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# Knowledge is Power: The Fundamental Right to Record Present Observations in Public

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# *NOTES*

## KNOWLEDGE IS POWER: THE FUNDAMENTAL RIGHT TO RECORD PRESENT OBSERVATIONS IN PUBLIC

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*"Publicity is a great purifier because it sets in action the forces of public opinion, and in this country public opinion controls the courses of the nation."*[1]

## INTRODUCTION

The 2010-2011 democratic movements in Africa and the Middle East, dubbed the "Arab Spring," have borne witness to peaceful uprisings, bloody civil war, the deaths of civilians and militants, the removal of tyrants from power, and lingering questions regarding the future of these countries.[2] During such times of turmoil, violence, and uncertainty, it is unfortunate—but far from surprising—when there are reports of targeted violence and persecution against those recording these events.[3]

In America, by contrast, those with power employ similar tactics of oppression—but without the pretense of societal chaos as an excuse. Americans seeking to record public life often find themselves victims of government suppression. Police have used physical methods to prevent journalists from recording public protest events across America, such as "Occupy Wall Street."[4] Police have trained their guns on unarmed citizens for recording their activities in public streets.[5] Citizens have been arrested for recording police officers' public conduct.[6] Claims of police destroying recording equipment

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1. Charles Evans Hughes, Chief Justice, U.S. Supreme Court, Address to the Manufacturers' Association (May 1908), *in* THE GREAT QUOTATIONS 334, 335 (George Seldes ed., 1966).

2. *See* Peter Hartcher, Op-Ed., *Sun Sets on Tyranny but Strife Looms on Horizon*, SYDNEY MORNING HERALD (Oct. 25, 2011), http://www.smh.com.au/opinion/politics/sun-sets-on-tyranny-but-strife-looms-on-horizon-20111024-1mgb4.html.

3. *E.g.*, *Egypt Targeting Reporters: Press Freedom Group*, HUFFINGTON POST (Jan. 26, 2011, 4:56 PM), http://www.huffingtonpost.com/2011/01/26/egypt-targeting-reporters_n_814521.html; Josh Halliday, *Gaddafi's Forces Target International Journalists in Libya*, GUARDIAN (Mar. 25, 2011), http://www.guardian.co.uk/world/2011/mar/25/gaddafi-forces-target-international-journalists.

4. *E.g.*, Steven M. Ellis, *IPI: Journalists Arrested Across the U.S.*, TR. MEDIA (Nov. 8, 2011, 10:13 AM), http://www.trust.org/trustmedia/news/ipi-journalists-arrested-across-the-us/.

5. Donald R. Winslow, *At Gunpoint, Miami Beach Police Threaten Videographer at Fatal Shooting*, NAT'L PRESS PHOTOGRAPHERS ASS'N (June 7, 2011), http://www.nppa.org/news_and_events/news/2011/06/miami.html.

6. Thomas MacMillan, *Top Cop: You're Arrested for Videotaping Us*, NEW HAVEN INDEP. (Nov. 11, 2010, 11:16 AM), http://www.newhavenindependent.org/index.php/archives/entry/videotaper_arrested_by_top_police_brass/; *Navy Vet Arrested After Taping Police on Cell*

and erasing recorded material are common.[7] These events are not new, they happen often, and they occur throughout America.[8]

When police subject Americans to such treatment, they act either on their own authority or pursuant to legislative decree.[9] The United States currently lacks a judicial check on this kind of suppression.[10] To protect against this assault on the acquisition of knowledge, courts require—and America needs—a properly founded constitutional protection. The Fourteenth Amendment is the source of that protection; through it, every American has a fundamental right to record.

Part I of this Note evaluates the formal intrusion of state authority on the right to record: recording statutes. Part II assesses the current state of litigation regarding the right to record. By the conclusion of these two Parts, this Note will have shown that the government is restraining the right to record and that the current legal paradigms are insufficient to truly provide protection. To this end, Part III engages in a Fourteenth Amendment substantive due process analysis of the right to record, ultimately concluding that such a right is fundamental and therefore protected under substantive due process jurisprudence.

## I. A GLIMPSE OF THE PROBLEM

Although the scope of the constitutional right must be developed,[11] the best introduction to the issue is evaluating those statutes directly limiting the proposed right. This starting point establishes one avenue of government intrusion and cultivates a better understanding of the fundamental right. Forty-nine states[12] and the fed-

*Phone*, WTSP 10 NEWS (July 22, 2011, 6:59 PM), http://www.wtsp.com/news/topstories/article/202273/250/Navy-vet-arrested-after-taping-police-on-cell-phone.

7. *E.g.*, *Man Sues Baltimore Police for Deleting Cell-Phone Videos*, FIRST AMENDMENT CENTER (Sept. 1, 2011, 10:08 AM), http://www.firstamendmentcenter.org/man-sues-baltimore-police-for-deleting-cell-phone-videos; Winslow, *supra* note 5.

8. *See infra* notes 52-60, 246-47 and accompanying text.

9. *See infra* Part III.D.1.

10. *See infra* Part II.

11. *See infra* Part III.C.

