Fifth, Seventh, Ninth, and Eleventh Circuits issued rulings to protect the right of bystanders to record police actions in public, subject to reasonable limitations. In total, '[t]heir collective jurisdictions now amount to exactly half of the [United States,] and roughly [sixty] percent of the American population.'" (alteration in original) (citations omitted)).

that the courts have relied on in finding a right to record, as well as the shortcomings of the current doctrine regarding the right to record.

A. First Circuit

In 2011, the First Circuit became the first to find a First Amendment right to record when it decided *Glik v. Cunniffe*.[19] In that case, plaintiff Simon Glik observed three police officers arresting a man on the Boston Common.[20] Glik heard another individual object to the way the police were treating the man prompting Glik to begin recording the altercation with his cell phone.[21] He was standing about ten feet away from the police as he recorded their activity.[22] After completing the arrest, one of the officers approached Glik, telling him: "I think you have taken enough pictures."[23] A second officer asked him whether his phone recorded audio.[24] Glik said that it did, and the officer arrested him for "unlawful audio recording in violation of Massachusetts's wiretap statute."[25] The charges against Glik were dismissed by the Boston Municipal Court.[26] Glik filed a civil rights action against the officers involved and the City of Boston for violation of his First and Fourth Amendment rights.[27] The district court denied the defendant's motion to dismiss, concluding that Glik had a clearly established First Amendment right to record police activity.[28]

On appeal, the First Circuit held in favor of the plaintiff.[29] The court observed that "the First Amendment's aegis extends further than the text's proscription on laws 'abridging the freedom of speech, or of the press,' and encompasses a range of conduct related to the gathering and dissemination of information."[30] The court further elaborated that:

> Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting "the free discussion of governmental affairs." . . . This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties.[31]

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[19] *See* 655 F.3d at 79.
[20] *Id.*
[21] *Id.* at 79–80.
[22] *Id.*
[23] *Id.* at 80.
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at 79.
[30] *Id.* at 82.
[31] *Id.* (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

The *Glik* decision appears to ground the right to record in the right to gather information.[32] As *Glik* makes clear, the right to record police activity is of particular interest to the public, as police officers can—and regularly do—use force against members of the public.[33] Therefore, the right to record police is especially protected under an information gathering scheme.[34] The court *did* find a right to record public officials in general; however, its language and its particular attention to the question of recording police conduct leaves open the issue of whether the right to record government officials generally and the right to record police are afforded the same sorts of constitutional protections.[35]

The court in *Glik* did state that "the right to film is not without limitations."[36] But it declined to elaborate on what those limitations might be.[37] The First Circuit returned to the question of reasonable restrictions on the right to record in *Gericke v. Begin* in 2014.[38] In that case, plaintiff Carla Gericke and her friend Tyler Hanslin were "caravanning in two cars" on their way to Hanslin's house.[39] Gericke was following Hanslin when he was pulled over by a police officer.[40] Gericke pulled her car to the side of the road, as she did not know the directions to Hanslin's house.[41] The officer approached Gericke's car and ordered her to move her car.[42] Gericke informed the officer that she was going to pull into an adjacent parking lot and wait for Hanslin.[43] After parking her car, Gericke retrieved a video camera from her car and announced to the officer that she was going to record him, however, when she could not get her camera to work, she simply held it up as though she were recording.[44] Then, a second officer arrived and approached Gericke, who was sitting in her car with the camera placed on the center console.[45] That officer demanded to know where the camera was and asked Gericke for her license and registration.[46] When Gericke refused, she was arrested and charged with "disobeying a police officer, obstructing a government official, and, the charge relevant here—unlawful interception of oral communications."[47] The town prosecutor declined to move forward with the

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[32] *See id.*
[33] *See id.*
[34] Bhagwat, *supra* note 3, at 1041.
[35] *Glik*, 655 F.3d at 83; *see also* Bhagwat, *supra* note 3, at 1040–41.
[36] *Glik*, 655 F.3d at 84.
[37] *Id.*
[38] *See* 753 F.3d 1, 7–8 (1st Cir. 2014).
[39] *Id.* at 3.
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 3–4.
[46] *Id.*
[47] *Id.* at 4 (internal citations omitted).

charges against Gericke, and she brought a civil rights action against the officers involved and the Weare Police Department for violation of her First Amendment rights.[48] The district court found in favor of Gericke and the defendants appealed.[49]

On appeal, the court addressed the question of "whether the occasion of a traffic stop places Gericke's attempted filming outside the constitutionally protected right to film police that [it] discussed in *Glik*."[50] Turning to the question of reasonable restrictions on the right to record, the court observed that traffic stops can be particularly dangerous for officers, and therefore, under particular circumstances, might justify reasonable restrictions in the interest of safety.[51] The court concluded that "a police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties."[52] This analysis would fit under both a speech creation and an information gathering framework but offers no clue as to which one the court is applying.

Therefore, although the First Circuit grounded the First Amendment right to record in the information-gathering right, it also reserved broad latitude for the exercise of the right, at least in the context of recording police officers in public.[53] However, it did not identify a particular test or frame of analysis against which to analyze potential restraints on the right to record.[54] Again, *Gericke*, like *Glik* leaves open the question of whether the contours of the right to record are the same when recording non-law enforcement public officials.[55]

B. Third Circuit

The Third Circuit was the most recent to find a First Amendment right to record in *Fields v. City of Philadelphia*.[56] The plaintiffs Amanda Geraci and Richard Fields filed separate civil rights actions against the City of Philadelphia for violation of their First Amendment rights.[57] Fields was a Temple University student who was walking down a street when he saw a group of police officers breaking up a house party.[58] He took a photo of the scene with his cell phone.[59] An officer noticed Fields

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[48] *Id.*

[49] *Id.* at 4–5.

[50] *Id.* at 7.

[51] *Id.* at 8 ("The circumstances of some traffic stops, particularly when the detained individual is armed, might justify a safety measure—for example, a command that bystanders disperse—that would incidentally impact an individual's exercise of the First Amendment right to film.").

[52] *Id.*

[53] *Id.*

[54] *See id.* at 8–10.

[55] *See* Bhagwat, *supra* note 3, at 1041–42.

[56] 862 F.3d 353 (3d Cir. 2017).

[57] *Id.* at 356.

[58] *Id.*

[59] *Id.*

and ordered him to leave; when he refused, the officer arrested him and confiscated his phone.[60] "The officer then released Fields and issued him a citation for 'Obstructing Highway and Other Public Passages.' These charges were withdrawn when the officer did not appear at the court hearing."[61] Geraci, a member of a police watchdog group, was attending an anti-fracking protest as a legal observer.[62] Police observed Geraci filming an arrest and an officer pushed her against a pillar for several minutes, preventing her from observing or recording the arrest.[63] The district court held for the defendants, ruling that the Third Circuit did not recognize a First Amendment right to record.[64]

On appeal, the Third Circuit ruled for the plaintiffs.[65] The district court had focused on whether the plaintiffs had had an expressive intent at the time they were recording; i.e., whether they were intending to communicate a particular message by their act of recording.[66] The court of appeals disagreed with this analysis, observing that:

> [The district court's] reasoning ignores that the value of the recordings may not be immediately obvious, and only after review of them does their worth become apparent. The First Amendment protects actual photos, videos, and recordings, and for this protection to have meaning the Amendment must also protect the act of creating that material. There is no practical difference between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them.[67]

The district court's reasoning suggests that it viewed recording as a type of expressive activity, an action that can have expressive value and therefore be protected but which does not always have such value.[68] The appellate court's analysis in this Section suggests that it viewed the right to record as speech creation, and therefore part of the core right to free speech, unlike the First Circuit, which discussed the right to record exclusively in the context of information gathering.[69] However, the Third Circuit later seems to dismiss the speech creation argument, instead stating that "recording police activity in public falls squarely within the First Amendment right

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.* at 356–57.

