NOTE

INFORMATION GATHERING IN THE ERA OF MOBILE TECHNOLOGY: TOWARDS A LIBERAL RIGHT TO RECORD

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INTRODUCTION

Cameras are everywhere. From private security footage to homeland security surveillance to the photographic mapping of the streets of the world, people today are under constant scrutiny while in the public sphere.[1] This phenomenon raises numerous legal questions, but possibly most problematic is the

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[1] *See generally* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 337–45 (2011) (surveying the legal challenges posed by mass image capture).

ubiquity of camera phones; today everyone has the ability to instantaneously create a video and spread it across the world.[2] The enormity of this power at first glance seems to beg for legal regulation, but the nature of the issue cautions against it. Videos, after all, are just a medium of expression. And liberal democracy places a premium on freedom of expression, often to the detriment of other rights.[3]

A video that a woman uploaded to Facebook in October 2015 highlights the complexity of this issue.[4] The subject of the video is a man who the woman alleges was filming her and some other women on a Boston street without their consent. The woman took offense and, in the spirit of vigilante justice, she turned the table on the man and confronted him with her own camera. In the video, the woman and the man both accuse each other of legal wrongdoing by filming the other without permission.[5] The woman turned her video over to the police, but the police declined to investigate because there was no evidence the man had committed a crime.[6] Ironically though, the woman very well might have. Massachusetts' wiretapping law criminalizes the recording of any speech without the speaker's consent (subject to certain exceptions that do not apply here).[7] Unsympathetic police officers could well have investigated the woman for filming the video that she readily turned over as evidence, an unsympathetic prosecutor could have charged her with wiretapping, an unsympathetic jury could have convicted her, and an unsympathetic judge could have sentenced her to up to five years in prison.[8]

This prospect is intuitively troublesome. Although some may disagree with the woman's tactics, she does not appear to

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2 In 2012 there were more than 4.4 billion camera phones in the world. Felix Richter, *4.4. Billion Camera Phones . . .*, STATISTA (Oct. 13, 2012), https://www.statista.com/chart/653/prevalence-of-selected-features-in-the-global-installed-base-of-mobile-phones/ [https://perma.cc/LR32-AA75].

3 *See* U.S. CONST. amend. I; OWEN M. FISS, THE IRONY OF FREE SPEECH 3 (1996) (explaining that free speech is vital for collective self-determination, even at the expense of other rights).

4 Jase Dillan, FACEBOOK (Oct. 29, 2015), https://www.facebook.com/bostonsara/videos/10102165415247387/ [https://perma.cc/AZ27-57CM].

5 *See id.*

6 Rossalyn Warren, *A Woman Confronted a Man She Claims was Secretly Filming Her in Public*, BUZZFEED (Nov. 2, 2015, 11:04 AM), http://www.buzzfeed.com/rossalynwarren/a-woman-confronted-a-man-she-claims-was-secretly-filming-wom#.wtpPxja [https://perma.cc/Z9ZE-YCNS].

7 MASS. GEN. LAWS ch. 272, § 99(B)(2), (C)(1) (2010). The issue with the woman's video is that it captured the man speaking. If the video the man allegedly took captured the woman or others speaking he may have been likewise liable.

8 *See id.*

be the original aggressor in the situation. She perceived an injustice and used a modern medium—the cellphone video—to expose this injustice, express her displeasure, and contribute to a broader conversation about the harassment of women. If she had penned a letter to the editor about this incident (assuming her allegations were based in truth), her speech would have invoked the core of the First Amendment. So can it possibly be that the First Amendment would remain silent were this woman imprisoned for making this video? Recent developments in the federal courts of appeals suggest it would not.

Three circuit courts have held that the First Amendment protects citizens' right to record police officers performing their duties in public without the officer's consent.[9] Although the courts limited these holdings to this narrow circumstance, they have not articulated any principle that would prevent further expansion of the holdings. This naturally raises the question of whether this burgeoning right to record[10] extends beyond the nonconsensual recording of police officers. And if it does extend beyond this narrow circumstance, where does it end? Does the right to record protect the woman in the video discussed above? What about the man whom she accused of surreptitiously recording her and other women? This Note seeks to develop a framework for the right to record that can begin to answer these and other questions.

These recent cases base the right to record on the established principle that the First Amendment not only protects the right to disseminate information but also the right to seek out and collect information. The Supreme Court and lower courts have developed this First Amendment right to gather information[11] in a patchwork of cases over the past forty years, but the Court has never explained its exact origins or rationale.[12] In

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9 *See* ACLU of Illinois v. Alvarez, 679 F.3d 583 (7th Cir. 2012); Glik v. Cunniffe, 655 F.3d 78 (1st Cir. 2011); Smith v. City of Cumming, 212 F.3d 1332, 1332 (11th Cir. 2000).

10 This Note defines the right to record as the right to use technology to capture one's auditory and/or visual impression without the subject's consent. Although this Note frequently discusses the right to record in terms of videography, it extends equally to still photography and purely audio recordings as well.

11 The "right to gather information" is often referred to as the "newsgathering right." For the purposes of this Note, I will refer to this right as the "right to gather information" because the formulation "newsgathering right" implies the right only protects gathering information of some public interest or import. As discussed *infra* subpart I.A, this is not necessarily the case.

12 *See infra* subpart I.A. *See generally* 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, 273–302 (2004) (providing an

order to delineate the boundaries of the right to record, this Note seeks to identify the theoretical basis of the Court's right to gather information doctrine.[13] This Note examines the right to gather information as a democratic right and as a liberal right—based on two of the most common justifications for protecting free speech—and determines that Supreme Court precedent is more consistent with a liberal view of the right to gather information.[14] As such, this Note concludes that the right to record is personal to the videographer and is not dependent on the purpose or subject matter of the recording, or the importance of the recording to the public at large. Thus, the right to record applies to any circumstance in which the videographer can readily see and hear the recording's subject from somewhere the videographer has a right to be and in which the subject does not have a reasonable expectation of privacy.[15]

This Note begins in Part I with an overview of the case law establishing the right to gather information and the recent circuit court cases recognizing a right to record police officers without their consent. Part II then presents a brief overview of the democratic and liberal free-speech theories. Part III proceeds by analyzing the case law on the right to gather information against both theories and concludes that Supreme Court precedent on the matter is most consistent with a right to gather information based on a liberal theory of free speech. Part IV discusses the implications of a liberal right to record by proposing a test for when it should apply and discussing potential criticisms of a liberal right to record. This Note concludes by discussing how courts and legislators can bring the law into compliance with the right to record and identifying areas of further scholarship.

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overview of the development of the right to gather information and suggesting criteria for determining who should be able to invoke this right).

13 *Cf.* Frederick Schauer, *Must Speech Be Special?*, 78 N.W. U. L. REV. 1284, 1298 (1983) ("The very reason we are concerned about the underlying theoretical justification for the principle of freedom of speech, in a way that we are not with respect to the age of the presidency and equal representation in the Senate, is that the text is not clear, and we are therefore required to work out a theory of free speech so that we can intelligently apply the vague words of the document." (internal footnotes omitted)).

14 This Note defines the democratic theory of free speech as the idea that the freedom of speech is a necessary means to achieve democratic governance. It defines the liberal theory of free speech as the idea that freedom of speech is an aspect of personal autonomy that a government cannot strip from a sovereign person. *See infra* Part III (elaborating further on these definitions and explaining these theories).

15 *See infra* subpart IV.A.

This Note has two important limitations. First, it assumes that the First Amendment right to gather information at a minimum includes a right to record police officers performing their duties in public. Although every circuit court to directly address the issue has concluded this is the case,[16] the Supreme Court has not spoken on the issue, and there are strong arguments that no such right exists.[17] Second, this Note does not seek to settle the age-old debate over whether the First Amendment or the broader right to free speech is a democratic or a liberal right, or even whether these justifications are mutually exclusive. Rather, this Note concludes only that the existing Supreme Court doctrine regarding the right to gather information is squarely grounded in a liberal view of free speech, and through this lens, the right to record cannot be logically limited to recording police officers.

I
BACKGROUND

A. The Right to Gather Information

1. *The Reporters' Privilege*

The right to gather information can be traced to the Supreme Court's opinion in *Branzburg v. Hayes*, which was ironically a loss for the journalists trying to assert their First Amendment right to gather information.[18] *Branzburg* was a consolidation of four cases in each of which journalists sought to quash grand-jury subpoenas compelling them to testify about the identity of their confidential sources.[19] The journalists argued that the First Amendment immunized them against the subpoenas because if they were forced to betray their sources' confidence, future sources would "be measurably de-

16 The Third and Fourth Circuits have held that there is no "clearly established" right to film police officers performing their duties in public such that a 42 U.S.C. § 1983 plaintiff can overcome qualified immunity. Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010) (holding there is "insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on 'fair notice' that seizing a camera or arresting an individual for videotaping police during the stop would violate the First Amendment"); Szymecki v. Houck, 353 F. App'x 852, 853 (4th Cir. 2009) (not precedential) (holding that the plaintiff's "asserted First Amendment right to record police activities on public property was not clearly established in this circuit at the time of the alleged conduct").

17 *See, e.g.*, ACLU of Illinois v. Alvarez, 679 F.3d 583, 609 (7th Cir. 2012) (Posner, J., dissenting) (cautioning against expansion of First Amendment rights that threatens public safety and privacy interests).

18 408 U.S. 665 (1972).

19 *See id.* at 668–78.

terred from furnishing publishable information, all to the detriment of the free flow of information protected by the First Amendment."[20] The Court rejected this argument,[21] but in framing the issue it crucially clarified that "it [is not] 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."[22]

In addition to its explicit endorsement of the right to gather information, the Court's lengthy treatment of the historic importance of grand juries and their investigatory powers further evinces that the Court intended that its holding be narrowly applied to the facts of the case and that it indeed envisioned there is a right to gather information that simply was not implicated.[23] This view is bolstered by Justice Lewis F. Powell Jr.'s short but notorious concurrence, which called for a case-by-case determination as to whether a journalist was entitled to a privilege from subpoena by balancing the journalists' First Amendment interests against the state's need for the information.[24]

Indeed, Justice Powell's concurrence cast considerable confusion over the Court's opinion and the state of the so-called reporters' privilege. Lower courts responded by reading Powell's concurrence in conjunction with Justice Potter Stewarts's dissent to establish a qualified reporters' privilege.[25] Thus, this special First Amendment privilege, grounded in the

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20 *Id.* at 680.