12. Jesse Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian's Right to Record Public Police Activity*, 9 FIRST AMENDMENT L. REV. 487, 489 n.3 (2011).

eral government have statutes limiting the ability of private citizens to record.[13] Though the statutes have various names and forms,[14] this Note will refer to this type of statute as a "recording statute." These recording statutes prevent persons from recording[15] electronic, wireless, and oral communications.[16]

The history giving rise to these statutes is fairly straightforward. In the early years of recording technology, states affirmatively outlawed wiretapping and other means of intercepting private communications.[17] In 1967 the Supreme Court weighed in, declaring in *Katz v. United States* that "the Fourth Amendment protects people, not places."[18] The Court concluded that the Fourth Amendment extends to what a person attempts to keep private, even in a publicly accessible place.[19] To this end, the Fourth Amendment controlled when the government electronically listened to and recorded a telephone conversation held within a glass, public phone booth.[20] Justice Harlan's concurring opinion ultimately defined Fourth Amendment jurisprudence,[21] setting forth the oft-cited[22] two-part test for what constitutes a governmental search.[23]

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13. *Id.* at 533-45.

14. *E.g.*, COLO. REV. STAT. § 18-9-304 (2010) ("eavesdropping"); VA. CODE ANN. § 19.2-62 (2011) ("interception").

15. "Recording" includes "intercept[ion]," 18 U.S.C. § 2510(4) (2006), "eavesdropp[ing]," CAL. PENAL CODE § 632(a) (West 2011), and "wiretapping," *id.* § 631. "Wiretapping" traditionally refers to the specific "tapping" of wires to access and record communications. Michael Potere, Note, *Who Will Watch the Watchmen?: Citizens Recording Police Conduct*, 106 NW. U. L. REV. 273, 280 (2012).

16. *See, e.g.*, 18 U.S.C. § 2511(1)(a)-(b); CAL. PENAL CODE § 632(a); *see also* Potere, *supra* note 15, at 282-83.

17. *See* Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 492 (2006).

18. 389 U.S. 347, 351 (1967).

19. *Id.* at 351-52.

20. *Id.* at 353.

21. Carol M. Bast, *What's Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 842 (1998).

22. *E.g.*, Kyllo v. United States, 533 U.S. 27, 32-33 (2001); United States v. Dunn, 480 U.S. 294, 315-18 (1987) (Brennan, J., dissenting); California v. Ciraolo, 476 U.S. 207, 211-13 (1986); Oliver v. United States, 466 U.S. 170, 177 (1984).

23. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) ("There is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'").

In direct response to the Court's holding in *Katz*,[24] Congress passed the Omnibus Crime Control and Safe Streets Act of 1968.[25] This law was more than a response to *Katz*—it was an expansion. The Act established a standard regulating more than just government conduct or mere wiretapping.[26] It pertained to both government and private conduct and addressed both the method and substance of recording.[27] In turn, states used this federal legislation as a model for their legislative agendas and reworked their recording statutes.[28] And though these federal and state statutes are not identical,[29] three pertinent elements of a recording statute are relevant to the right to record: consent, privacy, and secrecy.[30] Because each of these elements may vary by jurisdiction, they will be discussed in turn.

*Consent*. Consent in a recording statute pertains to an agreement by the parties to record the communication. The federal standard requires that at least one party to the communication consent to the recording.[31] Under this standard, the recording party's consent is implied if that party partakes in the communication.[32] To the extent this occurs, this consent requirement is effectively moot because the recording party will always consent to the recording taking place. Thirteen states go beyond the federal standard, at least with respect to some types of recordings, and require that all recorded parties consent to the recording.[33] The recording statutes' consent element

24. *See* S. REP. NO. 90-1097, at 28 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113; Alderman, *supra* note 12, at 493 & n.18; *see also* Bast, *supra* note 21, at 842-43 (describing amendments).

25. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (codified as amended at 18 U.S.C. §§ 2510-2522 (2006)).

26. *See* Bast, *supra* note 21, at 845 & n.83.

27. 18 U.S.C. § 2511.

28. *See* Potere, *supra* note 15, at 282-83.

29. *See* Bast, *supra* note 21, app. at 927-30.

30. Alderman, *supra* note 12, at 490.

31. 18 U.S.C. § 2511(2)(c)-(d).

32. *Id.* § 2511(2)(d).

33. CAL. PENAL CODE §§ 631-632 (West 2011); CONN. GEN. STAT. ANN. §§ 53a-187 to -189a (West 2011); DEL. CODE ANN. tit. 11, §§ 1335, 2401-2402 (2011); FLA. STAT. ANN. §§ 934.02-.03 (West 2011); 720 ILL. COMP. STAT. ANN. 5/14-1 to -3 (West 2011); MD. CODE ANN., CTS. & JUD. PROC. §§ 10-401 to -402 (West 2011); MASS. GEN. LAWS ANN. ch. 272, § 99 (West 2011); MICH. COMP. LAWS ANN. §§ 750.539a-.539e (West 2011); MONT. CODE ANN. § 45-8-213 (2011); N.H. REV. STAT. ANN. §§ 570-A:1 to :2 (2011); OR. REV. STAT. ANN. §§ 133.721, 165.535-.543 (West 2011); 18 PA. CONS. STAT. ANN. §§ 5702-5704 (West 2011); WASH. REV. CODE ANN. § 9.73.030

can therefore be viewed on a three-point spectrum: all party consent, at least one recorded party's consent, and no consent if the recording party partakes in the recorded communication.