[65] *Id.* at 353.

[66] *Id.* at 356 ("[T]he District Court on its own decided that Plaintiffs' activities were not protected by the First Amendment because they presented no evidence that their 'conduct may be construed as expression of a belief or criticism of police activity.'" (internal citation omitted)).

[67] *Id.* at 358 (internal citation omitted).

[68] *Cf. id.*

[69] *See* discussion *supra* notes 32–35, 51 and accompanying text.

of access to information. As no doubt the press has this right, so does the public."[70] Finally, the court also stated that the right to record is subject to reasonable restrictions, specifically noting that recording that tends to interfere with police activity may not be protected.[71]

The court's invocation of both information gathering and speech creation leaves unclear the test that should be applied to analyze potential restrictions of the right to record. What is clear is that the court rejected the idea that recording falls into the category of expressive activity as unworkable. As such, the Third Circuit's decision in *Fields* leaves the scope of the right to record in that jurisdiction substantially less clear than in the First Circuit. While the First Circuit grounded the right in the right to gather information, the Third Circuit references both the speech creation line of precedent as well as the information gathering precedent.[72] The court in *Fields* alludes to reasonable restrictions, suggesting that recording that interferes with police business might not be protected.[73] The Third Circuit's language here is somewhat broader than that used by the First Circuit in *Gericke*, which suggests that restricting the right to record is permissible when it interferes with police business in such a way as to increase the danger of a situation.[74] Like the First Circuit, the Third Circuit does not specifically address the contours of the right outside the police context.[75]

C. Fifth Circuit

The Fifth Circuit addressed the question of the First Amendment right to record for the first time in *Turner v. Lieutenant Driver*.[76] Here, plaintiff Phillip Turner was standing on a public sidewalk across the street from a police station and recording the exterior of the building.[77] Two officers pulled up to the station, got out of their patrol car, and approached Turner, asking him for his I.D.[78] When Turner repeatedly refused to identify himself, one of the officers arrested him and confiscated his video camera, placing him in the back of his patrol car.[79] Turner was left in the car for several hours before eventually being released without charges.[80] Turner brought a civil

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[70] *Fields*, 862 F.3d at 359 (citations omitted).

[71] *Id.* at 360 ("If a person's recording interferes with police activity, that activity might not be protected. For instance, recording a police conversation with a confidential informant may interfere with an investigation and put a life at stake.").

[72] *Compare* Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011), *and* Bhagwat, *supra* note 3, at 1064, *with Fields*, 862 F.3d at 358–60.

[73] *See Fields*, 862 F.3d at 360.

[74] *Compare id.*, *with* Gericke v. Begin, 753 F.3d 1, 7 (1st Cir. 2014).

[75] *Cf. Fields*, 862 F.3d at 360 ("We do not say that all recording is protected or desirable. The right to record police is not absolute.").

[76] 848 F.3d 678 (5th Cir. 2017).

[77] *Id.* at 683.

[78] *Id.*

[79] *Id.*

[80] *Id.* at 684.

rights action against the officers involved individually.[81] The district court granted defendants' motion to dismiss and Turner appealed.[82]

On appeal, the Fifth Circuit found a First Amendment right to record.[83] The court observed that the First Amendment prohibits government from "limiting the stock of information from which members of the public may draw."[84] Circuit Judge Wiener began by discussing the right to record in the context of the right to gather information about government activities before stating: "[T]he Supreme Court has never 'drawn a distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded.'"[85] The court also stated that reasonable restrictions apply to the right to record, but declined to elaborate on what might constitute reasonable restrictions.[86]

Like the Third Circuit, the Fifth Circuit clearly established a right to record but leaves the basis and the contours of the right unclear.[87] Its decision in *Turner* references both the right to gather information and speech creation, without making it clear in which line of precedent it had grounded the right to record.[88] Additionally, the court only addresses the right to record police activity, without examining the right to record nonpolice officials.[89]

D. Seventh Circuit

The Seventh Circuit addressed the right to record in *ACLU v. Alvarez* in 2012, writing the most comprehensive opinion on the issue thus far.[90] In *Alvarez*, the ACLU filed a pre-enforcement action against the Cook County State's Attorney for "declaratory and injunctive relief barring her from enforcing [Illinois's eavesdropping] statute" against members of the ACLU engaging in a "police accountability program," which would involve making recordings of police officers in public places.[91]

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[81] *Id.*

[82] *Id.*

[83] *Id.* at 685.

[84] *Id.* at 688 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978)).

[85] *Id.* at 689 (quoting Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061 (9th Cir. 2010)).

[86] *Id.* at 690.

[87] *Compare* Fields v. City of Philadelphia, 862 F.3d 353, 358–60 (3d Cir. 2017), *and* discussion *supra* notes 70–71 and accompanying text, *with Turner*, 848 F.3d at 688–90.

[88] *See Turner*, 848 F.3d at 688–90.

[89] *See id.* at 689. The *Turner* decision did note that "[g]athering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest," but did not expand on nonpolice officials. *Id.*

[90] Bhagwat, *supra* note 3, at 1042.

[91] ACLU v. Alvarez, 679 F.3d 583, 586 (7th Cir. 2012).

The district court found that there was no First Amendment right to record.[92] The ACLU appealed.[93]

On appeal, the Seventh Circuit found for the plaintiffs.[94] The court first observed that videos and recordings "are media of expression commonly used for the preservation and dissemination of information and ideas and thus are 'included within the free speech and free press guaranty of the First and Fourteenth Amendments.'"[95] Therefore, if the act of making a recording is unprotected, then the means of expression—a recording or video itself—is insecure.[96] The court observed that the First Amendment interest in recording public officials is strong, grounding its analysis of the right to record in the broader consideration of recording all public officials rather than police specifically.[97]

The court also discussed the right to record as part of the right to gather information, noting that the right to gather information is ill-defined and subject to limitation.[98] In its discussion of newsgathering, the court elaborated on the sort of restrictions that may be imposed on the right to record, noting that the Supreme Court has ruled that "generally applicable" laws do not violate the First Amendment if they incidentally infringe speech.[99] Reviewing the Supreme Court's precedents on the application of generally applicable laws to speech and speech-adjacent conduct, the court concluded that:

> When the expressive element of an expressive activity triggers the application of a general law, First Amendment interests are in play. On the other hand, when "speech" and "nonspeech" elements are combined, and the "nonspeech" element (e.g., prostitution) triggers the legal sanction, the incidental effect on speech rights will not normally raise First Amendment concerns.[100]

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[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 595 (quoting Burstyn v. Wilson, 343 U.S. 495, 502 (1952)).

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

[97] *Id.* at 597.