21 The Court discussed five reasons: (1) not all incidental burdens on speech violate the First Amendment, *id.* at 682; (2) the institutional press enjoys no greater rights to information than ordinary citizens, *id.* at 684; (3) there was no such privilege at common law, *id.* at 685; (4) grand juries are historically important, *id.* at 686–88; and (5) the journalists' fears of a chilling effect on the flow of news were overblown, *id.* at 693–95.

22 *Id.* at 681. The Court reemphasized this point later in the opinion and suggested that the First Amendment could sometimes be grounds to squash a subpoena: "[A]s we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment." *Id.* at 707–08.

23 *See id.* at 686–88, 693–95.

24 *Id.* at 710 (Powell, J., concurring).

25 *See, e.g.*, Zerilli v. Smith, 656 F.2d 705, 714 (D.C. Cir. 1981) (holding that protection of a news reporter's sources in many situations outweighs the interest of compelling disclosure of those sources under the First Amendment); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 595–96 (1st Cir. 1980) (explaining that courts must balance the potential harm to the flow of information when considering when to allow disclosure of reporter sources); *see also* Stephen Bates, *Overruling a Higher Court: The Goodale Gambit and* Branzburg v. Hayes, 14 NEXUS 17, 25 (2009) (detailing how the lower courts have been deferential to reporters' privilege in protecting their sources).

press' right to gather information, soon became near-universal law; in the years following *Branzburg*, only the Sixth Circuit read *Branzburg* to deny the reporters' privilege altogether.[26] Regardless of the uncertainty surrounding *Branzburg*'s holding, the Court has repeated *Branzburg*'s dicta that "news gathering is not without its First Amendment protections,"[27] and "without some protection for seeking out the news, freedom of the press could be eviscerated."[28]

2. *Access to Government Information*

Following *Branzburg*, the Court addressed a series of cases over whether the First Amendment right to gather information means the government must provide the media access to certain information. The Court in *Pell v. Procunier* and *Saxbe v. Washington Post Co.* affirmed substantially identical policies of the California Department of Corrections and the Federal Bureau of Prisons, respectively, limiting face-to-face interviews between the members of the media and prison inmates.[29] Both policies restricted prisoners to receiving visitors with whom they had some prior personal relationship, but allowed journalists to tour the prisons and "stop and speak about any subject to any inmates whom they might encounter."[30] Journalists could also request a randomly selected group of inmates to interview, but they could not interview whomever they wished.[31] Rejecting the journalists' claims, the Court held that

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26 *See* Storer Commcn'ns, Inc. v. Giovan (*In re* Grand Jury Proceedings), 810 F.2d 580, 584 (6th Cir. 1987); Bates, *supra* note 25, at 26–27. More recently, though, the tide has begun to turn away from the qualified reporters' privilege. The Seventh Circuit rejected the privilege on first impression in 2003, McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003), and the D.C. Circuit soon thereafter distinguished its prior holding in *Zerilli*, 656 F.2d at 714, to hold that *Branzburg* categorically denied a reporters' privilege in criminal cases, *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 972 (D.C. Cir. 2005).

27 Pell v. Procunier, 417 U.S. 817, 833 (1974) (quoting *Branzburg*, 408 U.S. at 707).

28 Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 576 (1980) (quoting *Branzburg*, 408 U.S. at 681).

29 Saxbe v. Washington Post Co., 417 U.S. 843, 846–48 (1974); *Pell*, 417 U.S. at 830–31.

30 *Pell*, 417 U.S. at 830; *see also Saxbe*, 417 U.S. at 846–48 (describing substantially identical Federal Bureau of Prisons Policy Statement).

31 *Saxbe*, 417 at 846–48; *Pell*, 417 U.S. at 830. The prisons argued that if journalists could single out prisoners for interviews, the press would focus its interests on a select group of inmates who would then become "virtual 'public figures' within the prison society and . . . bec[o]me the source of severe disciplinary problems." *Pell*, 417 U.S. at 831–32. Indeed, the California Department of Corrections claimed its past "liberal posture with regard to press interviews" was in part to blame for a fatal escape attempt. Hillery v. Procunier, 364 F. Supp. 196, 198 (N.D. Cal. 1973).

the Constitution grants the press no greater rights than members of the ordinary public and does not impose "upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."[32] Thus, the Court held that the policies were permissible insofar as they granted the press at least as much access as the general public.[33]

Justice Powell's dissenting opinion in *Saxbe* revealed the Justices' differing conceptions of the right to gather information and indeed the nature of the First Amendment itself. Powell, in contrast to the majority, envisioned a First Amendment that imposes an affirmative duty on the government to facilitate the free-flow of information.[34] Powell agreed with the majority's premise that the Constitution grants the press only the same rights as the public but argued that the First Amendment nevertheless prevents the government from denying members of the public certain information without sufficient reason to do so.[35] Emphasizing "the societal function of the First Amendment in preserving free public discussion of governmental affairs" and the public's reliance on the press to facilitate public discussion,[36] Powell warned that "[a]t some point official restraints on access to news sources, even though not directed solely at the press," would "undermine the function of the First Amendment."[37] Thus, he concluded that "it is both appropriate and necessary" that the press' access to information does not give way to mere "discretionary authority and administrative convenience."[38]

The Court significantly broadened *Pell* and *Saxbe* in *Houchins v. KQED, Inc.*[39] In that case, a broadcasting company sued to gain access to a county jail after an inmate committed

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32 *Pell*, 417 U.S. at 834; *see also Saxbe*, 417 U.S. at 850 (holding the case to be constitutionally indistinguishable from *Pell* and affirming that the Constitution does not require information be available to journalists that is not available to the general public).

33 *See Saxbe*, 417 U.S. at 850; *Pell*, 417 U.S. at 835.

34 *See Saxbe*, 417 U.S. at 862 (Powell, J., dissenting). Justice Powell incorporated his *Saxbe* dissent into his *Pell* dissent. *See Pell*, 417 U.S. at 835 (Powell, J., concurring in part and dissenting in part).

35 *See Saxbe*, 417 U.S. at 857 (Powell, J., dissenting).

36 *Id.* at 862–63 (Powell, J., dissenting).

37 *Id.* at 860 (Powell, J., dissenting).

38 *Id.* (Powell, J., dissenting). Applying precedent from a prior case involving prisoner communications, Justice Powell opined the regulations were unconstitutional because their blanket application was broader than necessary for prison officials to maintain order. *Id.* at 868 (Powell, J., dissenting).

39 438 U.S. 1 (1978).

suicide, purportedly because of conditions in the jail.[40] The sheriff offered to allow journalists to take part in a public tour of the jail, but the journalists would not be able to take pictures or audio or video recordings, would only see parts of the jail, and would not have access to inmates.[41] Citing *Pell* and *Saxbe*, the Court sided with the sheriff, using broad language to flatly reject "any notion that the First Amendment confers a right of access to news sources."[42] The Court recognized that *Branzburg* endorsed the right to gather information but limited that right to "an undoubted right to gather news 'from any source by means within the law.'"[43]

Justice John Paul Stevens dissented from *Houchins* with an opinion that echoed many of the sentiments of Justice Powell's dissent in *Saxbe*. He argued that the First Amendment is meant to ensure the free flow of information necessary for self-governance and, as such, the right to gather information exists "not for the private benefit of those who might qualify as representatives of the 'press' but to insure that the citizens are fully informed regarding matters of public interest and importance."[44] Justice Stevens distinguished *Pell* and *Saxbe* by arguing that the regulations in those cases still left the public with ample alternative channels to examine prison conditions but that the regulations in question "unduly restricted the opportunities of the general public to learn about the conditions of confinement in Santa Rita jail."[45]

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40 *Id.* at 3–4.

41 *Id.* at 5.

42 *Id.* at 11.

43 *Id.* (quoting Branzburg v. Hayes, 408 U.S. 665, 681–82 (1972)). One could doubt whether this formulation of the right to gather information is a really a right to gather information at all. To say that the right extends to means within the law seems akin to saying that one has a right to criticize the President as long as Congress does not forbid criticism of the President. This could hardly be considered a right to free speech. Another characterization of this formulation of the right to gather information, however, is that the government cannot specifically forbid information-gathering activity, but can impose regulations targeting other governmental interests without regard to the incidental burdens on information gathering. *Cf.* Pell v. Procunier, 417 U.S. 817, 830 (1974) ("We note at the outset that this regulation is not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions."). But, as Justice Powell noted in his *Saxbe* dissent, this rule would conflict the Court's holding in *United States v. O'Brien* that any incidental burden on speech must be no greater than necessary to further an important governmental interest unrelated to the speech itself. *See* Saxbe v. Washington Post Co., 417 U.S. 843, 858 (1974) (Powell, J., dissenting); United States v. O'Brien, 391 U.S. 367, 377 (1968).

44 *Houchins*, 438 U.S. at 32 (Stevens, J., dissenting).

45 *Id.* at 29–30 (Stevens, J., dissenting). *See generally* Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive*

By the time the Court had the opportunity to reexamine the question of access to government information, *Pell*, *Saxbe*, and *Houchins* had solidified into well-settled law. In 1999, the Court in *Los Angeles Police Department v. United Reporting Publishing Corp.* considered whether a California law restricting access to arrestee's addresses was a facial First Amendment violation.[46] Although the Court was divided over whether the respondent-plaintiff could alternatively succeed on Equal Protection grounds, all nine Justices agreed: "California could decide not to give out arrestee information at all without violating the First Amendment."[47] Even Justice Stevens, who dissented in *Houchins*, conceded in dissent that "the majority is surely correct" that California had no First Amendment duty to provide access to this information.[48]

3. *Access to Criminal Proceedings*

The Court first considered whether the First Amendment granted the public a right to attend criminal proceedings in *Gannett Co., Inc. v. DePasquale* but ultimately disposed of the case without deciding the issue.[49] Nevertheless, the issue provoked debate among the Justices over the right to gather information in a series of concurring and dissenting opinions. Justice Powell wrote a concurring opinion in which he argued that the First Amendment right to gather information provides the public with a limited right to attend criminal proceedings weighed against the defendant's Sixth Amendment right to a fair trial.[50] He concluded that the appropriate question in these cases is "whether a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury."[51] Justice William Rehnquist argued in direct opposition to Justice Powell that the Court's prece-

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"Right to Know," 72 MD. L. REV. 1, 43–67 (2012) (describing how *Houchins* fits into the broader debate surrounding the constitutional "right to know").