*Privacy*. With regard to the recording statutes, privacy is the ability to have one's communications kept from others—or at least off a permanent recording. The federal standard establishes that there must be an expectation of privacy attached to the communication for the recording to violate the statute.[34] Nine states set a higher standard by altogether ignoring the privacy expectations and looking to other elements to ascertain if a recording is illegal.[35] This higher standard may prohibit recording communications that lack any expectation of privacy, including conversations of public officials acting in the normal course of their duties.[36]

*Secrecy*. Secrecy in recording statutes matters only to the extent that the recording activity is disclosed to or readily discoverable by those parties being recorded. The federal standard does not account for secrecy when ascertaining what recordings are unlawful.[37] This lack of a secrecy element indicates that Congress intended to protect private communications[38] with only consent and privacy considerations. The inferential conclusion, then, is that *both* surreptitious and open recordings may violate the statute. Five states deviate from this standard by prohibiting only those recordings that are surreptitious.[39]

These three elements are important because of their substantive impact on the constitutional right at issue. Consent limits who may be recorded. Privacy limits where the recording may take place and the substance of the recording. Secrecy limits the method of

(West 2011).

34. 18 U.S.C. § 2510(2); *see also* S. REP. NO. 90-1097, at 11 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2178; Alderman, *supra* note 12, at 493.

35. ALASKA STAT. ANN. § 42.20.310 (West 2011); CONN. GEN. STAT. ANN. §§ 53a-187 to -189; 720 ILL. COMP. STAT. ANN. §§ 5/14-1 to -3; KY. REV. STAT. ANN. §§ 526.010-.030 (West 2011); MASS. GEN. LAWS ANN. ch. 272, § 99; MONT. CODE ANN. § 45-8-213; NEV. REV. STAT. ANN. §§ 200.610-.690 (West 2010); N.M. STAT. ANN. § 30-12-1 (West 2011); N.Y. PENAL LAW §§ 250.00-.05 (McKinney 2011).

36. *See, e.g.*, Commonwealth v. Hyde, 750 N.E.2d 963, 967-68 (Mass. 2001).

37. *See* 18 U.S.C. §§ 2510-2511.

38. *See* Bartnicki v. Vopper, 532 U.S. 514, 523 (2001).

39. GA. CODE ANN. § 16-11-62 (West 2011); IOWA CODE ANN. § 727.8 (West 2011); MASS. GEN. LAWS ANN. ch. 272, § 99(B)(4); NEV. REV. STAT. ANN. § 200.650; OR. REV. STAT. ANN. § 165.540(6) (West 2010).

recording. Thus, the statutory landscape is a patchwork of normative decisions regarding which elements, and in what formulation, best protect privacy interests. From a broad procedural view, this is acceptable—even laudable. Legislatures are the arena of policy making, and individual states are allowed to experiment with their social values.[40]

The fault lies in the policymakers' blind reliance on the standard set forth by the higher authority. State legislatures shaped their recording statutes in light of the federal standard,[41] which Congress fashioned to reflect the judicial standard in *Katz*.[42] But the *Katz* Court spoke specifically to government actors recording citizens.[43] A Fourth Amendment analysis of *government* wiretapping[44] produced the focus on people instead of places,[45] as well as the development of a two-step standard to determine constitutionally permissible conduct.[46] The applicability of such Fourth Amendment determinations should thus be limited to government actors; the legality of private conduct is not constrained by Fourth Amendment boundaries.[47] And yet, through these recording statutes, private conduct is regulated by these very Fourth Amendment restraints on government action: consent, privacy, and secrecy. This template for proper government action was inappropriately used as guidance in constraining private conduct.

Moreover, legislative reliance on the Court's Fourth Amendment standards has narrowed the perceived universe of constraints, allowing legislatures to ignore other constitutional limitations. By focusing on consent, privacy, and secrecy—the statutory standards deriving from the Fourth Amendment analysis—legislatures have ignored other constitutional provisions that they may be violating.

The above critique is not to suggest that every recording statute is in some way unconstitutional. Different legal standards may simultaneously and concordantly designate the same conduct per-

40. Chandler v. Florida, 449 U.S. 560, 579 (1981).
41. *See supra* note 28 and accompanying text.
42. *See supra* notes 24-26 and accompanying text.
43. Katz v. United States, 389 U.S. 347, 348 (1967).
44. *Id.* at 353.
45. *Id.* at 351.
46. *Id.* at 361 (Harlan, J., concurring).
47. United States v. Jacobsen, 466 U.S. 109, 113 (1984).

missible or impermissible. Although the recording statutes trace their modern scope to *Katz*, the boundaries of the constitutional right to record may fall along similar lines. The right to record is not without its own limitations. But, until now, only the *Katz* Fourth Amendment benchmarks have shaped the ability of citizens to exercise their right to record. The consequence has been the inappropriate curtailing of private liberty interests predicated upon the constitutional constraints of government conduct.