[98] *Id.* at 598–99 ("The Supreme Court has not elaborated much on its abstract observation in *Branzburg* that 'news gathering is not without its First Amendment protections.' The *Branzburg* opinion itself suggests some caution in relying too heavily on the Court's discussion of a First Amendment right to gather news and information." (internal citations omitted)).

[99] *Id.* at 601 ("[T]he Supreme Court's decision in *Branzburg* rested in part on the principle that a generally applicable law will not violate the First Amendment simply because its application has an incidental effect on speech or the press.").

[100] *Id.* at 602.

While the Seventh Circuit discussed the question of a First Amendment right to record in some depth, it failed to clarify the particular test that should be applied to potential restrictions of the right to record.[101] Instead, the court invoked three separate doctrines in its discussion.[102] It invoked the news-gathering right established in *Branzburg*,[103] the concept of speech creation,[104] and the doctrine of symbolic speech[105] at different points in its discussion. This scattershot approach is problematic as each of these doctrines involves a different test against which courts must analyze content-neutral restrictions under different tests.[106] The court draws out this distinction but fails to resolve it.[107]

While the Seventh Circuit appeared to prefer an interpretation of the right to record as an act of creating speech,[108] the court also acknowledged that it could be seen as information gathering as well.[109] In its analysis of the Supreme Court's precedent on generally applicable laws, the court drew out a critical element of the distinction between viewing speech as newsgathering, a "corollary right," and viewing it as speech creation, inseparable from speech itself, in that they implicated different regulatory schemes.[110] If the right to record is a form of speech creation, it is an activity inextricably bound up with expression and is therefore entitled to time, place, and manner protections.[111] If it is information gathering, it enjoys much less protection.[112]

E. Ninth Circuit

The Ninth Circuit addressed the question of the right to record in 1995 in *Fordyce v. City of Seattle*.[113] In that case, plaintiff Jerry Edmon Fordyce was participating in a public protest march and also videotaping the march on behalf of a local television station.[114] Throughout the day, Fordyce also videotaped the police officers present at the event.[115] The officers responded negatively to Fordyce's filming and at least one officer "attempted physically to dissuade Fordyce from his mission."[116] Eventually, the officers arrested Fordyce when he taped a group of

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[101] Bhagwat, *supra* note 3, at 1044.
[102] *See Alvarez*, 679 F.3d at 595–99.
[103] *See id.* at 597–99 (citing Branzburg v. Hayes, 408 U.S. 665 (1972)).
[104] *See id.* at 595–96.
[105] *See id.* at 596.
[106] *See* Nguyen, *supra* note 14, at 650; *see also* Bhagwat, *supra* note 3, at 1058–65.
[107] *See Alvarez*, 679 F.3d at 600; Bhagwat, *supra* note 3, at 1040.
[108] *Cf. Alvarez*, 679 F.3d at 596 ("[T]here is no fixed First Amendment line between the act of creating speech and the speech itself.").
[109] *See id.* at 600.
[110] *Id.* at 595.
[111] *See* McDonald, *supra* note 11, at 267–68.
[112] *Id.* at 268–69.
[113] *See* 55 F.3d 436, 438 (9th Cir. 1995).
[114] *Id.*
[115] *Id.*
[116] *Id.*

bystanders without their consent.[117] Fordyce filed a civil rights action against the city, in part for violating his First Amendment right to gather news.[118] The district court granted the defendant's motion for summary judgment and Fordyce appealed.[119]

On appeal, the court reversed the summary judgment and remanded.[120] However, because Fordyce did not raise the First Amendment issue on appeal, the court addressed it only briefly.[121] The court did note that Fordyce possessed a First Amendment right to record, but didn't elaborate.[122] The Ninth Circuit, therefore, left the issue entirely up in the air, with no specific guidance on the right to record beyond the fact that it exists.[123]

F. Eleventh Circuit

The Eleventh Circuit quickly addressed the right to record in *Smith v. City of Cumming*.[124] Plaintiffs James and Barbara Smith filed a civil rights action against the City of Cumming and its police chief for violation of Mr. Smith's First Amendment rights.[125] They specifically alleged that Mr. Smith had been prevented from videotaping police.[126] The court

> agree[d] with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct. The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest.[127]

However, the court found that the Smiths had failed to demonstrate that the defendants had actually infringed their First Amendment rights and dismissed the case.[128] Like the Ninth Circuit, the Eleventh Circuit found a First Amendment right to record, but was extremely cursory in its analysis, leaving the right mostly undefined.[129] The

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[117] *Id.*
[118] *Id.*
[119] *Id.* at 438–39.
[120] *Id.* at 439.
[121] Nguyen, *supra* note 14, at 657.
[122] *Fordyce*, 55 F.3d at 439.
[123] *See* Nguyen, *supra* note 14, at 657.
[124] 212 F.3d 1332, 1332–33 (11th Cir. 2000).
[125] *Id.* at 1332.
[126] *Id.*
[127] *Id.* at 1333.
[128] *Id.*
[129] *Compare* Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995), *and* discussion *supra* notes 113–23 and accompanying text, *with Smith*, 212 F.3d at 1333.

court stated that time, place, and manner restrictions applied, but neglected to explain why.[130] This would suggest that the court views the right to record as speech creation, but it is impossible to draw a firm conclusion from the cursory analysis of the court's opinion.[131]

The appellate courts have thus left the state of the right to record very unclear.[132] While a majority of Americans live in a jurisdiction that recognizes the right, it remains ill-defined.[133] Among those circuits that engaged in a more thorough analysis of the right, none clearly distinguished between the right as speech creation and the right as information gathering, although the Seventh Circuit acknowledged that the implications of the approaches were different.[134] Additionally, the courts almost exclusively considered the right in the context of recording police activity, although several found a right to record public officials more generally.[135] Only the First and Seventh Circuits considered the question of reasonable restrictions in any detail,[136] but only the Seventh Circuit acknowledged that those restrictions might differ based on the particular theory in which the right to record is based.[137] Neither court explicitly identified a test to apply to potential restrictions of the right to record, leaving the issue very much in the air.[138] Despite its importance to modern civil society, the right to record is left poorly grounded in doctrine and, accordingly, ill-defined.[139]

II. EXAMINING THE SPEECH CREATION AND INFORMATION GATHERING THEORIES

As previously noted, there are two dominant scholarly theories regarding the right to record.[140] Each has different implications for the scope of the right and the potential limitations that may be placed on it by government.[141] This Part examines

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[130] *See* Nguyen, *supra* note 14, at 657–58.

[131] *See* Bhagwat, *supra* note 3, at 1042.

[132] *Id.* at 1044; *see also* discussion *supra* Part I.

[133] Bhagwat, *supra* note 3, at 1044.

[134] *Id.* at 1039–40.

[135] *See id.* at 1038, 1041.

[136] *See* Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014); ACLU v. Alvarez, 679 F.3d 583, 601–02 (7th Cir. 2012); Bhagwat, *supra* note 3, at 1039–41.

[137] *See* Bhagwat, *supra* note 3, at 1038–40.

[138] *Id.* at 1041, 1044.

[139] *See id.* at 1044.