46 528 U.S. 32, 34 (1999).

47 *Id.* at 40; *see also id.* at 41 (Scalia, J., dissenting) ("[T]he fact that it is formally nothing but a restriction upon access to government information is determinative."); *id.* at 42 (Ginsburg, J., concurring) ("I join the Court's opinion, which recognizes that California Government Code § 6254(f)(3) is properly analyzed as a restriction on access to government information, not as a restriction on protected speech. That is sufficient reason to reverse the Ninth Circuit's judgment." (internal citation omitted)).

48 *Id.* at 45 (Stevens, J., dissenting).

49 443 U.S. 368, 392 (1979).

50 *See id.* at 398–99 (Powell, J., concurring).

51 *Id.* at 400 (Powell, J., concurring).

dents made clear that there is no right of access to government proceedings, which include criminal proceedings.[52] Justice Harry Blackmun and the remaining three Justices agreed with Justice Rehnquist.[53]

Despite five Justices seeming to agree in *Gannett* that the public has no First Amendment right to attend criminal proceedings, the Court held a year later in *Richmond Newspapers, Inc. v. Virginia* that this right indeed exists.[54] Although the Court was badly divided in its reasoning, six Justices explicitly endorsed some sort of right to gather information as the basis for open trials.[55] Chief Justice Burger grounded his plurality opinion in *Branzburg*'s dicta that the First Amendment must include "some protection for seeking out the news"[56] and characterized the right to attend criminal trials "as assured by the amalgam of the First Amendment guarantees of speech and press."[57] Chief Justice Warren Burger distinguished the prison-access cases because "[p]enal institutions do not share the long tradition of openness" that criminal trials enjoy.[58] Thus, the plurality appeared to hold that the First Amendment guarantees a right for the public to access any information to which it has historically enjoyed access.

Justice William J. Brennan Jr. and Justice Stewart more explicitly grounded their opinions in the right to gather information. Echoing the rhetoric Justice Powell used in his *Saxbe* dissent, Justice Brennan—joined by Justice Thurgood

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52 *See id.* at 404–05 (Rehnquist, J., concurring).

53 Justice Blackmun and the three Justices who joined his dissenting opinion likewise dismissed the notion of a First Amendment right for the public to attend criminal proceedings in favor of a Sixth Amendment right, which the majority rejected. *Id.* at 442–43, 447 (Blackmun, J., concurring in part and dissenting in part) (rejecting First Amendment theory because "this case involves no restraint upon publication or upon comment about information already in the possession of the public or the press").

54 448 U.S. 555, 580 (1980).

55 *See id.* at 576, 587–88, 599. Justice Powell did not participate in the decision but had been among the right to gather information's most vocal proponents in prior cases. *See, e.g.*, *Gannett*, 443 U.S. at 400 (Powell, J., concurring); Saxbe v. Washington Post Co., 417 U.S. 843, 858 (1974) (Powell, J., dissenting).

56 *Richmond Newspapers*, 448 U.S. at 576 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)) (internal quotation marks omitted).

57 *Id.* at 577.

58 *Id.* at 576 n.11. The Court discussed the "unbroken, uncontradicted history" of the public trial at common law at great length, and concluded it is "supported by reasons as valid today as in centuries past." *Id.* at 573. This discussion focused the need for the public to see criminals brought to justice as the primary justification. *See id.* at 571 ("The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner or in any covert manner." (internal quotation marks and alterations omitted)).

Marshall—drew upon the First Amendment's role in "fostering our republican system of self-government."[59] In this vein, he concluded that one should consider the right to gather information in light of the "tradition of public entree to particular proceedings or information" and "whether access to a particular government process is important in terms of that very process."[60] Justice Stewart tersely explained in a footnote citing *Branzburg*—as if to take it as a forgone conclusion—that "[t]he right to publish implies a freedom to gather information."[61] From this premise, Justice Stewart concluded that First Amendment rights apply in the courtroom, and there is thus a right to gather information from court proceedings.[62]

Richmond Newspapers was the first time the Court had actually invoked the right to gather information in favor of the party seeking to gather the information.[63] In fact, the only subsequent cases in which the Court held in favor of the information gatherer were open-court cases flowing directly from *Richmond Newspapers*.[64] Nevertheless, the open-court cases unequivocally demonstrated that the First Amendment indeed includes a right to gather information.

4. *Generally Applicable Laws*

One final line of cases substantially limited the right to gather information by firmly establishing that generally appli-

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59 *Id.* at 587 (Brennan, J., concurring).

60 *Id.* at 589 (citing *In re* Winship, 397 U.S. 358, 361–62 (1970)).

61 *Id.* at 599 n.2 (Stewart, J., concurring).

62 *See id.* at 599–600 (Stewart, J., concurring). Unlike the other Justices who limited their reasoning to criminal proceedings, Justice Stewart advocated extending a right to attend civil proceedings as well. *See id.* at 599 (Stewart, J., concurring). Justice Blackmun, for his part, did not elaborate on why the public has a right to attend criminal proceedings beyond noting the history and importance of open trials. *See id.* at 604 (Blackmun, J., concurring). He only reluctantly concluded that open trials were a First Amendment right after giving up on convincing his colleagues it was better conceived as a Sixth Amendment right. *See id.* at 603–04 (Blackmun, J., concurring). Only Justice Rehnquist dissented, reiterating the point he made in his *Gannett* concurrence that the First Amendment provides no right of access whatsoever. *See id.* at 605 (Rehnquist, J., dissenting).

63 This fact was not lost on Justice Stevens, who celebrated this milestone as a "watershed" achievement and used the occasion to lament the Court's prior holding in *Houchins*. *Id.* at 582–84 (Stevens, J., concurring) ("Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever.").

64 *See, e.g.*, Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508 (1984) (extending *Richmond Newspapers* to voir dire); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 610 (1982) (invalidating a Massachusetts statute requiring courtroom closure for testimony of minor sex-abuse victims).

cable laws may burden the right to gather information without running afoul of the First Amendment. Although this rule came out of several decades of cases[65]—including *Branzburg*—the preeminent case on the matter is *Cohen v. Cowles Media Co.*[66] In that case, the Court held that a newspaper could not use the First Amendment to shield itself from a promissory estoppel suit brought by a source whose confidentiality the newspaper violated.[67] The defendant-newspaper did not try to argue that the right to gather information precluded the cause of action but rather relied on a line of cases holding that newspapers have a right to publish "lawfully obtain[ed] truthful information about a matter of public significance."[68] But the Court instead held, in broad language, that the First Amendment offered the defendant no protection because "generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[69]

Cohen is remarkable because it severely limits whatever ground the right to gather information gained from *Richmond Newspapers* and its progeny. Although factually distinct from the right-of-access cases, the Court's broad holding dispensed with any notion that the First Amendment must allow access to information where the public's right to access outweighs the government's interest in restricting access.[70] The Court in *Cohen* did not consider the public's interest in knowing the source's identity, nor (by logical necessity) did it weigh this interest against the plaintiff's interest in seeing his promise upheld.[71] Without balancing these interests, the Court in *Cohen* implicitly rejected once and for all the position advanced by several members of the Court that "the societal function of the

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65 *See, e.g.*, Zacchini v. Scripps-Howard Broad. Co., 433 U.S. 562, 574–75 (1977) (holding no First Amendment exception to state publicity-rights law); Associated Press v. United States, 326 U.S. 1, 20 (1945) (holding no First Amendment exception to Sherman Act); Associated Press v. Nat'l Labor Relations Bd., 301 U.S. 103, 132–33 (1937) (holding no First Amendment exception to National Labor Relations Act).

66 501 U.S. 663 (1991).

67 *See id.* at 665.

68 *Id.* at 668–69 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)) (internal quotation marks omitted).

69 *Id.* at 669.

70 *Cf.* Saxbe v. Washington Post Co., 417 U.S. 843, 862 (1974) (Powell, J., dissenting) ("No aspect of that constitutional guarantee is more rightly treasured than [the First Amendment's] protection of the ability of our people through free and open debate to consider and resolve their own destiny.").

71 *See Cohen*, 501 U.S. at 678 (Souter, J., dissenting) ("The importance of this public interest is integral to the balance that should be struck in this case.").

First Amendment in preserving free public discussion of governmental affairs" drives the right to gather information.[72] If the necessity of the free flow of information was the driving force behind the right to gather information, presumably some generally applicable laws would be so detrimental to the free-flow of information to offend the First Amendment. After *Cohen*, the right to gather information seems to be that the First Amendment categorically does not guarantee any access to information, but it prevents laws that directly target information-gathering activity or restrict information historically open to the public.

B. The Right to Record Police Officers

A few important lower-court cases contributed to the right to record and thus warrant brief discussion. In one line of cases, courts have recognized First Amendment rights to film a burglary from a public street,[73] to photograph a fatal accident scene from behind a reasonable police perimeter,[74] and to more broadly film matters of public interest.[75] In the former two cases, the district courts explained that this right applies wherever the photographer or videographer is standing in a place he has a right to be and does "not unreasonably obstruct or interfere" with emergency responders.[76] The Ninth Circuit in *Fordyce v. City of Seattle* did not have an opportunity to explore the extent of the right to film matters of public interest because of the case's procedural posture.[77]

Two important circuit court cases recognize a possible right to film public meetings. In *Blackston v. Alabama*, the Eleventh Circuit held that two plaintiffs had stated a First Amendment claim because they were denied their rights to videotape a public meeting.[78] Rather than a right to gather

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72 *Saxbe*, 417 U.S. at 862–63 (Powell, J., dissenting).