## II. CONTEMPORARY FOCUS ON THE RIGHT TO RECORD

The battleground to vindicate the right to record has been in three general types of litigation. A private individual may have a state-based cause of action against another party who records that individual.[48] A state may criminally charge an individual with violating an applicable state recording statute.[49] Or a private individual may bring action against the government for impermissibly restricting that citizen's right to record.[50] For the purposes of this Part, the most salient type of case arises from this final category and involves a citizen who brings an action for deprivation of rights under 42 U.S.C. § 1983. The nature of a § 1983 action requires the plaintiff to allege that a state actor deprived that citizen of "any rights, privileges, or immunities secured by the Constitution."[51] The requirement of an affirmatively pled constitutional right makes this type of litigation fertile ground to explore the boundaries of state infringement upon constitutional freedoms. As will be shown, the focus of these actions has been on First Amendment concerns, whereas the Fourteenth Amendment's substantive due process considerations are almost nonexistent.

48. *See, e.g.*, Allstate Ins. Co. v. Ginsberg, 863 So. 2d 156, 162 (Fla. 2003) (pursuing a common law claim); People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1278 (Nev. 1995) (proceeding under a statutory cause of action).

49. *See, e.g.*, Commonwealth v. Hyde, 750 N.E.2d 963, 964-65 (Mass. 2001).

50. *See, e.g.*, Robinson v. Fetterman, 378 F. Supp. 2d 534, 538-40 (E.D. Pa. 2005).

51. 42 U.S.C. § 1983 (2006); *see also* Baker v. McCollan, 443 U.S. 137, 140 (1979).

### *A. First Amendment Litigation*

In pertinent § 1983 actions, the conduct central to each dispute is a public official preventing a private citizen from using some device—visual, audio, or a combination thereof—to record another person.[52] The vast majority of legal arguments stemming from this litigation focus on whether the First Amendment protects the action of recording,[53] and the academic discourse tracks this focus.[54]

Each link of the "chain of communication,"[55] from the act of recording to delivering the recording to an audience, contains a different theory of First Amendment protection. The relevant First Amendment argument therefore depends upon the threshold determination of what stage in the recording process an individual's conduct enjoys the aegis of First Amendment protection. The earliest possible stage of recording is when a party captures an observation with a recording device. At this point, the theories of First Amendment protection are either a general right to gather information[56] or an essential aspect of the more specific right to petition.[57] The next stage of recording involves the ability of the observer to communicate. The theory of First Amendment protection at this

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52. *See, e.g.*, Iacobucci v. Boulter, 193 F.3d 14, 18 (1st Cir. 1999) (arrest for videotaping meeting in town hall); Bloom v. Levy, No. 97-7549, 1998 WL 536395, at *1 (2d Cir. June 11, 1998) (threatened destruction of video camera); Fordyce v. City of Seattle, 55 F.3d 436, 438-40 (9th Cir. 1995) (arrest for nonconsensual videotaping of public protest bystanders); Matheny v. Cnty. of Allegheny Pa., No. 09-1070, 2010 WL 1007859, at *1 (W.D. Pa. Mar. 16, 2010) (arrest for recording police officers' conversation); *Robinson*, 378 F. Supp. 2d at 538-40 (arrest for videotaping state troopers inspecting trucks).

53. *See, e.g.*, Glik v. Cunniffe, 655 F.3d 78, 82-84 (1st Cir. 2011); Kelly v. Borough of Carlisle, 622 F.3d 248, 259 (3d Cir. 2010); *Fordyce*, 55 F.3d at 438.

54. *See* sources cited *infra* notes 55-60.

55. Seth Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 382-83 (2011).

56. *See* Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 339-55 (2004); Lisa Skehill, Note, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 SUFFOLK U. L. REV. 981, 1004-06 (2009). *Compare, e.g.*, *Glik*, 655 F.3d at 82-83, Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000), *and Iacobucci*, 193 F.3d at 25, *with* Colten v. Kentucky, 407 U.S. 104, 109 (1972).

57. *See* Tichinin v. City of Morgan Hill, 99 Cal. Rptr. 3d 661, 676 (Cal. Ct. App. 2009); *see also* Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 656-60 (2009).

point asserts a constitutional right to convey an inherently expressive message,[58] which may be narrowed to a prior restraint claim.[59] The final stage of recording relates to the audience receiving the recording. At this point, the First Amendment protection focuses on the audience rather than the recording party by framing the recording as an essential aspect of the public's right to receive information.[60]

Even when the right has been framed under a particular First Amendment theory, the government may restrict that right to a reasonable time, manner, and place.[61] In § 1983 actions to date, the question of what will clear this hurdle of reasonableness is determined only by those facts before each court.[62] The relatively few cases bearing upon the right to record therefore fail to sufficiently trace the full extent of constitutionally protected conduct. This produces a doctrinal inadequacy, whereby the judicial lines tracing the right are either insufficient or simply in the wrong places.

A critical view of this First Amendment litigation also reveals the deficiency in terms of litigation strategy. There is no clear, single basis upon which this right can be litigated under the First Amendment. The result is fractured theories about how to define the right,[63] which have expanded into a disjointed consensus regarding whether a right actually exists—much less to what extent.[64] This splintering of the underlying theory and its appropriate scope has had ripple effects in terms of its practical success, so that authority is split across jurisdictions in establishing both the underly-

58. *See* Kreimer, *supra* note 55, at 370-74. *Compare* Gilles v. Davis, 427 F.3d 197, 212 n.14 (3d Cir. 2005), *with* Am. Civil Liberties Union of Ill. v. Alvarez, No. 10 C 5235, 2011 WL 66030, at *4 (N.D. Ill. Jan. 10, 2011), *and* Pomykacz v. Borough of W. Wildwood, 438 F. Supp. 2d 504, 513 n.14 (D.N.J. 2006).