[140] *See supra* notes 6–10 and accompanying text; *see also* Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 185 (2017) ("A right to record fits not only within free speech intuitions and First Amendment theory but also within several lines of well-established doctrine. Recording might be protected as speech itself, or it might be protected because it is a necessary part of a recognized communications medium. The First Amendment also protects the corollary or penumbral rights that are necessary for speech; newsgathering is a particular kind of corollary right.").

[141] *See* McDonald, *supra* note 11, at 257 ("[R]ecognizing a general right to gather information in order to engage in 'speech' would be unduly broad and unmanageable, encouraging

these two theories in greater detail and attempts to discern the potential implications that they have for the scope of the right to record. It first considers the information-gathering doctrine, sometimes called the newsgathering doctrine. Then it discusses the concept of speech creation and analyzes it through the widely cited Ninth Circuit case *Anderson v. City of Hermosa Beach*.[142]

A. Information Gathering

The Supreme Court first considered a right to gather information in *Zemel v. Rusk*.[143] In that case, a citizen sued to have his passport validated for travel to Cuba.[144] After the Cuban Revolution, the State Department "broke relations" with Cuba and required that United States citizens who were seeking to travel there get their passport validated by the Secretary of State.[145] The petitioner held a valid passport and sought to get that passport validated—first for travel to Cuba as a tourist—and then for the purpose of gathering information about the state of affairs in Cuba.[146] After he was denied permission to travel there, he filed a complaint and sought a declaratory judgment holding, in part, that denial of permission to travel to Cuba violated his First Amendment rights.[147]

The appellant argued that denying him the opportunity to travel to Cuba interfered with his ability to become informed about the foreign policy of the United States and its effect on foreign nations.[148] The Court agreed with the appellant that restricting the ability to travel did, in fact, restrict the free flow of information.[149] However, the Court nonetheless rejected the argument that the restriction implicated the First Amendment.[150] The Court held that the restriction was a restriction on action and observed that "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow."[151] It concluded that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information."[152]

Thus, it rejected the idea that information gathering was entitled to constitutional protection when it first considered the question of First Amendment protections for

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an undesirable increase in social conflict involving First Amendment values and other interests valued by society.").

[142] 621 F.3d 1051 (9th Cir. 2010).

[143] 381 U.S. 1 (1965); Steven Helle, *Reconsidering the Gathering/Publication Dichotomy: Recording as Speech? What Next?*, 33 N. ILL. U. L. REV. 537, 540 (2013).

[144] Helle, *supra* note 143, at 540.

[145] *Zemel*, 381 U.S. at 3.

[146] *Id.* at 3–4.

[147] *Id.* at 4.

[148] *Id.* at 16.

[149] *Id.*

[150] *Id.*

[151] *Id.* at 16–17.

[152] *Id.* at 17.

non-speech activity for the purpose of information gathering.[153] The Court acknowledged that such a restriction likely did restrict the free flow of information, but observed that restrictions on the ability of the public to freely enter the White House also impede the flow of information.[154] Importantly, while the Court categorically rejected the argument that the ability to travel was protected, it did not completely reject the idea that information gathering may be entitled to some level of protection.[155] The Court stated that there is not an *unrestrained* right to gather, not that there is no right to gather at all.[156]

The Court next addressed the question of information gathering in *Branzburg v. Hayes*.[157] This time, the Court directly confronted the question in relation to journalism and freedom of the press.[158] In that case, a reporter refused to testify before a grand jury as to the identities of a series of sources for stories he had written on the manufacture of hash from marijuana and the local drug scene.[159] He asserted a First Amendment right to protect the confidentiality of his sources under the Free Press Clause.[160] The Court ruled that the Free Press Clause does not grant members of the press the right to ignore valid laws of general applicability.[161] The Court rejected the argument that the press as an institution has a separate and greater right than the public in general.[162] At the same time, the Court stated that newsgathering *is* entitled to some degree of First Amendment protection.[163] However, the Court did not elaborate on what those protections might be.[164] The logical conclusion to *Branzburg*, however, is that the constitutional protections of newsgathering must extend to the public at large and cannot be confined to the institutional press.[165] The information gathering

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[153] *Id.* at 16–17.

[154] *Id.* at 17.

[155] *Id.* at 16.

[156] *Id.* at 17.

[157] 408 U.S. 665 (1972); David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 845 (2017).

[158] *See Branzburg*, 408 U.S. at 667–71.

[159] *Id.* at 668.

[160] *Id.*

[161] *Id.* at 682–83 ("It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed.").

[162] *See id.* at 684–85.

[163] *Id.* at 681 ("We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated.").

[164] *See* RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567, 573–74 (2017).

[165] *See* Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459, 462 (2012).

privilege has remained ill-defined since *Branzburg*.[166] The Court has generally found the privilege applicable to particular, narrow categories of speech.[167]

The Court returned to the question of information gathering and free press rights in *Richmond Newspapers, Inc. v. Virginia*.[168] There a Virginia trial court had granted a motion to close a murder trial to the public.[169] Two newspaper reporters requested a hearing to vacate the order closing the trial.[170] The Court held that closed trials violated the First Amendment right to receive information.[171] The Court declared that the "expressly guaranteed freedoms [of the First Amendment] share a common core purpose of assuring freedom of communication on matters relating to the functioning of government."[172] In his concurrence, Justice Brennan proposed a conceptual framework that became the basis for the Court's information gathering jurisprudence.[173] Justice Brennan argued that the right to gather information was a "*structural*" right with a "role to play in securing and fostering our republican system of self-government."[174] He suggested that such a structural right should be analyzed under a balancing test, balancing the interest in access to information against "opposing interests" in protecting it from access.[175] Brennan further proposed two principles to guide the application of the test:

> First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular

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[166] *See* Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 20 (2016) ("[T]he *Branzburg* decision is frustratingly ambiguous. To begin with, the Court framed its discussion by observing that 'a State's interest must be "compelling" or "paramount" to justify even an indirect burden on First Amendment rights.' It then proceeded to apply elevated scrutiny. 'On the records now before us,' the Court remarked—intimating a possible limitation on its holding—there was 'no basis' for giving constitutional priority to journalists based on a 'consequential, but uncertain, burden on news gathering.'" (citations omitted)).

[167] *See id.* at 21.

[168] 448 U.S. 555 (1980).

[169] *Id.* at 560.

[170] *Id.*

[171] *Id.* at 580–81.

[172] *Id.* at 575.

[173] Brian C. Murchison, *The Visibility Value of the First Amendment*, 26 WM. & MARY BILL RTS. J. 995, 996 (2018) ("In large part, the right of access is a product of Justice William Brennan's constitutional philosophy; in his *Richmond Newspapers* concurrence and other writings, he explained the right as a 'structural' protection in the sense of relating not to expression itself but to 'the structure of communications necessary for the existence of our democracy.'" (footnotes omitted)).

[174] *Richmond Newspapers, Inc.*, 448 U.S. at 588 (Brennan, J., concurring) ("An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded."(footnote omitted)).

[175] Bruce Brown & Selina MacLaren, *Holding the Presidency Accountable: A Path Forward for Journalists and Lawyers*, 12 HARV. L. & POL'Y REV. 89, 115 (2018).