73 *See* Channel 10, Inc. v. Gunnarson, 337 F. Supp. 634, 638 (D. Minn. 1972).

74 *See* Connell v. Town of Hudson, 733 F. Supp. 465, 473 (D.N.H. 1990).

75 *See* Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995). *Fordyce* specifically addressed the arrest of a videographer filming a public protest, but the Ninth Circuit broadly framed the plaintiff's right in question as a "First Amendment right to film matters of public interest." *Id.*

76 *Channel 10*, 337 F. Supp. at 638; *see also Connell*, 733 F. Supp. at 469 (quoting *Channel 10*, 337 F. Supp. at 638).

77 *See Fordyce*, 55 F.3d at 439 (reversing summary judgment order because genuine issue of material fact existed as to whether defendant-police officer sought to "prevent or dissuade" plaintiff-videographer from exercising First Amendment right).

78 30 F.3d 117, 120 (11th Cir. 1994).

information, the Eleventh Circuit framed this right as a right to "expressive conduct."[79] The Eleventh Circuit explained that this right might be subject to "time, place, and manner" restrictions, but it was not clear from the pleadings that the state had met its burden for showing that this was an appropriate "time, place, and manner" restriction.[80]

In *Iacobucci v. Boulter*, the First Circuit held that the police violated the plaintiff's constitutional rights by arresting him for disorderly conduct when he was trying to film a public meeting.[81] Although the plaintiff's 42 U.S.C. § 1983 claim was predicated on his Fourth as opposed to his First Amendment rights,[82] the court's reasoning in denying the defendant-police officer qualified immunity necessarily relied upon a First Amendment right to film public meetings. The Massachusetts Supreme Judicial Court had limited the state's disorderly conduct statute to exclude "activities . . . implicating the 'lawful exercise of a First Amendment right.'"[83] Thus, in holding that a reasonable police officer would not have arrested the plaintiff for disorderly conduct, the court necessarily concluded—without further discussion—that the plaintiff's "activities were . . . done in the exercise of his First Amendment rights."[84] Although neither of these cases actually discussed the right to gather information, courts would later interpret them this way and use them to develop the right to record.[85]

The Eleventh Circuit was the first to explicitly recognize a right to record police officers. The plaintiffs in *Smith v. City of Cumming* sued a city police chief, alleging that officers harassed the plaintiffs to prevent them from filming police activity.[86] The court cited *Blackston*, *Fordyce*, and the District Court's opinion in *Iacobucci* for the proposition that "[t]he First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."[87] The short *Cumming* opinion did not discuss the nature of the right to gather

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79 *Id.*

80 *See id.*

81 *See* 193 F.3d 14, 25 (1st Cir. 1999).

82 *See id.* at 21.

83 *Id.* at 24 (quoting Commonwealth v. A Juvenile, 334 N.E.2d 617, 628 (Mass. 1975)).

84 *Id.* at 25.

85 *See infra* notes 86–94 and accompanying text.

86 212 F.3d 1332, 1332 (11th Cir. 2000).

87 *Id.* at 1333. The Eleventh Circuit nevertheless denied the plaintiffs' § 1983 claim because they could not show that the defendant-police officers' allegedly harassing behavior actually violated this right. *See id.*

information or explore the scope of the right to film public officials that it announced. Nevertheless, the language the court used points to two important takeaways: (1) the right is not limited to filming police officers, and (2) public interest in the dissemination of information of public importance drives the right.

The First Circuit expanded *Iacobucci* in *Glik v. Cunniffe* to hold that citizens have a clearly established First Amendment right to film police officers performing their duties in public.[88] The plaintiff in *Glik* sued a Boston police officer for arresting the plaintiff for violating Massachusetts' wiretapping statute after the plaintiff filmed the defendant and other officers using force while making an arrest.[89] Harkening back to *Branzburg*, the court began with the premise that the First Amendment "encompasses a range of conduct related to the gathering and dissemination of information."[90] Although the court did not engage in much of a doctrinal discussion of the right to gather information itself, the court noted that a right to film government officials serves the First Amendment's broader purpose of facilitating discussion of important topics.[91]

The court cited to *Smith*, *Fordyce*, *Connell*, and *Channel 10, Inc.*, among other cases, to support its conclusion.[92] The court also relied heavily on *Iacobucci* to show that the defendant-police officer could not claim qualified immunity because the right to record was clearly established in the First Circuit.[93] The court noted that it had hardly discussed the First Amendment principles involved in *Iacobucci* but nevertheless justified its reliance on the case by explaining that its passing attention on the issue "implicitly speaks to the fundamental and virtually self-evident nature of the First Amendment's protections in this area."[94]

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88 655 F.3d 78, 85 (1st Cir. 2011).

89 *Id.* at 79–80. This is the same statute that the woman discussed in the introduction may have violated. *See supra* note 7 and accompanying text.

90 *Id.* at 82.

91 *See id.* ("Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966))).

92 *Id.* at 83.

93 *Id.* at 82–84.

94 *Id.* at 85. The court also noted that *Smith* and *Fordyce* addressed the question in a similarly laconic manner. *See id.* at 84–85. The First Circuit applied and refined the right announced in *Glik* in *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014). In that case, the Court refused to grant police officers qualified immunity in a § 1983 suit for arresting a woman for violating New Hampshire's wiretapping laws for filming police during a traffic stop. *Id.* at 4. In doing so, the Court

The Seventh Circuit has provided the most substantive discussion in favor of the right to record police officers. In *ACLU of Illinois v. Alvarez*, the ACLU sued the Cook County state's attorney seeking to enjoin her from prosecuting the ACLU's legal observers for filming police officers under Illinois' extraordinarily broad wiretapping laws.[95] The court began with the uncontroversial premises that audiovisual recordings are modes of speech and thus disseminating audiovisual recordings is protected speech. The court then noted that the necessary corollary of this is that the First Amendment also protects the creation of audiovisual recordings.[96] The court framed this corollary as the First Amendment protecting the entirety of the "speech process," and not just the actual communicative act.[97] The court buttressed this conclusion with *Branzburg*'s observation that there must be some right to gather information.[98]

After determining that the recording indeed implicates the First Amendment, the court pivoted to see whether the Illinois wiretapping statute could nevertheless be justified as applied. The Court assumed that the law was generally applicable but nevertheless subject to First Amendment scrutiny because the law directly burdened communicative conduct.[99] The court then concluded that the law was content neutral and thus could be justified as a time, place, and manner restriction if it was narrowly tailored to fit an important government interest and left open ample alternative channels of communication.[100] Applying this intermediate scrutiny, the Court concluded that the statute was too broad to be justified by privacy interests;

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recognized that traffic stops may sometimes give rise to some particular circumstances under which the police could justifiably order a detainee to stop recording, but "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." *Id.* at 8.

95 679 F.3d 583, 586 (7th Cir. 2012). The ACLU planned to implement a "police accountability program" whereby ACLU videographers would film police performing their duties in public. *Id.*; *see generally* Jocelyn Simonson, *Copwatching*, 104 CALIF. L. REV. 391, 407–27 (2016) (describing organized programs to monitor police activity such as the one in dispute in *Alvarez*).

96 *See Alvarez*, 679 F.3d at 595–96 ("By way of a simple analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes.").

97 *Id.* at 596 ("Put differently, the eavesdropping statute operates at the front end of the speech process by restricting the use of a common, indeed ubiquitous, instrument of communication.").

98 *See id.* at 596–98.

99 *Id.* at 602–03.

100 *Id.* at 603.

the statute was over-inclusive, in that it prohibited recording conversations that the speaker could not have expected to be private, and under-inclusive, in that it did not prohibit observers from listening to conversations and taking notes by hand.[101]

The courts in *Smith*, *Glik*, and *Alvarez* all narrowly framed the question before them, but the principles they each announced have far broader implications. If audiovisual recording is a protected First Amendment activity, then the government would need to meet intermediate scrutiny at a minimum to justify any law curtailing audiovisual recording. A better theoretical understanding of the right to gather information and why the First Amendment protects the right to record will thus help delineate the extent to which the right to record should apply.

II
THEORETICAL FRAMEWORK

Any understanding of First Amendment doctrine is incomplete without a broader understanding of free speech. The law and society take for granted that freedom of speech is a worthwhile goal,[102] but the reasons for this are not always clear. At the broadest level of analysis, free speech could be either a formidable end in and of itself or a means of achieving some other laudable result.[103] In the former conceptualization, free speech is often framed as a liberty right—whether premised on the notion of freedom to live "the good life" or personal autonomy, the argument is that one's speech is necessarily beyond the reach of a liberal government.[104] This Note refers to this as a "liberal" theory of free speech. Alternatively, free speech is often framed as a means to one of two ends: either the search for truth or democratic governance.[105] This Note refers to these theories as "truth" and "democratic" theories of free speech, respectively.

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101 *Id.* at 606. The court also rejected the government's claim that the law was necessary to encourage police-civilian interactions, control the flow of information of security matters, and prevent the escalation of certain police encounters. *Id.* at 607.

102 *See generally* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 63 (1982) (explaining the importance of free speech in a democratic society).

103 *See id.* at 5 (framing the question of whether free speech is an independent principle or an instance of a broader principle).

104 *See generally id.* at 47–72 (surveying liberal theories of free speech).

105 *See generally id.* at 15–46 (surveying truth and democratic theories of free speech).

This Part provides a brief overview of the liberal and democratic theories as applied generally to the right to free speech.[106] This Note will not explore the possibility that a truth theory of free speech drives the right to gather information for two primary reasons. First, although their theoretical foundations are different, democratic and truth theories of free speech would likely overlap in practice, which would render an analysis of a truth theory superfluous.[107] Second, the literature often casts the debate in American First Amendment doctrine as primarily between liberal and democratic theories.[108]

A. Liberal Theory of Free Speech

The liberal theory of free speech, sometimes called the libertarian theory, is a non-consequentialist view that personal autonomy necessarily includes freedom of conscience and thus freedom of speech. Liberal theorists argue that a sovereign's power is limited to acts that do not interfere with the individual autonomy of its citizens.[109] At its most basic formulation, au-

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106 A complete discussion of either theory is impracticable considering how much ink scholars have spilt on the topic. This Part by necessity only captures a small minority of viewpoints. Although a broader discussion may be desirable, rather than wading into philosophical debates, the aim of this Part is to give the reader the elementary understanding of each theory necessary to understand how each would affect the right to gather information.