59. *See* Robinson v. Fetterman, 378 F. Supp. 2d 534, 541 (E.D. Pa. 2005); *see also* Potere, *supra* note 15, at 302-12.

60. *See Glik*, 655 F.3d at 82; *see also* Alderman, *supra* note 12, at 519-25.

61. *E.g.*, *Glik*, 655 F.3d at 84; Kelly v. Borough of Carlisle, 622 F.3d 248, 262 (3d Cir. 2010).

62. *See, e.g.*, *Glik*, 655 F.3d at 84-85 (establishing that this determination is a case-by-case inquiry).

63. *See supra* notes 55-60 and accompanying text.

64. *See supra* notes 61-62 and accompanying text. Other litigation further complicates this doctrine. *See, e.g.*, Gritzke v. M.R.A. Holding, LLC, No. 4:01CV495-RH, 2002 WL 32107540, at *4 (N.D. Fla. Mar. 15, 2002) (private action); Commonwealth v. Hyde, 750 N.E.2d 963, 967-68 (Mass. 2001) (criminal action).

ing right and the situations in which it is protected.[65] Ultimately, the doctrinal failings necessarily produce litigation strategy issues: the First Amendment cannot provide a clear or unified avenue of assault against infringement of the right to record.

Considering the above, the First Amendment is not the vehicle to protect and enforce the right to record. It is therefore appropriate to look for other constitutional alternatives to uphold this right. Such a constitutional alternative may provide a uniform theory of protected conduct, fill in the gaps of First Amendment litigation, and fully establish the appropriate scope of the right to record. The Fourteenth Amendment's Due Process Clause can provide these solutions.[66]

### *B. Fourteenth Amendment Litigation*

Compared to the litigated First Amendment issues, the black ink of judicial and academic opinion has left the canvas of Fourteenth Amendment protection all but blank. Only a few courts have assessed whether a Fourteenth Amendment substantive due process right to record exists. Exposing the dearth of attention paid to the Fourteenth Amendment underscores the need for this Note to fully flesh out the substantive due process right as discussed below.[67]

The court in *Horen v. Board of Education* spoke most on point regarding a substantive due process right to record.[68] The plaintiff-appellants, parents of a ten-year-old child with various disabilities, had a prolonged and contentious relationship with various defendants, including the local school district.[69] The parties repeatedly convened with the intent to draft an Individual Educational Plan so that the student could return to school.[70] But because the parents wanted to record these meetings and the school district did not, the

65. *See supra* notes 53-62 and accompanying text.

66. It is unclear if Fourteenth Amendment protection can be coextensive with other constitutional provisions. *See* Toni M. Massaro, *Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1097-98 (1998). *Compare* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 843 (1998), *with* United States v. James Daniel Good Real Prop., 510 U.S. 43, 49-50 (1993) (discussing Fifth Amendment due process).

67. *See infra* Part III.

68. 594 F. Supp. 2d 833 (N.D. Ohio 2009).

69. *Id.* at 839.

70. *Id.*

parties failed to develop an educational plan.[71] The Toledo Public Schools thereafter filed an administrative complaint and an Impartial Hearing Officer granted, in pertinent part, their request to ban the parents' audio or video recordings of the meetings without prior consent of all involved parties.[72] A subsequent appeal brought the parties before the United States District Court,[73] which considered the parents' claims—including that of a substantive due process right to record the Individual Education Plan meetings.[74]

The *Horen* court dismissed this claim by focusing on two substantive due process interests.[75] First, the court reasoned that because no constitutional right to education exists, the parents retained no apparent constitutional right to attend and record the educational meetings.[76] The ability to record, then, could draw constitutional authority from the ability to attend the educational meetings, but only if that underlying ability was itself constitutionally guaranteed. And because attending educational meetings was not protected by a specific constitutional provision, no constitutional right to record the educational meetings existed.[77]

The court next shifted its focus to an alternative substantive due process interest and found, once more, the plaintiffs' position wanting. The court declared that requiring all parties to consent to the recording, and the Toledo Public Schools' subsequent denial of consent, was not such an "abuse of power that 'shocks the con-

71. *Id.*
72. *Id.* at 839-40.
73. *Id.* at 840.
74. *Id.* at 843-44.
75. *See id.* at 844.
76. *Id.*
77. *Id.* at 843-44. When there is no constitutional right being violated, government infringement on an individual's liberty interest is subjected to rationale basis scrutiny. *See infra* notes 249-50 and accompanying text. A few courts have assessed whether government infringement of the right to record is permissible under this level of judicial scrutiny. *See, e.g.*, Whiteland Woods, L.P. v. Twp. of W. Whiteland, No. 96-8086, 1997 U.S. Dist. LEXIS 16313, at *22 (E.D. Pa. Oct. 21, 1997) (holding that an executive officer prohibiting an individual from recording a Planning Commission meeting survived rational basis review); Order at 12, Illinois v. Drew, No. 10-CR-00046 (Ill. Cir. Ct. Mar. 7, 2012) (holding that 720 ILL. COMP. STAT. ANN. 5/14 (West 2011) is unconstitutional under a rational basis analysis of substantive due process because the statute "lacks a culpable mental state and subjects wholly innocent conduct to prosecution"); Order on Motion to Declare 720 ILSC 5/14 Unconstitutional, Illinois v. Allison, No. 2009-CF-50 (Ill. Cir. Ct. Sept. 15, 2011) (same), *available at* http://iln.isba.org/sites/default/files/blog/2011/09/Cell%20phones%20and%20eavesdropping/Allison%20order.pdf.