> proceedings or information. . . . Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.[176]

Justice Brennan's framework was adopted by the Court in *Globe Newspaper Co. v. Superior Court for Norfolk County*.[177] In that case, the *Globe Newspaper* sought to gain access to a rape trial where the defendant was accused of sexual assault of three girls who were minors at the time of the trial.[178] The Court had ordered that the trial be closed in order to protect the minor witnesses from public scrutiny during their testimony.[179] *The Globe* sought injunctive relief.[180] The Court held that "the circumstances under which the press and public can be barred from a criminal trial are limited; the State's justification in denying access must be a weighty one."[181] While the Court agreed that the State's interest in protecting minor victims was compelling, it ruled that the State's remedy was not sufficiently narrowly tailored.[182] Justice Brennan applied the analysis that he developed in his concurrence in *Richmond Newspapers* to conclude that the press and public have a general interest in access to criminal trials.[183]

Thus, in *Richmond Newspapers* and *Globe Newspaper*, Justice Brennan sets out a conceptual framework that defines information gathering as a structural right rather than part of the core speech right, which protects interpersonal communication.[184] In order to determine whether information gathering is entitled to First Amendment protection, courts must employ a balancing test, weighing the value of the information sought against the importance of the "opposing interests" harmed by granting the right.[185] This test is to be guided by two considerations: whether the information sought is traditionally available to the public, and the specific value of the information in the facts before the court.[186]

The newsgathering right has rarely been invoked by the Court since *Globe Newspaper* and is generally quite ill-defined.[187] The contours and limitations of the

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[176] *Richmond Newspapers, Inc.*, 448 U.S. at 589 (Brennan, J., concurring).

[177] 457 U.S. 596 (1982); Campbell, *supra* note 166, at 23 n.119.

[178] *Globe Newspaper Co.*, 457 U.S. at 598–601.

[179] *Id.* at 598.

[180] *Id.* at 599.

[181] *Id.* at 606.

[182] *Id.* at 606–07, 609.

[183] *See* Murchison, *supra* note 173, at 996–97.

[184] *See id.*; *see also Globe Newspaper Co.*, 457 U.S. at 603–07; Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).

[185] *Richmond Newspapers Inc.,* 448 U.S. at 588–89.

[186] *Id.* at 589.

[187] McDonald, *supra* note 11, at 254 ("[T]he Court has created a legal scheme governing a First Amendment right to gather information that is . . . fragmented and inconsistent. . . .").

right are best understood in the context of the Court's broader First Amendment jurisprudence. In the Court's conception, free speech involves an extremely broad array of conduct.[188] The primary distinction that the Court makes is between content-based and content-neutral regulations of speech.[189] Laws that fall within the former category are subject to the highest form of scrutiny.[190] While they are not unlawful per se, the bar is set extremely high in that circumstance.[191] For content-neutral restrictions on speech, there is a further division between purely expressive activity and activity with an expressive component.[192] The distinction can be somewhat subtle. Purely expressive activity generally includes speech itself as well as other things, such as music, which serve no purpose other than to communicate an idea.[193] Activity with an expressive component includes things like burning draft cards and national flags (the two most famous examples).[194] These are actions that can have an expressive element but don't have one inherently. Thus, while an activist who burns an American flag as part of an anti-war protest probably intends to convey a message by doing so, an individual burning a flag as a means of disposal in accordance with the flag code likely does not.[195]

Content-neutral restrictions on purely expressive activity and activity with an expressive component are analyzed under different tests.[196] Restrictions on purely

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[188] *Id.* at 260 ("[T]he Court has construed the First Amendment broadly to cover conduct that is either expressive itself—by its nature or because engaged in for an expressive purpose—or intimately related to acts of expression. . . . [T]he Court has also pulled certain forms of conduct within its ambit not because they are expressive in nature, but rather because they are deemed necessary to accord full meaning and substance to those guarantees.").

[189] Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 616 (1991) ("One of the most important [First-Amendment principles] is the distinction between content-based and content-neutral regulations of speech. The distinction has enjoyed growing prominence as a judicial tool for categorizing government actions regarding expression and for justifying the level of scrutiny applied to those actions." (footnote omitted)).

[190] *Id.* at 625.

[191] *See id.*

[192] *Id.* at 636 ("The meaning of content discrimination evolved alongside the development of different doctrinal lines designed to deal with the distinct problems of content-neutral regulations of speech. Two of the most important of these lines are the symbolic speech doctrine and the [time, place, or manner] doctrine.").

[193] McDonald, *supra* note 11, at 258–59 ("[Speech] includes not only acts of speaking or communicating in other verbal or aural forms (e.g., singing or orchestral performances), but also the acts of representing things visually in writings, pictures or other works of art, or audio-visually in multiple formats such as text, sound, graphics, pictures, or videos that are transmitted via electronic means of communication . . . .").

[194] *See id.*; *see also* Texas v. Johnson, 491 U.S. 397, 418–19 (1989) (holding that burning an American flag as part of an anti-war protest is protected expression); United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (holding that burning a draft card to protest the war in Vietnam is protected expression but that it is overridden by the government's compelling interest in maintaining the draft).

[195] *Johnson*, 491 U.S. at 418.

[196] Williams, *supra* note 189, at 636.

expressive activity are analyzed under the time, place, and manner test.[197] Under this test, the government must demonstrate that the challenged regulation can be justified without reference to the content of the speech being regulated, that it advances some significant government interest, and that it leaves open ample alternatives for expression.[198] This standard can be variable. For instance, the Court has substituted "adequate alternatives" for "ample alternatives" on at least one occasion.[199] It is also much more lenient than the strict scrutiny standard applied to content-based restrictions.[200]

Restrictions on activity with an expressive component are analyzed under the so-called "symbolic speech doctrine."[201] This doctrine is comprised of two tests. As a preliminary matter, it must be demonstrated that there was "[a]n intent to convey a particularized message" and that "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."[202] This test—the *Spence* test—deliminates how a court is to determine whether a specific act was sufficiently expressive so as to warrant First Amendment protection.[203]

Once it is determined that an act is expressive, the court turns to the regulation in question.[204] For a regulation to survive scrutiny, it must further an important or substantial interest that is unrelated to the suppression of the expression in question and is an incidental restriction, no greater than necessary to advance the interest.[205] While this standard might appear stronger than the time, place, and manner test at first blush, the Court has affirmatively stated that the government generally has greater leeway to regulate expressive conduct under this test than it does to regulate purely expressive conduct under the time, place, and manner test.[206]

There are other subcategories of speech within this basic framework.[207] The first is non-expressive activity that is inextricably bound up with purely expressive activity.[208] Certain essential predicates to speech, i.e., the processes of creating speech,

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[197] *Id.* at 637.

[198] *Id.* at 639–40.

[199] *Id.* at 642 ("This test can also have degrees of strictness. The Court has sometimes described the requirement as one of ample alternative channels, which appears to set a high standard. In practice, however, the Court has often applied an adequate alternatives test, not an ample alternatives test."(footnotes omitted)).

[200] *Id.* at 644.

[201] *Id.*

[202] Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam).

[203] James McGoldrick, Jr., *Symbolic Speech: A Message from Mind to Mind*, 61 OKLA. L. REV. 1, 6–7 (2008).

[204] *See, e.g.*, *id.* at 37–42.

[205] Williams, *supra* note 189, at 647.

[206] Texas v. Johnson, 491 U.S. 397, 406 (1989) ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.").