107 In essence, both theories ultimately advocate that as much information be disseminated to the public debate as possible, but both are limited by their ultimate goals: i.e., free speech is only desirable to the extent that its negative effects are outweighed by the benefit of revealing the truth or promoting self-governance. Because the value of truth and self-governance are beyond the scope of this Note, analyses on the limits of the right to gather information would be identical under these theories. Likewise, as means to an end, both theories posit that free speech must subordinate their overarching goals, so a democratic free speech theory would disallow speech that threatens democratic principles, and a truth free speech theory would disallow speech that is demonstrably false. But insofar as this Note limits its analysis of the right to gather information as dealing in the collection of raw data (as opposed to the creation, manipulation, or dissemination of those data), it is difficult to imagine how the right to gather information could implicate speech that directly undermines the truth or democracy, thus eliminating another area in which the practical application of these theories might diverge. *Cf.* SCHAUER, *supra* note 102, at 45 ("An examination of the paradoxes and other weaknesses of the argument from democracy reveals that much of its strength derives not from its independent force, but from the extent to which it is a discrete and important subset of the argument from truth.").

108 *See, e.g.*, FISS, *supra* note 3, at 2–3 (introducing the liberal/democratic free-speech dichotomy); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 665 (2013) (same).

109 *See, e.g.*, Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215 (1972) (taking "the view that the powers of a state are limited to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents").

tonomy means that a government cannot invade an individual's thoughts.[110] Assuming autonomous actors consider information available to them when deciding how to think and act, for a government to restrict the information available to its citizens is thus to restrict its citizens' autonomy. As Scanlon explained:

> The harm of coming to have false beliefs is not one that an autonomous man could allow the state to protect him against through restrictions on expression. For a law to provide such protection it would have to be in effect and deterring potential misleaders while the potentially misled remained susceptible to persuasion by them. In order to be protected by such a law a person would thus have to concede to the state the right to decide that certain views were false and, once it had so decided, to prevent him from hearing them advocated even if he might wish to.[111]

Apart from just demanding a right to *receive* information, freedom of conscience also assumes a right to *communicate* information. As Schauer writes, the former is dependent on the latter:

> [I]t is important to remember that language is not only the medium of communication, it is also the medium of thinking. We think not in complete abstractions, but (most commonly) in words. Our ability to think creatively, therefore, is to a great degree dependent upon our language. If communication is stifled, the development of language is restricted. To the extent, therefore, that we curtail the development of linguistic tools, we chill the thought process that utilizes those very same tools.[112]

None of this is to suggest that, under a strict liberal construction of free speech, the government may never restrict actions with communicative value. An autonomous individual may give the government the authority to protect oneself from the non-communicative dangers of an act of expression[113] or

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110 *See* SCHAUER, *supra* note 102, at 68 ("Because thought may be inherently as well as morally beyond the reach of state power, it is plausible to suggest that the province of thought and individual decision-making is an area, or the only area, in which the individual is truly autonomous.").

111 Scanlon, *supra* note 109, at 217–18. Scanlon used autonomy to argue that states cannot restrict expression: (1) to prevent falsehoods from harming those who accept the falsehoods as truth, and (2) to prevent individuals from committing a harmful act because "the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing." *Id.* at 213.

112 SCHAUER, *supra* note 102, at 54.

113 To ask the government to protect oneself from a terrorist's bomb, for example, is not the same as asking the government to protect oneself from the idea the terrorist is trying to communicate.

from those situations in which the ideas communicated cannot contribute to rational thought.[114] Likewise, the speaker's freedom of conscience is only relevant to the extent that the expressive act could fairly be said to contribute to the speaker's subsequent thought process. To give an extreme illustration, preventing a protestor from engaging in self-immolation does not infringe on the protestor's freedom of conscience because the communicative value of the protestor's actions, if completed, would not have an opportunity to further develop the protestor's thoughts on the subject. The question under a liberal theory of free speech must thus be whether the government can justify the restriction without reference to the harm of the communicative aspect or without restricting the speaker's ability to develop her thoughts on the subject.

B. Democratic Theory of Free Speech

At the outset, the one thing that sets the democratic theory of free speech apart from the liberal theory is that it is dependent upon broader democratic principles—to the extent one rejects democracy as a desirable end, one must also reject freedom of speech.[115] But to the extent that self-governance is a laudable goal, democratic theorists argue that free speech is necessary for a democratic system to function. At a most basic level, freedom of speech is a means by which the sovereign (the people) supervises its elected representatives (the government).[116] Thus, freedom of speech under the democratic theory is not aimed at protecting any individual rights to self-expression but those of society as a whole to have access to the information necessary to inform the democratic process. As Alexander Meiklejohn, the preeminent democratic free speech theorist, observed:

> The First Amendment, then, is not the guardian of unregulated talkativeness. It does not require that, on every occasion, every citizen shall take part in public debate. Nor can it even give assurance that everyone shall have opportunity to

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114 Scanlon gave the classic example of falsely shouting "fire" in a crowded theater: "Part of what makes the restriction acceptable is the idea that the persons in the theater who react to the shout are under conditions that diminish their capacity for rational deliberation." Scanlon, *supra* note 109, at 220.

115 *See* SCHAUER, *supra* note 102, at 35.

116 *See id.* at 36 ("First, freedom of speech is crucial in providing the sovereign electorate with the information it needs to exercise its sovereign power, and to engage in the deliberative process requisite to the intelligent use of that power. Second, freedom to criticize makes possible holding government officials, as public servants, properly accountable to their masters, the population at large.").

> do so. . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said. To this end, for example, it may be arranged that each of the known conflicting points of view shall have, and shall be limited to, an assigned share of the time available.[117]

To Meiklejohn and likeminded scholars, restrictions on speech are thus permissible as long as they do not violate "equality of status in the field of ideas."[118] In other words, suppressing speech may sometimes be justified for various reasons, but to suppress speech because of the viewpoint it espouses is offensive to democratic principles and cannot be justified in a democratic regime.

The democratic theory of free speech is thus similar to the liberal theory of free speech in the sense that it forbids the government from choosing which ideas are worthy of consideration. But while this result is the same, the justification behind each makes all the difference. The democratic theory only justifies freedom of speech to the extent that the speech in question contributes somehow to the political process. Meiklejohn divided the world of speech into "public" and "private" speech; private speech, he argued, "must be under legislative control," but freedom of public speech is absolute.[119] The liberal theory, on the other hand, protects ideas more broadly, not just those that implicate self-governance.[120] Thus, under the democratic theory, the government could justly dictate artistic taste (assuming the art in question is demonstrably apolitical). But under the liberal theory, telling someone she must prefer surrealism to impressionism would be as offensive to that person's autonomy as telling her that she must prefer federalism to confederacy.

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117 ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 25–26 (1948).

118 Id. at 26.

119 *Id.* at 62–63. Meiklejohn did not argue private speech is without any protection, but argued that the First Amendment provides absolute protection to public speech while the Fifth Amendment Due Process Clause "gives assurance that a private need to speak will get the impartial consideration to which it is entitled." *Id.* at 63.

120 *See* Scanlon, *supra* note 109, at 214–15 ("[T]he [liberal] principle is the only plausible principle of freedom of expression I can think of which applies to expression in general and makes no appeal to special rights (e.g., political rights) or to the value to be attached to expression in some particular domain (e.g., artistic expression or the discussion of scientific ideas).").

III
ANALYSIS

The Supreme Court's right to gather information doctrine[121] is best understood as a liberal free speech doctrine. The doctrine as it exists puts no greater emphasis on "public" speech as opposed to "private" speech. Nor does the importance of the information sought matter to the applicability of the right. Although the public-trial cases spoke of the importance of public trials, the Court put significant weight on the historical nature of the public trial.[122] Taken in conjunction with the prison-access cases, this suggests that the government may not suppress the collection of information already available, but the government has no duty to make information otherwise available, regardless of its public importance.

Initially, the dialogue between the majority and dissenters in the Court's right to gather information cases provides ample evidence that the Court rejected a right to gather information supported by a democratic theory of free speech. Justice Powell's *Saxbe* dissent and Justice Steven's *Houchins* dissent are both replete with democratic free speech theory rhetoric.[123] Invoking Meiklejohn, Justice Powell argued that the right to gather information is paramount to democratic society:

> What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny. As the Solicitor General made the point, "[t]he First Amendment is one of the vital bulwarks of our national commitment to intelligent self-government." It embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of

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121 *See supra* subpart I.A.

122 *See, e.g.*, Richmond Newspapers, Inc. v. Virginia 448 U.S. 555, 569–70 (1980) ("[T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open . . . [giving] assurance that the proceedings were conducted fairly to all concerned, and . . . discourage[ing] perjury, the misconduct of participants, and decisions based on secret bias or partiality . . . . The early history of open trials in part reflects the widespread acknowledgement, long before there were behavioral scientists, that public trials had significant community therapeutic value.").

123 *See* Houchins v. KQED, Inc., 438 U.S. 1, 30–38 (1978) (Stevens, J., dissenting); Saxbe v. Washington Post Co., 417 U.S. 843, 861–63 (1974) (Powell, J., dissenting).

> views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression.[124]

Likewise, Justice Stevens argued for a right of access because "information gathering is entitled to some measure of constitutional protection . . . to insure that the citizens are fully informed regarding matters of public interest and importance."[125]

The majority countered by finding dispositive the general applicability of the challenged regulations.[126] The Court most resoundingly rejected the notion that the democratic theory of free speech supports the right to gather information in *Cohen* when it declared that the right to gather information could never be used to exempt an information seeker from an otherwise generally applicable law.[127] This interpretation of the right to gather information cannot be rectified with the democratic free speech theory.[128]

Because free speech under this theory is a means to an end—the end being democratic governance—there are only two factors that can logically be used to valuate speech: the value of democratic governance and the contribution of the speech in question to democratic governance. Thus, a restriction on speech that protects against a harm greater than the loss of democratic governance is justifiable as means to a more important end. Likewise, a restriction on speech that is irrelevant or contrary to democratic governance is justifiable without reason because the restricted speech has no value.[129] That a law is

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124 *Saxbe*, 417 U.S. at 862–63 (Powell, J., dissenting) (alteration in original) (footnote and citations omitted); *see also id.* at 862 n.8 ("Indeed, Professor Meiklejohn identified this aspect of the First Amendment as its paramount value.") (citing MEIKLEJOHN, *supra* note 117, at 26).