science.'"[78] Thus decided, the court moved on to the plaintiffs' other claims, presumably finding the substantive due process claim thoroughly explored.

The *Horen* court devoted a total of ten sentences to the substantive due process analysis;[79] to qualify this rumination on the right to record as lacking would be an understatement. Yet this is representative of the total lack of ammunition a citizen currently has at her disposal if she wishes to validate her Fourteenth Amendment right to record. If substantive due process jurisprudence is to provide grounds to protect this right, further development of the right to record is necessary. This Note provides the first step of an admittedly arduous journey.

## III. SUBSTANTIVE DUE PROCESS

Both the Fifth and Fourteenth Amendments protect citizens from deprivations of "life, liberty, or property, without due process of law."[80] Procedural due process is the literal application of this language and prohibits those processes that deprive life, liberty, or property but lack sufficiently equitable procedures to protect those interests.[81] Parallel to this procedural protection is the concept of substantive due process: that some life, liberty, and property interests are so fundamental that no process, regardless of its procedural protections, could constitutionally result in their deprivation.[82] It is to substantive due process that this Note now turns. As the *Horen* court noted, there are three types of individual interests that substantive due process protects,[83] each of which is discussed below.

78. *Horen*, 594 F. Supp. 2d at 844 (quoting Cnty. of Sacramento v. Lewis, 523 U.S. 833, 846 (1998)).

79. *See id.* at 843-44.

80. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

81. *See* Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 419 (2010).

82. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 331 (1986); *see also* Williams, *supra* note 81, at 419.

83. *See Horen*, 594 F. Supp. 2d at 843.

### *A. Interests Protected by Substantive Due Process*

#### *1. Existing Constitutional Rights*

The first substantive due process interest is the protection against government infringement upon constitutional rights specifically guaranteed outside the Due Process Clause.[84] Applying this substantive due process interest to the right to record would root the constitutional protection for the right in an alternate section of the Constitution—such as the First Amendment.[85] The Due Process Clause would then apply that protection against state action. Because such an application of substantive due process establishes the source of protection outside of the Due Process Clause, this substantive due process interest is beyond the scope of this Note. This Note does not use the Due Process Clause merely as a means to apply the protections found elsewhere in the Constitution to the right to record. The Due Process Clause *is* the source of that fundamental right. It is therefore prudent to look to the alternative interests protected by substantive due process.

#### *2. Egregious Executive Conduct*

The second substantive due process interest is the protection against government action that is so egregious that it "shock[s] the conscience"[86] and fails to "respect certain decencies of civilized conduct."[87] Although this may appear to focus on the process of government action, the Court has held that this is an application of substantive due process.[88] The "shocks the conscience" test is the

84. McDonald v. City of Chi., 130 S. Ct. 3020, 3030-31 (2010) (plurality opinion). The *Horen* court appeared to apply a modified version of this analysis. *See supra* notes 76-77 and accompanying text. This trends closely to protecting the penumbras of enumerated rights, *see* Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965), but some claim that the Court has discarded the concept of penumbras for substantive due process purposes, *see, e.g.*, Lawrence v. Texas, 539 U.S. 558, 594-95 (2003) (Scalia, J., dissenting); *see also* Aaron J. Shuler, *From Immutable to Existential: Protecting Who We Are and Who We Want to Be with the "Equalerty" of the Substantive Due Process Clause*, 12 J.L. & SOC. CHALLENGES 220, 268-70 (2010).

85. *See supra* Part II.A.

86. *Horen*, 594 F. Supp. 2d at 843.

87. Rochin v. California, 342 U.S. 165, 173 (1952).

88. *See* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 845-47 (1998).

manifestation of substantive due process protection only against arbitrary *executive* conduct.[89]

Applying this substantive due process interest to the right to record is possible. Executive conduct has infringed upon the right to record.[90] But this Note intends to establish that the right to record is itself fundamental, rather than that a particular executive action is unconstitutional. This analysis will avoid the distraction of focusing on a single type of executive conduct. Such a narrow focus would ignore not only existing legislative conduct,[91] but it might also fail to address other methods of executive conduct that may impermissibly infringe upon the right. This substantive due process interest is therefore put to the side.

*3. Nontextual Constitutional Rights*

The final, and perhaps the most controversial,[92] substantive due process interest is establishing those liberty interests not found in the Constitution's text but deemed to be of such a fundamental nature that they are afforded constitutional protection.[93] The Court, by and large, continues to be receptive to the fact that substantive due process *can* identify unenumerated rights.[94] Paired with this recognition is the well-founded principle of judicial restraint, which arises from intertwining concerns. The first of these concerns is an apprehension regarding the judiciary's legitimacy when invalidating

89. *Id.* at 846; *see also* Martinez v. Cui, 608 F.3d 54, 63-64 (1st Cir. 2010). *See generally* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 529-35 (2008).