[207] *See* McDonald, *supra* note 11, at 260–61.

[208] *Id.* at 260 ("The Court has also pulled certain forms of conduct within its ambit not because they are expressive in nature, but rather because they are deemed necessary to accord full meaning and substance to [free speech] guarantees.").

are also extended full First Amendment protection under the time, place, manner speech even though they are not in and of themselves expressive.[209] This subject will be covered in greater detail in the next Section.

Finally, there is non-expressive conduct that is not bound up in expressive activity.[210] This last category is where information gathering is generally situated.[211] Justice Brennan deemed this category "structural rights," which are necessary for speech and should be protected but must be balanced against other competing interests as well.[212]

B. Speech Creation

Speech creation or speech production finds its origin as a distinct category within the broader category of free speech in the 1983 Supreme Court decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*.[213] In that case, the Court considered a use tax on paper and ink that was applied exclusively to periodical publications that consumed over $100,000 worth of paper and ink per annum.[214]

The Court held that, while states could apply "generally applicable economic regulations" to the press without implicating the First Amendment, the use tax applied a special burden to press institutions.[215] Such a tax, the Court suggested, appeared to be related to a goal of suppressing the press and therefore the regulation would have to pass strict scrutiny to be upheld.[216] The Court did not elaborate on its reasoning for finding that the use of paper and ink deserved First Amendment protection.[217] However, it is notable that the use of ink and paper is not in and of itself expressive. Instead, it is non-expressive activity that is closely tied up in the expressive activities of the press.[218] Without ink and paper, the press would not be able to undertake its core expressive activity.[219]

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[209] *Id.* at 260–61.

[210] *Id.*

[211] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587 (1980) (Brennan, J., concurring).

[212] *Id.*

[213] 460 U.S. 575 (1983); Bhagwat, *supra* note 3, at 1036 ("The foundational case in this area is undoubtedly the Supreme Court's 1983 decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*.").

[214] *Minneapolis Star & Tribune Co.*, 460 U.S. at 575.

[215] *Id.* at 581–82.

[216] *Id.* at 585 ("Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." (footnote omitted)).

[217] Bhagwat, *supra* note 3, at 1036–37.

[218] *See* McDonald, *supra* note 11, at 259–60.

[219] Bhagwat, *supra* note 3, at 1033–35.

Lower courts have built on the foundation laid by the Court in *Minneapolis Star & Tribune Co.* to extend First Amendment protection to a range of activities that is non-expressive itself but is bound up in the creation or production of core speech.[220] Activities that have been held to fall within this category includes activities as diverse as still photography, tattooing, and pornography.[221] The best statement of the principle that emerged from *Minneapolis Star & Tribune* comes from the Ninth Circuit decision in *Anderson v. City of Hermosa Beach*.[222]

In *Anderson*, the court considered a complaint by a tattoo parlor which alleged that municipal ordinances which effectively banned the operation of tattoo parlors in a city violated the First Amendment rights of tattoo artists.[223] The court decided that tattooing was more similar to "purely expressive activity," such as writing, than to conduct that merely had an expressive element, such as burning a draft card.[224] Because the court found tattooing to be purely expressive, it held that it was entitled to full First Amendment protection.[225] In the court's estimation, tattooing was part of a process, each part of which was entitled to First Amendment protection.[226] It stated that "[t]he process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds."[227] Thus, certain activity that is not inherently expressive is protected by the First Amendment by virtue of the fact that certain types of expression are impossible without those acts.[228] In other words, some conduct is so integral to an act of expression that it must be afforded full First Amendment protection in order to protect that expression.[229]

Speech creation or speech production falls within the core of the First Amendment and is therefore afforded regular First Amendment protections.[230] While information gathering and speech creation both fall within a grey area outside pure speech itself, speech creation is afforded significantly more protection by the courts.

III. RECORDING AS INFORMATION GATHERING VERSUS SPEECH CREATION

This Part discusses the right to record in terms of the information gathering and speech creation frameworks. It first examines the practical aspects of the right to record

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220 *Id.* at 1034.
221 *Id.*
222 *See* 621 F.3d 1051 (9th Cir. 2010).
223 *Id.* at 1055.
224 *Id.* at 1062.
225 *Id.* at 1068.
226 *Id.* at 1060.
227 *Id.* at 1062.
228 *Id.*
229 *Id.*
230 *Id.* at 1061.

and asks whether it fits more cleanly into the speech creation or information-gathering frameworks. It then considers the policy implications of the two frameworks in regards to the right to record and the breadth of the right under them.

A. Fitting Recording into the Frameworks

Placing recording in either framework would have important policy implications for the scope of the right to record. However, before considering the implications of the two frameworks, it is important to consider whether recording actually fits into both categories as a substantive matter.

At first blush, the act of recording has much in common with information gathering. For instance, both generally involve the collection of statements or observations of third parties, which may be given unintentionally or intentionally.[231] Thus, in the traditional example of information gathering, involving a reporter attending a trial, the reporter collects observations about the trial, the witnesses presented, and the statements made for later use in a piece of writing or a news segment. Meanwhile, the typical situation imagined in right to record cases involves an individual filming an altercation involving law enforcement or other public officials in a public space without their consent. The exercise of either right, therefore, raises concerns about the infringement of the rights of others in a way that pure expression may not.[232]

Another important similarity, one commentator argues, is that both information gathering and recording involve a distinct temporal gap between the gathering of the information that will constitute speech, the creation of the message to be disseminated as speech, and the actual publication of the speech.[233] Both acts are part of a chain of activity that eventually culminates in speech and, like other preceding links in the chain, might be regulated without a high risk of censorship.[234]

While there are some similarities between information gathering and recording, the differences between the two acts are significant, particularly as recording technology continues to progress.

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[231] *See* McDonald, *supra* note 11, at 271 ("[T]he right to gather information often will involve attempts to acquire information from 'unwilling' speakers like the government in certain cases or situations that may involve no 'speakers' at all . . . .").

[232] *Id.* at 266–67 ("[A]s freedom of expression moves away from such 'pure speech' activities, and expression is delivered or facilitated through forms of conduct beyond the basic acts of speaking or publishing, the potential for interference with other socially-valued rights and liberties increases. No longer is that interference limited to reluctant reception or listening, but now a wider panoply of potential conflict is opened . . . .").

[233] *See* Bhagwat, *supra* note 3, at 1033–34 ("[T]here is a time lag, sometimes a substantial one, between creating the message and its dissemination to its intended audience.").

[234] *Id.* at 1066 ("[W]e are dealing here with laws regulating not speech, but speech production, itself a penumbral right, and doing so in content-neutral terms, thereby reducing the risk of censorship.").

For one, the assertion that there is a distinct time lag between gathering and disseminating a recording is increasingly out of step with modern recording technology.[235] Indeed, given the increasing interconnectedness of internet-enabled devices and the proliferation of technologies such as streaming, the temporal distinction between the acts of recording and publishing is reduced to seconds or is even obliterated altogether.[236] A legal framework that turns on that distinction is increasingly untenable in a world of instant and near-instant mass communication.[237] As people become increasingly interconnected and communication becomes increasingly instantaneous, it is difficult to take seriously the assertion that recording and dissemination are not tied up with one another.[238] While this distinction may have made sense in an era of broadsheets and broadcast television, it does not work in an era of Twitter and Instagram.