125 *Houchins*, 438 U.S. at 32 (Stevens, J., dissenting).

126 *See id.* at 16 ("[T]he media have no special right of access to the Alameda County Jail different from or greater than that accorded the public generally."); Pell v. Procunier, 417 U.S. 817, 835 (1974) ("[S]ince § 415.071 does not deny the press access to sources of information available to members of the general public, we hold that it does not abridge the protections that the First and Fourteenth Amendments guarantee.").

127 *See* Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991).

128 *See* Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 16–19 (1976) (arguing that a democratic understanding of the First Amendment must include some right of access to government information).

129 *Cf.* MEIKLEJOHN, *supra* note 117, at 25 ("If, for example, at a town meeting, twenty like-minded citizens have become a 'party,' and if one of them has read to the meeting an argument which they have all approved, it would be ludicrously

generally applicable takes neither of these factors into account. These laws treat political speech and pornography as peers and ignore the gravity of the harm threatened by both. This proposition is best illustrated with an example from a more basic exercise of speech: a law that forbids discussion of the president's policies would be just as offensive to a democratic free speech theory as a law that forbids only opposition party members from discussing the president's policies. Although this hypothetical law is generally applicable because it does not target one set of views, it hinders the discussion of policy that the sovereign public needs to properly supervise its elected leader.[130]

That *Cohen* dealt with explicitly political speech should not go unnoticed. The plaintiff in *Cohen* was a political operative trying to leak information about a gubernatorial candidate's criminal record to the defendant-newspapers.[131] The newspapers' editors decided that, in their professional judgment, they needed to renege on their promise to protect the plaintiff's identity as an ally of the candidate's opponent so that readers could make fully informed decisions about how this information should affect their votes.[132] This speech thus implicates the core of what democratic free speech theory seeks to protect: fully informed self-governance.

One could argue that *Cohen* did not directly implicate democratic free speech values because the plaintiff was a private actor seeking to restrict the speech through a private cause of action—promissory estoppel. But the Court in *Cohen* explicitly recognized that the state court creates a state action when it enforces a promissory estoppel claim.[133] Thus, the state

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out of order for each of the others to insist on reading it again. No competent moderator would tolerate that wasting of the time available for free discussion.").

130 The democratic free speech theory does allow viewpoint-neutral restrictions in some cases. *See id.* at 26 ("[I]t may be arranged that each of the known conflicting points of view shall have, and shall be limited to, an assigned share of the time available."). But this does not mean that the state can shut down discussion of a topic in its entirety. At the heart of the democratic free speech theory is the idea that the government cannot restrict the sovereign electorate from receiving information relevant to its self-governance. *See, e.g.*, SCHAUER, *supra* note 102, at 36 ("[F]reedom of speech is crucial in providing the sovereign electorate with the information it needs to exercise its sovereign power . . . ."). Thus, while the town meeting moderator in Meiklejohn's famous analogy may restrict redundant or irrelevant discussion in the interest of time, MEIKLEJOHN, *supra* note 117, at 25, he may not deem a politically relevant topic wholly unworthy of discussion.

131 *See Cohen*, 501 U.S. at 665.

132 *See id.* at 666.

133 *See id.* at 668; *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on

court—as a branch of the government—is acting on a private citizen's desire to impede upon the newspapers' right to gather information. That the desire to do so originated with a private citizen does not change the fact that the government is the one ultimately restricting the newspapers' ability to speak freely. The effect is therefore a government restriction on speech directly relevant to self-governance. The Court's failure to analyze it as such shows that some principle other than the democratic free speech theory drives its decision.

But a generally applicable restriction on speech can be justified under a liberal theory of free speech, as long as the harm it seeks to prevent does not arise from the communicative aspect of the speech. This is because an individual can ask the government to protect the individual from speech's incidental harm, just not from the potentially harmful ideas that the speech conveys.[134] The liberal theory thus takes a categorical approach to restrictions on speech: if the harm the restriction seeks to protect against is unrelated to the idea the speech conveys, the restriction is justifiable without reference to the gravity of the harm; but if the restriction seeks to protect against a potentially harmful idea, the restriction is categorically impermissible without reference the importance of the idea. *Cohen* and the prison-access cases are therefore completely consistent with the liberal theory of free speech because the restrictions in question are justifiable without reference to the ideas the speech expressed.

Concededly, *Richmond Newspapers* and its progeny appear at first glance to support the democratic view of the right to gather information. Indeed, Chief Justice Burger dedicated a significant portion of his plurality opinion to discussing the importance of public trials.[135] But this reading of *Richmond Newspapers* is irreconcilable with the Court's refusal to con-

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their constitutional freedoms of speech and press."); Shelley v. Kraemer, 334 U.S. 1, 14 (1948) ("That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.").

134 *Cf.* Scanlon, *supra* note 109, at 217 (differentiating the "certain harms" the state has a duty to protect against and "[t]he harm of coming to have false beliefs" from which an autonomous individual cannot seek the state's protection).

135 *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569–73 (1980) ("[T]he open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful 'self-help,' as indeed they did regularly in the activities of vigilante 'committees' on our frontiers.").

sider the importance of media access to prisons in *Houchins* just two years prior.[136] Read properly, Chief Justice Burger's primary emphasis on the strong history of the open trial reveals *Richmond Newspaper*'s correct meaning:[137] because criminal trials have always been open to the public, restricting access to them is better conceptualized as depriving the public of information already available to it than as declining to grant the public access to information not otherwise available to it.

This distinction is crucial. A democratic right to gather information would likely support an open criminal trial—an important part of governance—regardless of whether Anglo-American society has historically done so. But a liberal right to gather information is only offended once the state restricts access to information that has already been publically communicated. The difference can be thought of as a positive versus a negative obligation. Although liberal theory permits an autonomous person to consent to submit herself to a government that will not do everything in its power to ensure the individual's thoughts are as fully formed as possible, an autonomous person cannot consent to submit to a government that will actively restrict the individual's ability to fully formulate her thoughts; to do so would be to sacrifice the one area that makes the individual truly autonomous and thus undermine the validity of her consent to be governed.[138] So if the information disclosed at a criminal trial is conceptualized as already being publicly available, then the state infringes upon individual autonomy by forbidding individuals from collecting this information to formulate their thoughts. But because information within prisons is not already publicly available, the state does not actively impede on thought development by failing to make access to this information available.

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136 This is not to suggest that the Court could not have denied the journalists access to the prisons in these cases under a democratic free speech regime; indeed, it could have weighed the relevant factors and determined that the harm from disorder that access would threaten within the prisons outweighs the benefit to self-governance that access would provide. But the Court simply did not engage in this analysis.

137 *See Richmond Newspapers*, 448 U.S. at 564–69.

138 *See* SCHAUER, *supra* note 102, at 68.

IV
IMPLICATIONS

A. Applying the Right to Record

This understanding that the right to gather information is based on a liberal view of free speech must drive the proper readings of *Smith*, *Glik*, and *Alvarez*. To be consistent with Supreme Court precedent, any First Amendment right to film police officers in public must also protect a right to record private citizens in public as well. Under the liberal theory of free speech, this right is inherently a private right and thus does not depend on the subject of the recording or the content of the information to be recorded. The Supreme Court's liberal understanding of the right to gather information suggests a three-part test for when the First Amendment protects recording a subject without the subject's consent: The information the videographer seeks to record must (1) be observable to the videographer (2) from somewhere the videographer has a right to be (3) under circumstances in which the subject does not have a reasonable expectation of privacy.[139]

The first prong addresses the liberal notion that the government generally may not prevent its citizens from communicating information already available to them. As Kreimer argues, once information is in public, it has "already been 'supplied' to the observer who seeks to record" it.[140] In other words, as soon as the information is observable or audible to third parties, it becomes the prerogative of all who can observe or hear it to communicate this information as they wish—including by taking an audiovisual recording.[141] So if two people are

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139 *See generally* Kreimer, *supra* note 1, at 355, 386 (surveying a broad range of First Amendment recording issues through a liberal perspective).

140 *Id.* at 391.

141 There could be some debate over whether information must be observable by the naked eye or audible by the naked ear before it is available to the videographer in a manner that the liberal theory of free speech cautions the government against restricting the communication of the information. On the one hand, the liberal theory of free speech does not seem to distinguish between the means by which the speaker comes to attain the information she seeks to communicate. But on the other hand, allowing speakers to obtain such information through advanced technological means (audio enhancing equipment, for instance), blurs the distinction between information available to the speaker and information the speaker has pried away from another source. *Cf.* Florida Star v. B.J.F., 491 U.S. 524, 535 (1989) (distinguishing between publishing personal information that is already publicly available and publishing personal information acquired through unlawful means); Margot E. Kaminski, *Regulating Real-World Surveillance*, 90 WASH. L. REV. 1113, 1158–65 (2015) (discussing how technological innovations make surveillance increasingly possible in formerly private places). Resolving this question would require a separate analysis that is beyond the scope of this Note.

having a conversation in a public square and a third person can observe their interactions and hear their conversations, the first prong of this test has been met because to restrict the recording would be to restrict the third person from communicating information already available to her.[142]

The liberal theory of free speech would not allow this restriction unless communicating this information threatens some harm separate from the ideas expressed by communicating the information. This is the basis for the test's second and third prongs: recording may nevertheless be restricted if the videographer is trespassing or the subjects of the recording have a reasonable expectation of privacy. To begin with the second prong, one could argue that even when the recorder is trespassing, any observable information has nevertheless been made available to the recorder and therefore the state cannot prevent its communication. But the state can prevent the separate harm caused by the act of trespass—which by logical extension includes information gathered while trespassing—without violating any liberal notions of free speech. This is consistent with the Supreme Court doctrine that the media may be liable for disseminating unlawfully obtained speech[143] and with *Cohen*'s holding that generally applicable laws do not offend the right to gather information if they burden information gathering activity.[144] Therefore, this right may only be exercised when the videographer may observe the information from somewhere she is entitled to be without question of whether or not she is recording anyone.[145]

For present purposes, the question is moot because any information that is communicated but is not observable by the naked eye or audible by the naked ear would likely have been communicated with a reasonable expectation of privacy. Thus, the videographer would fail the test's third prong regardless of whether or not she could pass the first prong.