90. *See supra* notes 4-7, 52-60; *infra* notes 246-47 and accompanying text.

91. *See supra* Part I.

92. *See, e.g.*, Williams, *supra* note 81, at 408, 411 & nn.1-7.

93. *See generally* Shuler, *supra* note 84, at 239-62 (discussing the history of substantive due process).

94. *See* Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 836-38 (2003). Recent cases are informative. Justice Thomas does not support substantive due process arguments. *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3062 (2010) (Thomas, J., concurring in part and in judgment). Justice Scalia has harangued substantive due process but appears open to the "historical tradition" analysis. *See* Nat'l Aeronautics and Space Admin. v. Nelson, 131 S. Ct. 746, 765 (2011) (Scalia, J., concurring); *see also infra* notes 117-25 and accompanying text (describing the historical tradition analysis).

"democratically-enacted legislation" based upon the limited means of precise standards.[95] The second is a fear of judges having free reign to "impose their own personal preferences instead of engaging in the proper judicial role" of a neutral and detached arbiter.[96] These concerns make the Court hesitant to establish additional nontextual constitutional rights; nonetheless it remains open to the possibility.[97] Even in the face of this reluctance, it is this substantive due process interest that best protects the right to record.

### *B. Generality and Scope of the Liberty Interest*

Before determining whether a liberty interest is a nontextual constitutional right, that liberty interest must first be adequately defined. This Note asserts that recording statutes go too far in restricting the constitutional right,[98] and that First Amendment litigation is unable to go far enough in protecting the full extent of the right to record.[99] A substantive due process analysis, as called for in this Note, requires more: there must be an affirmative right, and merely labeling it the "right to record" is insufficient.

The Court has counseled for "careful description of the asserted fundamental liberty interest"[100] in order to justify constitutional protection of the interest in light of the concerns underlying the finding of nontextual rights.[101] The Court has been loath to provide any firm guidance as to how to describe a right carefully. The focus on the implications of establishing a nontextual right indicates that the description should at least be precise enough to avoid unintended consequences.[102]

A few Justices have indicated that a proper description requires framing the right at the "most specific level [of generality] at which a relevant tradition protecting, or denying protection to, the as-

95. Rubin, *supra* note 94, at 837 & n.17.
96. *Id.* at 837.
97. *Id.* at 836-38.
98. *See supra* Part I.
99. *See supra* Part II.A.
100. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (internal quotation marks omitted).
101. *See id.* at 721; *supra* notes 95-96 and accompanying text.
102. *See, e.g.*, *Glucksberg*, 521 U.S. at 720-21.

serted right can be identified."[103] This standard provides additional protection against arbitrary judicial fiat,[104] but no controlling decision has adopted this standard. Criticism of this most-specific-level standard[105] has highlighted its disconnect with Court precedent[106] as well as more fundamental problems.[107] Regardless of its flaws and detractors, this standard provides the crucial foundation to formulate the contours of the right to record. It mitigates concerns that the judiciary makes its own normative values into law,[108] and the specificity suggests only a minimal exercise of judicial action. But this standard is only a starting point. The Court has encouraged "formulating the interest at stake" in a "precise" manner while simultaneously deviating from the most specific level of generality and evaluating broader liberty interests.[109]

With these considerations acting as guideposts, the right to record is defined as follows: (1) a private citizen has (2) a fundamental right to record with a mechanical device all things then observable by the citizen (3) within public space (4) that are legally observable by that individual. This right has been separated into four distinct elements, but the sum of the parts encapsulates the right to record. The separation merely provides a convenient mechanism to adequately assess the various parts of the right at issue in the following substantive due process analysis.

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103. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion).

104. *See id. But see* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1093 (1990).

105. *See generally* John Safranek & Stephen Safranek, *Finding Rights Specifically*, 111 PENN ST. L. REV. 945, 947 & n.16 (2007).

106. *E.g.*, *Michael H.*, 491 U.S. at 132 (O'Connor, J., concurring in part); Bowers v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, J., dissenting), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

107. *See, e.g.*, Tribe & Dorf, *supra* note 104, at 1086. *But see* Safranek & Safranek, *supra* note 105, at 966-76.

108. *See* McDonald v. City of Chi., 130 S. Ct. 3020, 3057-58 (2010) (Scalia, J., concurring). *But see* Tribe & Dorf, *supra* note 104, at 1095-96.

109. Washington v. Glucksberg, 521 U.S. 702, 722-23 (1997).

### *C. The Nontextual Right Analysis: Establishing the Liberty Interest as Fundamental*

The analysis for ascertaining whether a nontextual liberty interest is constitutionally protected as a fundamental right shapes the framework of this Section. The Court has implemented two methods of identifying fundamental rights, both of which are now reviewed.