Additionally, the risk of censorship may actually be heightened in the context of recording relative to information gathering.[239] In the traditional information gathering scenario, there are alternative ways to obtain the information necessary to produce a news article or television segment. A reporter could get access to transcripts or other government records if they are refused access to a courtroom. Such documents offer a rough approximation of the information that a reporter would otherwise have had access to in producing their subsequent report. In the recording context, however, if a bystander is prevented from filming a particular scene or event, a substantial part of the value of the antecedent speech is lost. An individual might substitute interviews with witnesses or perhaps footage of the aftermath of an altercation, but such substitute footage cannot substantially replace footage of the altercation or activity itself.

Given these considerations, recording, at least in a modern context, fits more clearly within a speech creation context.[240] The act of recording a particular scene, incident, or altercation is inextricably connected to the dissemination of a recording of that scene.[241] Additionally, the temporal distinction between various steps in the process of speech is increasingly irrelevant to the act of making a recording, which today can be simultaneous with the publication of the recording.[242] Recording in the modern era increasingly resembles pure speech rather than information gathering.[243]

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[235] Helle, *supra* note 143, at 556 ("With webcams, 'smart' phones, and augmented reality head-mounted displays, gathering and publication are becoming more antiquated as discrete concepts by the nanosecond.").

[236] *Cf.* Bhagwat, *supra* note 3, at 1053; Helle, *supra* note 143, at 551.

[237] *Cf.* Bhagwat, *supra* note 3, at 1053; Helle, *supra* note 143, at 551.

[238] *See* Helle, *supra* note 143, at 556–57.

[239] *See id.* at 539.

[240] *See* Bhagwat, *supra* note 3, at 1033–35.

[241] *See* Helle, *supra* note 143, at 550.

[242] *See* Bhagwat, *supra* note 3, at 1033–34.

[243] *See id.* at 1033 ("Pure, oral speech, however, has a distinct characteristic in that it is 'created' simultaneously with its dissemination. The speaker makes noise, and the noise is heard at the same time."); *see also* Kaminski, *supra* note 140, at 188 ("When you can demarcate

B. Policy Implications

The right to record fits more closely with speech creation than it does with information gathering. However, it is also important to consider the potential policy ramifications of grounding the right to record in either the information gathering right or the speech creation right. If recording is speech creation, and therefore an action bound up with expressive activity, then content-neutral regulation of speech is subject to time, place, and manner restrictions.[244] Any content-neutral regulation would, therefore, have to be justified without reference to the act of recording, advance a compelling state interest, and leave open ample alternatives for recording.[245]

Some commentators have suggested that the act of recording public officials is invariably an expressive act, and therefore any restriction on recording would have to further a compelling government interest.[246] However, this is not necessarily the case. While recording is bound up in an expressive act, it could be undertaken in a non-expressive way. Furthermore, allowing the test to turn on whether or not recording is being done in an expressive manner creates its own problems.[247] Content-neutral restrictions on recording are possible and necessary in certain circumstances. Regulations that restrict how or from where individuals can record public officials could be permissible to ensure safety during police interactions for instance.[248]

A time, place, and manner test would make it very difficult for government to prevent the recording of public officials. The modern time, place, and manner test requires that any regulation leave open "ample alternative channels for the communication of the information."[249] While this requirement has been formulated in language of variable strength, whether the test is phrased as requiring adequate alternatives

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the act of producing communication from the act of actually communicating, this raises the questions of whether the act of production is truly part of the communicative moment and how far into conduct First Amendment protections extend."(footnote omitted)).

[244] Williams, *supra* note 189, at 644–47.

[245] *See id.* at 647.

[246] *See* Simonson, *supra* note 12, at 1575–76 ("The content of the message of a bystander who is visibly pointing a recording device in the direction of the police is different than a bystander who has their hands at their sides. The recording bystander is telling the officer: I am watching you, and I care about how you speak and act when you are on duty. . . . [W]hen a legislature bans recording within a certain distance of a police officer on duty, or when a police officer arrests someone solely because of the presence of a recording device, those actions are being taken based in part on the expressive content of visibly holding the recording device.").

[247] *See* Calvert, *supra* note 1, at 245 ("This analysis, with its uncompromising requirement that recording must be accompanied by spoken words critical of the police or be done with an intent to criticize the police, is troubling for two key reasons. First, it suggests that citizens may be protected by the First Amendment when they record images of police, but only if they first announce, either through their words or their expressive actions, to the very same officers they are recording, that they are doing so to criticize or challenge the officers' actions.").

[248] Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014).

[249] Williams, *supra* note 189, at 640.

or ample alternatives makes little difference because there are effectively no alternatives available that can adequately substitute for the opportunity to record an official. While protestors who are denied the opportunity to sleep in a national park as part of a protest against homelessness are still able to communicate their message, a protestor denied the ability to film an altercation between a law enforcement officer and a member of the public or an interaction between an elected official and a constituent is permanently denied the opportunity to communicate that image. A mere description of such an interaction is often not a sufficient alternative. Video of incidents such as the vicious beating of Rodney King by the Los Angeles Police Department or the death of Eric Gardner at the hands of the New York City Police Department depict altercations that would be difficult or impossible to describe in words alone and which would be unlikely to achieve credibility, let alone the level of national notoriety and importance that they did without video footage.[250]

Therefore, any restriction under a time place and manner test would likely have to preserve the ability of bystanders to film. At the same time, regulations for the purposes of safety that do not otherwise inhibit the ability to film, such as those suggested by the First and Third Circuits would likely be acceptable under this standard.

A time, place, and manner test would also allow government to assert legitimate interests such as safety in implementing content-neutral regulation of the right to record. While the ability to record would be protected, interference with the business of public officials in such a way as to endanger those officials or members of the public could be limited. Thus, a time, place, and manner test would preserve some flexibility, while at the same time allowing a broad and robust right to record.

If recording is a form of information gathering, however, a much broader set of restrictions becomes possible. Under the *Richmond News* test, information gathering is a structural right and the interest in gathering information must be weighed against the relevant opposing interests and ought to be evaluated in terms of the value of the information sought.[251] This is a much lower bar to regulation than is a time, place, and manner test.[252] Under this formulation, the interest of the individual recording

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[250] *See* German Lopez, *How Video Changed Americans' Views Toward the Police, From Rodney King to Alton Sterling*, VOX (July 6, 2016, 11:05 AM), https://www.vox.com/policy-and-politics/2015/12/10/9886504/police-shooting-video-confidence [https://perma.cc/KMM7-CKBZ] ("In 1991, four white Los Angeles police officers brutally beat Rodney King, an unarmed black man, as it was caught on video, sparking local riots and putting a spotlight on longstanding feelings of distrust toward law enforcement in minority communities. . . . The proliferation of video through smartphones, dashboard cameras, and body cameras—and social media's ability to send a video into viral overdrive—has played a major role in holding police accountable . . . ."); *see also* Jessica Glenza & Oliver Laughland, *One Year Later: Eric Garner's Death Led to Most Active U.S. Protests Since 1960s*, GUARDIAN (July 7, 2015, 2:21 PM), https://www.theguardian.com/us-news/2015/jul/17/one-year-ago-eric-garner-new-york [https://perma.cc/ET5W-6XMD].