142 *Cf.* Kreimer, *supra* note 1, at 390 ("Prohibitions of image capture are not directed against the 'gathering' of information from unwilling sources; they bar the act of recording for future review impressions already gathered by observers.").

143 *See Florida Star*, 491 U.S. at 534 ("[T]he *Daily Mail* formulation only protects the publication of information which a newspaper has 'lawfully obtained' . . . ." (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979)) (internal alterations omitted)).

144 Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991); *see also supra* section I.A.4 (presenting the line of cases establishing that generally applicable laws may constitutionally burden the right to gather information).

145 It should be emphasized that this second prong does not restrict the right to record to public spaces; rather, the videographer may record as long as she is not trespassing. Thus, a videographer could record a patron dining at a restaurant as long as the videographer has the proprietor's permission to do so. The proprietor may exercise her right to exclude the videographer from her property,

As for the third prong, beyond trespassing, the harm the recording threatens would almost invariably be the invasion of the subject's privacy.[146] Although the exact harm that invasion of privacy poses is often intangible and thus difficult to define for the purposes of a legal test,[147] the common-law invasion of privacy tort causes of action, which reflect centuries of Anglo-American wisdom, support the notion that there should be no legally recognized harm to the subject's privacy interests when the subject did not have a reasonable expectation of privacy. There are two common-law invasion of privacy torts that implicate recording subjects without their consent: "unreasonable publicity given to the other's private life" and "unreasonable intrusion upon the seclusion of another."[148] But the elements of reasonableness, privacy, and seclusion strictly exclude a cause of action based on nonconsensual recording

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but in this circumstance the government—on its own or through a private action by the recording's subject—is prevented from restricting the recording, assuming of course that the other two prongs are met.

146 One could even question whether the harm caused by an invasion of privacy is distinctive enough from the ideas expressed through the recording that a liberal government can seek to prevent it. This philosophical question is beyond the scope of this Note, which assumes for present purposes that the invasion of privacy indeed presents a distinctive harm.

There may be additional, case-specific harms that recording can cause. To return to the example of recording police, which framed this Note, recording might still be constitutionally prohibited if the actual act of recording interferes with the officers' duties. *See* Gericke v. Begin, 753 F.3d 1, 8 (1st Cir. 2014) ("[A] police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is interfering, or is about to interfere, with his duties."); Justin Welply, Comment, *When, Where and Why the First Amendment Protects the Right to Record Police Communications: A Substantial Interference Guideline for Determining the Scope of the Right to Record and for Revamping Restrictive State Wiretapping Laws*, 57 ST. LOUIS U. L.J. 1085, 1106–10 (2013) (proposing a "substantial interference" test for when recording police officers can be constitutionally prohibited). This Note does not seek to address all possible scenarios when recording threatens some harm unrelated to the idea expressed, but such cases should still be analyzed under the principles expressed herein.

147 *See* Kaminski, *supra* note 141, at 1115–16 ("[M]erely identifying the government interest in surveillance laws as an interest in privacy protection is inadequate because privacy can mean many different things."). Kaminski argues that privacy can best be conceptualized as "boundary management"—that is, "the process of dynamically managing the degree of disclosure of one's self to others." *Id.* at 1116. Under this framework, she concludes, the government has an interest in "in preventing people from miscalculating their boundaries" by misunderstanding the level of publicity to which their actions are exposed, and protecting people against having to change their behaviors in light of new technologies and other intrusions on previously private spheres. *Id.* at 1135.

148 RESTATEMENT (SECOND) OF TORTS § 652A(2)(a), (c) (AM. LAW INST. 1977).

when the subject does not have a reasonable expectation of privacy.[149]

B. Potential Critiques

A plausible criticism is that this conclusion is inherently incompatible with the courts' holdings in *Smith*, *Glik*, and *Alvarez*—that is, these cases can only be read with a foundation in a democratic theory of the right to gather information and simply are not supported by the Supreme Court's precedent in this area. It is true that the courts in all three cases—especially *Glik*—found it significant that the subjects of the recordings at issue were police officers.[150] Although this seemingly invokes a democratic view of the right to gather information because of the democratic importance of monitoring public servants, it may still be consistent insofar as police officers working in

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149 *See id.* § 652B cmt. c ("Nor is there liability for observing him or even taking his photograph while he is walking on the public highway, since he is not then in seclusion, and his appearance is public and open to the public eye."); *id.* § 652D cmt. b ("[T]here is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye."); *cf.* Florida Star v. B.J.F., 491 U.S. 524, 532 n.7 (1989) ("[P]rivacy interests fade once information already appears on the public record."). It should be noted that these traditional torts have faced criticism amid the robust and ongoing debate around privacy rights. *See, e.g.*, Danielle Keats Citron, *Mainstreaming Privacy Torts*, 98 CALIF. L. REV. 1805, 1825–26 (2010) (arguing that certain modern "privacy problems fall outside the four privacy torts."); Kaminski, *supra* note 141, at 1124–25 (lamenting the insufficiency of the "the private-public binary" reflected in the common law privacy torts); Neil M. Richards & Daniel J. Solove, *Prosser's Privacy Law: A Mixed Legacy*, 98 CALIF. L. REV. 1887, 1918 (2010) (arguing that "[t]ort law has not emerged as the leading protector of privacy" because "[p]rivacy tort cases have proven quite difficult for plaintiffs to win, and the torts have not kept pace with contemporary privacy problems"). Nevertheless, the requirement that invasion-of-privacy plaintiffs had a reasonable expectation of privacy is not seriously undermined by these criticisms. Kaminski, for example, argues that one of the government's interests in privacy law is protecting people from surveillance in situations in which they have a reasonable but mistaken expectation of privacy. *See* Kaminski, *supra* note 141, at 1136 ("[The government's] interest [in privacy laws] is implicated when a person has a desired degree of openness to the world, but miscalculates her use of management mechanisms based on settled expectations about her environment.").

150 *See* ACLU of Illinois v. Alvarez, 679 F.3d 583, 597 (7th Cir. 2012) ("[T]he First Amendment interests are quite strong. On the factual premises of this case, the eavesdropping statute prohibits nonconsensual audio recording of public officials performing their official duties in public."); Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) ("Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting the 'free discussion of governmental affairs.' . . . This is particularly true of law enforcement officials . . . ."); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) ("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.").

public should expect some level of public scrutiny and therefore have a diminished expectation of privacy. This observation might make a given set of facts more compelling, but it does not undermine the conclusion that the right established in these cases must extend to recordings of private citizens. Even if police officers generally have a lower expectation of privacy when working in public, it would be an overly broad and unprincipled generalization to declare that only police officers so lack an expectation of privacy that the First Amendment protects recording them but not private citizens.[151]

Another potential criticism is that this Note ignores the gravity of the privacy interests at stake even when a person does not have a reasonable expectation of privacy. That is, although the subject of the recording may reasonably expect that passersby will observe him and overhear his conversations, the harm posed by recording the subject may nevertheless supersede the videographer's right to record.[152] As Lipton notes, the nature of audiovisual recordings and their easy dissemination pose significant threats to privacy.[153] In particular, the argument goes, modern video recordings can be produced and disseminated worldwide instantaneously by almost anyone, and they can serve as powerful assertions of fact despite potentially lacking crucial context.[154] Indeed, a number of

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151 *Cf. Alvarez*, 679 F.3d at 605–06 (dismissing the argument that police officers had an expectation of privacy during audible conversations on public streets). An alternative explanation is that there is no actual invasion of privacy if the information is of public concern. Indeed, that publicized information "is not of legitimate concern to the public" is an element for a common-law "Publicity Given to Private Life" tort claim. RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977). But defining the harm police officers face when they are recorded in terms of this common-law tort is both over- and under-inclusive: it assumes that all conversations police officers will have while performing their duties in public will be "of legitimate concern to the public" and also requires that the information recorded be subsequently "give[n] publicity." *Id. Smith* and *Glik* do not contemplate either factor, and the court in *Alvarez* only briefly touches upon the former. *See Alvarez*, 679 F.3d at 606 n.12 ("The communications at issue here are not [covered by this tort]."); *id.* at 611–12 (Posner, J., dissenting) ("In some instances such publicity would violate the tort right of privacy.").

152 *Cf.* Julie E. Cohen, *Examined Lives: Informational Privacy and the Subject as Object*, 52 STAN. L. REV 1373, 1425 (2000) ("The injury, here, does not lie in the exposure of formerly private behaviors to public view, but in the dissolution of the boundaries that insulate different spheres of behavior from one another."); Kaminski, *supra* note 141, at 1125–26 (criticizing the traditional "binary" approach to privacy law that distinguishes between information revealed inside and outside the home).

153 Jacqueline D. Lipton, *"We, the Paparazzi": Developing a Privacy Paradigm for Digital Video*, 95 IOWA L. REV. 919, 927 (2010).

154 *Id.* at 927–28.

commentators have advocated expanding invasion of privacy torts to include invasions of privacy in public spaces.[155]

This criticism invokes a wider debate between the First Amendment and privacy rights that is beyond the scope of this Note. For present purposes, two counterpoints suffice: (1) exempting situations in which a person, despite being in public, has a reasonable expectation of privacy addresses the most troublesome invasions of the person's private affairs; and (2) the harms threatened in situations in which a person does not have a reasonable expectation of privacy may nevertheless be excluded from First Amendment protection through other doctrines such as libel. First, the most prominent concern regarding recording in public places is the ease and proliferation of voyeurism.[156] Specifically, commentators rightfully worry about the ease of photographing—or recording—one's genitals or other intimate areas with mobile technology.[157] But although such voyeurs may be able to meet the first and second prongs of the proposed test, they would almost invariably fail the third; social norms clearly dictate that one has a reasonable expectation of privacy to their parts under their clothes.[158] Indeed, many anti-voyeurism laws mandate that the victim has a reasonable expectation of privacy, which they specify the victim can have in a public place.[159]

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155 *See, e.g.*, Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image Over the Internet*, 49 SANTA CLARA L. REV. 313, 354 (2009) (proposing multifactor balancing test imposing liability for violating one's right to his or her digital identity by disseminating digital images or recordings); Aimee Jodoi Lum, Comment, *Don't Smile, Your Image Has Just Been Recorded on a Camera-Phone: The Need for Privacy in the Public Sphere*, 27 U. HAW. L. REV. 377, 412 (2005) (proposing cause of action in tort for "recording an image in public of another's intimate area(s), without that person's consent" (footnote omitted)); Andrew Jay McClurg, *Bringing Privacy Law out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1058–59 (1995) (proposing a multifactor balancing test imposing liability for intrusion into one's privacy that is "highly offensive to a reasonable person," even if intruded upon affairs are "open to public inspection").

156 *See* Blackman, *supra* note 155, at 360; Lum, *supra* note 155, at 379.

157 *See* Blackman, *supra* note 155, at 360; Lum, *supra* note 155, at 379.

158 The expectation remains regardless of one's choice of outfit. *See* Lum, *supra* note 155, at 412 n.252 ("Skimpy thongs, bras, and other similar lingerie are commonly worn, and can shift with the slightest movement of the wearer, thereby exposing intimate areas partially, albeit underneath clothing. This should not compromise women's expectation of privacy for those intimate areas.").

159 *See, e.g.*, 18 U.S.C. § 1801(b)(5)(B) (2012) (defining "reasonable expectation of privacy" as a reasonable belief "that a private area of the individual would not be visible to the public, regardless of whether that person is in a public or private place"); WASH. REV. CODE § 9A.44.115(2)(b) (2003) (criminalizing filming of intimate areas "under circumstances where the person has a reasonable expectation

Furthermore, a harmful recording of a subject in a circumstance in which the subject does not have a reasonable expectation to privacy will often fall into a separate category of unprotected speech. For example, Lipton expressed concern that recordings pose special privacy concerns because they can be viewed out of context.[160] But if a video is edited to remove context and imply a false assertion of fact, it could be found to be libelous and thus outside of the First Amendment's protection.[161] Likewise, courts have found that anti-harassment statutes that target the harasser's non-expressive conduct instead of speech are permissible under the First Amendment.[162] And if the act of recording is so offensive that it would cause the subject to fight the videographer, then it may be prohibited under the Court's fighting words doctrine.[163] Thus, the harm to privacy itself that the right to record presents is not enough to remove it from First Amendment protection.

Some may still argue that the value of permitting recording should nevertheless be weighed against the residual privacy concerns. Daniel J. Solove argues that a liberal free speech regime does not justify allowing individuals to invade each other's privacy because privacy rights are derived from the same interests in autonomy as free speech rights.[164] Thus, he argues that the law should take a balancing approach when the two rights are in conflict.[165] Initially, however, it should be noted that the liberal notion of protecting an individual's autonomy is rooted in the individual's ability to consent to govern-

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of privacy, whether in a public or private place"). *See generally* Lum, *supra* note 155, at 395–404 (surveying federal and state anti-voyeurism laws). But the language in these statutes must still be narrow enough to cover only those situations in which the victim has a reasonable expectation of privacy. *See Ex parte* Thompson, 442 S.W.3d 325, 348–49 (Tex. Crim. App. 2014) (holding catchall provision in state's anti-voyeurism statute was unconstitutionally overbroad because it criminalized recordings that did not invade "substantial privacy interests.").

160 Lipton, *supra* note 153, at 928.

161 *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (holding that First Amendment only requires some finding of fault for imposing liability for libeling a private citizen).

162 *See, e.g.*, Gormley v. Conn. State Dep't of Prisons, 632 F.2d 938, 941–42 (2d Cir. 1980) (upholding a Connecticut statute criminalizing harassing phone calls); United States v. Lampley, 573 F.2d 783, 787 (3d Cir. 1978) (upholding a federal statute criminalizing harassing phone calls).

163 *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942).

164 *See* Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 992 (2003) ("If the interest of the speaker or listener is defined in terms of self-determination and autonomy, the interest of the harmed individual can be conceptualized in similar terms . . . . There is no clear reason why the autonomy of speakers or listeners should prevail over that of the harmed individuals.").

165 *See id.* at 1031.

ment rule and therefore places no duty on the government to protect citizens from harm to their autonomy caused by a private actor.[166] But an autonomous actor can of course consent to government restrictions on speech to shield the actor from some harm unrelated to the ideas the speech expresses, which arguably includes an invasion of the actor's privacy by a private individual. Thus, the gravity of the harm threatened by the invasion of privacy is indeed relevant because it allows an autonomous individual to consent to the restriction on speech without sacrificing autonomy. But if this harm is not present, then an autonomous individual cannot consent to the restriction on speech regardless of the importance of the speech. Thus, the question is not a matter of balancing one interest against the other, it is merely a matter of inquiring whether the harm threatened by the invasion of privacy is sufficient to justify restriction on *any* speech. For the reasons discussed in this section, the right to record satisfies these conditions.

CONCLUSION

This Note set forth a framework under which the right to record can be explored further. One general question for further scholarship that this analysis leaves open is under what exact circumstances the recording subject's privacy rights are sufficient to overcome First Amendment scrutiny. Although this Note broadly concludes that the First Amendment does not protect recording a subject who has a reasonable expectation of privacy, further analysis is needed to properly define what a reasonable expectation of privacy entails.[167] In a general sense, the question remains of whether a reasonable expectation of privacy entails a reasonable expectation that the subject

166 *Cf.* Scanlon, *supra* note 109, at 215 ("[T]he powers of a state are limited to those that citizens could recognize while still regarding themselves as equal, autonomous, rational agents."). *See generally supra* subpart II.A (exploring the liberal theory of free speech).

167 For present purposes, it should be noted that a reasonable expectation of privacy should include certain situations in which the subject is in a public place. *See* Kaminski, *supra* note 141, at 1125–26 (criticizing the law's frequent conception of privacy as a dichotomy between public and private realms). In addition to the reasonable expectation of privacy people in public have underneath their clothes discussed above, see *supra* notes 156–159 and accompanying text, courts have found that "overzealous" private investigators' actions can rise to the level of an invasion-of-privacy tort when they use "intrusive" means "to elicit information which would not be available through normal inquiry or observation." Nader v. Gen. Motor Corp., 255 N.E.2d 765, 769, 771 (1970) (holding plaintiff had sufficiently pled an invasion of privacy tort by alleging investigators followed plaintiff so closely into a bank that they could "see the denomination of the bills he was withdrawing").

will not be seen or overheard, or whether it entails a reasonable expectation the subject will not be recorded. A more specific question in this area is whether a subject can ever have a reasonable expectation of privacy when the videographer is openly recording. And relatedly, further analysis could explore whether people have a per se reasonable expectation of privacy from surreptitious recording.[168]

But even within this framework of the right to record, courts and legislators should keep the right to record in mind when addressing privacy protections. Of most immediate concern are wiretapping laws, like the one addressed in the Introduction.[169] Many current wiretapping statutes are written narrowly enough that they already provide a basis for courts to exclude communications by individuals who do not have a reasonable expectation of privacy. The Federal Electronic Communications Privacy Act of 1968, for example, criminalizes the intentional interception of "oral" communication, but requires both a subjective and objective expectation of privacy by defining "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."[170] Federal courts have liberally interpreted this provision, holding, for example, that persons on a trading floor[171] and in a private "house of complete strangers"[172] have no reasonable expectation of privacy. State courts interpreting statutes with similar language should likewise interpret it liberally to respect the First Amendment's right

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168 Indeed, the ACLU recently filed a lawsuit in Massachusetts seeking to explicitly extend *Glik* to cover the surreptitious recording of police officers. *See ACLU Lawsuit Defends Right to Record Police in Public Performance of Duties*, ACLU (July 1, 2016), https://www.aclu.org/news/aclu-lawsuit-defends-right-record-police-public-performance-duties [https://perma.cc/X3D8-DCC7].

169 *See supra* notes 7–8 and accompanying text.

170 18 U.S.C §§ 2510(2), 2511(1) (2012); s*ee also, e.g.*, CAL. PENAL CODE § 632(c) (West 2016) (excluding "any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded" from eavesdropping prohibition); MO. REV. STAT. § 542.400(8) (2015) (defining "oral communication" in a wiretapping statute as requiring a justified expectation "that such communication is not subject to interception"). *But see, e.g.*, MICH. COMP. LAWS § 750.539c (2016) (forbidding any recording of a private conversation without the consent of all parties involved); OR. REV. STAT. § 165.540 (2015) (prohibiting nonconsensual recording of private conversations with some exceptions, namely for those involving law enforcement or taking place at certain public events).

171 *See In re* John Doe Trader Number One, 894 F.2d 240, 243 (7th Cir. 1990) (holding no reasonable expectation of privacy because "it has long been established that a police officer may enter private premises on a ruse or by deception").

172 United States v. Pui Kan Lam, 438 F.2d 1202, 1206 (2d Cir. 1973).

to record. Of potential future concern, courts and legislators should be wary of expanding invasion of privacy torts.[173] Such expansions are still possible as long as the plaintiff's reasonable expectation of privacy is included as a strict element.

In conclusion, this analysis reserves the normative question of whether a liberal right to gather information (including nonconsensual recording) is desirable. A democratic right to gather information would be more sensitive to private citizens' privacy interests, while ensuring that information of public import is available for public debate. Nevertheless, the Supreme Court has repeatedly rejected this view. Those concerned with the implications of a liberal right to gather information should focus their efforts on reversing this trend. But barring a change in direction, a right to record private citizens in public must inherently accompany any right to record police officers in public.

173 For a discussion of proposals to do so, *see supra* note 155 and accompanying text.