[251] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 587–89 (1980) (Brennan, J., concurring).

[252] *See id.* at 588–89.

and the value of the information sought via recording would be balanced against the interests of the government or the public official being filmed in not being recorded.

The most obvious interest that might be asserted would be a right to privacy, confidentiality, or safety. While safety interests would likely be upheld under a time, place, and manner test so long as they do not interfere with the ability of an individual to record, under an information gathering framework, there is no requirement that an individual have an adequate alternative to access the information sought because the right to gather information is not a speech right. Therefore, recording could be directly prohibited and the opportunity to record severely curtailed if a court were to find that the interest asserted by the government or public official was sufficiently compelling.

Proponents of an information gathering framework generally focus on the privacy implications of a broad right to record.[253] They emphasize that constant surveillance tends to alter behavior, interfere with the ability of public officials to execute their responsibilities properly, and impair the exercise of good government.[254] Indeed, concerns about the alteration of behavior for the worse is the justification most often raised to defend the practice of forbidding video and still photography from the Supreme Court and many courts of appeals and district courts.[255] These objections should be taken seriously. Some officials, particularly elected ones may feel increased pressure to behave differently in front of the camera than they might in a setting without cameras.[256] Some commentators have even suggested that the deterioration of congressional debate can be tied directly to the advent of C-SPAN.[257] However, recording of public officials may also alter their behavior in beneficial ways. Indeed, the impetus behind the implementation of body cameras is often the idea that law enforcement officers will behave better if they know that their interactions with the public are being recorded.[258] Such recordings can even increase public confidence when police departments can offer video evidence of well-handled altercations.[259]

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[253] *See generally* Kaminski, *supra* note 140.

[254] *See id.* at 171–72; Susan Davis, *C-SPAN Hits 35-Year Mark*, USA TODAY (Mar. 19, 2014, 6:03 PM), https://www.usatoday.com/story/news/politics/2014/03/19/cspan-anniversary/6577593/ [https://perma.cc/KE9P-P687] ("[T]elevision coverage of floor debates and committee hearings has contributed to the coarsening of debate and the polarization between the parties."); *see also* Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1492–93, 1535 (2012) ("Justice Kennedy . . . . worried that the tenor would be ineluctably altered by the introduction of cameras in the Supreme Court.").

[255] *See generally* Marder, *supra* note 254.

[256] *See id.* at 1555–56.

[257] *See* Davis, *supra* note 254.

[258] *See generally* Thomas Gardiner & Patrick Molinari, *Body Cameras: A New Era in Policing*, DCBA BRIEF, https://www.dcba.org/mpage/v30gardinermolinar [https://perma.cc/2QW7-RJ4W] (last visited Feb. 24, 2020).

[259] *See, e.g.*, Brad Evans, *Video: Body Cam Footage Shows Altercation Between Woman, Officer*, NBC 5, https://www.mynbc5.com/article/video-body-cam-footage-shows-altercation-between-woman-officer/10246731 [https://perma.cc/5G89-SSTU] (last updated July 6, 2017, 3:58 PM).

Ultimately, the aim of a broad right to record is to increase public accountability. While we may not always like the way that officials respond to the prospect of increased accountability, and recordings may not always increase public confidence or the efficient working of government, the value of video recordings to civil society and an informed populace certainly outweigh these concerns when it comes to recording officials in public.

Furthermore, reasonable regulations would still be permitted under a speech creation framework. While public officials would have to forgo a certain amount of privacy in their public duties under this framework, interests in safety and protection from harassment would be able to be vindicated.

Additionally, under an information gathering framework, the court would also be asked to consider the value of the information sought. This would require courts to make value judgments about the relative importance, not only of recording different classes of official but also of the specific circumstances of each individual case. This is a recipe for an inconsistent right that depends on the predilections of the reviewing court. It is also possible that this would lead to a hierarchy of access. If the ability to record officials depends in part on a court's determination of the value of the information sought, it is easy to imagine that recording of police officers might be afforded greater latitude than recording of congressmen and recording of congressmen more than that of judges. While the ability to record law enforcement officers is of particular importance as many courts have noted, the conduct of other officials, both appointed and elected is certainly a matter of public interest. While reasonable people may disagree over the relative importance of being able to record different officials, a speech creation framework would resolve these debates in favor of increased public access across the board.

An information-gathering framework would effectively allow government to substantially limit the ability of individuals to record many types of public officials outside of the law enforcement context. So long as a court deems the interest of the official in not being recorded as significant enough and the value of the information sought sparse enough, governments could effectively prohibit recording in certain contexts.

If, on the other hand, recording is speech creation, content-neutral regulations of recording would have to satisfy a time, place, and manner test. This would grant substantial protection to the right to record, as it is effectively impossible to ensure ample alternatives to recording.

CONCLUSION

The right to record public officials is an increasingly important element of civil society in the United States. Recordings of police activity, public meetings, and other public officials have become a critical element of how Americans interact with their elected officials and discuss public affairs. Recordings help keep officials accountable by exposing misconduct and other abuses by officials. They can also help keep

citizens engaged in the political process by demonstrating instances of good and responsive government, as well.

While many courts have recognized a right to record, and most Americans live in a jurisdiction where the right to record has been enshrined, they have largely failed to identify the specific doctrine by which First Amendment protection is extended to the right to record.[260] The cursory analysis employed by most of the courts that have examined the issue is an insufficient basis in which to ground such an important right.

As this Note argues, there are two potential doctrines under which the right to record could fall. It could either be considered speech creation[261]—and therefore an activity inextricably bound up with expression—or it could be considered information gathering[262]—and thus a structural right, important to the vindication of First Amendment rights but analyzed under a balancing test.

The more natural framework through which to analyze the right to record is the speech creation framework.[263] Modern recording technology and the interconnectedness afforded to individuals by ubiquitous internet access have increasingly made the temporal distinction between the act of recording and the act of publishing irrelevant or nonexistent.[264] This trend can only be expected to continue as connectivity expands and technology improves. These technological changes make the characterization of the act of recording as akin to information gathering an increasingly strained interpretation. Recording is more akin to core speech than ever before, and increasingly so. It is clearly bound up in the expressive act of disseminating a video. The act of recording clearly fits more naturally within the speech creation framework.

Characterized as speech creation, the right to record would extend core First Amendment protections. Therefore, governments could not directly prohibit or regulate recording of public officials without a compelling state interest. When content-neutral regulations infringe on the right to record, they would have to satisfy a time, place, and manner test which would provide substantial protection to the right to record, given the relative unavailability of substitutes to recording. A limited regulatory regime along these lines would reserve a broad right to record. A broad right to record serves an important societal interest by enhancing the ability of civil society to monitor and make accountable all public officials for actions taken in their official capacity. At the same time, the government would still have the latitude to impose reasonable regulations in the interest of safety.

The courts should clarify their right to record jurisprudence by adopting an understanding of the right to record grounded in speech creation jurisprudence and reserving a robust right of citizens to record their public officials.

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[260] *See* discussion *supra* Part I.
[261] *See* discussion *supra* Section II.B.
[262] *See* discussion *supra* Section II.A.
[263] *See* discussion *supra* Part III.
[264] *See* discussion *supra* Section III.A.