One method is labeled a "reasoned judgment" analysis,[110] whereby the Court identifies as fundamental those "personal liberties that it deems appropriate for our contemporary society."[111] Criticisms of this approach are fairly self-evident in light of the prudential concerns noted above.[112] They include charges of violating the separation of powers, judicial activism, and an impermissible return to subjectively implemented natural law.[113] Yet the Court has used the "reasoned judgment" analysis time and again to designate liberty interests as fundamental rights. This includes establishing the right of individuals to marry another person without the limitation of "invidious racial discriminations,"[114] the right of a woman to terminate her pregnancy,[115] and the right of individuals to engage in private sexual conduct without government interference.[116]

The alternative method is one of "historical tradition,"[117] whereby the Court "test[s] the asserted claim of constitutional protection ... against the Nation's traditional treatment of the claim."[118] The historical tradition analysis is more narrow than the reasoned judgment approach,[119] but this is a positive for its advocates: it provides real limitations on judicial action in light of the prudential concerns

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110. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 98-106 (2006).

111. *Id.* at 107.

112. *See supra* notes 95-96 and accompanying text.

113. *See* Shuler, *supra* note 84, at 260-61. *But see* Conkle, *supra* note 110, at 106-15.

114. Loving v. Virginia, 388 U.S. 1, 12 (1967); *see also* Shuler, *supra* note 84, at 263-64.

115. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870-78 (1992) (plurality opinion); Roe v. Wade, 410 U.S. 113, 170 (1973) (Stewart, J., concurring); *see also* Conkle, *supra* note 110, at 100-05; Shuler, *supra* note 84, at 267-68, 298-300.

116. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

117. *See* Conkle, *supra* note 110, at 83-90.

118. *See id.* at 92.

119. *Id.* at 87-88.

underlying the establishment of a nontextual right.[120] As a result, those Justices who appear most hesitant to engage in identifying nontextual rights have adopted the historical tradition analysis.[121] Implementation of this method has established a right to live with those family members of one's own choosing.[122] More notable may be those liberty interests to which the historical tradition analysis has denied status as a fundamental right. This includes the freedom of an individual to engage in homosexual sodomy,[123] the ability of an individual to be awarded parental rights by the state when that individual is all but certain to be the father of a child conceived as part of an adulterous affair,[124] and the access to physician-assisted suicide.[125]

The Court has used both the reasoned judgment and historical tradition methods of analysis to evaluate substantive due process claims. Though this treatment produces sometimes inconsistent results,[126] the Court has yet to invalidate either analytical method.[127] It is therefore left to litigants and the lower courts to decide which method to actually employ. In considering these two methods, this Note employs a pragmatic strategy by utilizing the analysis that appears to have the broader appeal. Because of that method's internally imposed limitation, as well as the contemporary Court's predilection towards it, the remainder of this Section will reflect an application of the "historical tradition" analysis of the right to record.[128]

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120. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 721-22 (1997); Bowers v. Hardwick, 478 U.S. 186, 194-95 (1986), *overruled by Lawrence*, 539 U.S. 558; Moore v. City of E. Cleveland, 431 U.S. 494, 503 & n.12 (1932) (plurality opinion).

121. *See, e.g.*, *Glucksberg*, 521 U.S. at 720; Michael H. v. Gerald D., 491 U.S. 110, 122 (1989) (plurality opinion).

122. *Moore*, 431 U.S. at 505-06; *see also* Conkle, *supra* note 110, at 84-85.

123. *Bowers*, 478 U.S. at 192-95; *see also* Conkle, *supra* note 110, at 87; Shuler, *supra* note 84, at 285-87.

124. *Michael H.*, 491 U.S. at 113-14, 124-27; *see also* Shuler, *supra* note 84, at 295-96.

125. *Glucksberg*, 521 U.S. at 728; *see also* Conkle, *supra* note 110, at 88-90; Shuler, *supra* note 84, at 306-08.

126. *Compare supra* note 116 (reasoned judgment analysis protecting all private sexual conduct), *with supra* note 123 (historical tradition analysis refusing constitutional protection of a specific, private sexual act).

127. *See* Conkle, *supra* note 110, at 82-83.

128. *See supra* notes 94, 121 and accompanying text.

The historical tradition method distinguishes as fundamental those liberty interests that are so "deeply rooted in this Nation's history and tradition"[129] that they are "implicit in the concept of ordered liberty."[130] Each element of the right to record will be analyzed under this standard in the following Subsections, so that each aspect of the right to record will be shown to be a deeply rooted American tradition. This process will establish the liberty interest as fundamental.

*1. Private Citizens*

Only private citizens can benefit from the constitutionally protected right to record. Although subsequent Sections of this Note will explain why private citizens retain the right,[131] it must first be established who does not fall within the purview of this category: state agents. As a general matter, there has long been a clear distinction between the identities of public and private actors—established well before America's founding.[132]

Fourteenth Amendment jurisprudence reflects this generally accepted divide. In its initial reviews of Fourteenth Amendment application, the Court recognized that the Fourteenth Amendment protects against certain conduct of state actors and not private persons.[133] This strand of jurisprudence eventually developed into the formal legal theory of state action,[134] with the underlying purpose being to "preserv[e] ... individual freedom"; simultaneously, the legal theory of state action would absolve the state of responsibility

129. *Glucksberg*, 521 U.S. at 721 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)).

130. *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

131. *See infra* Part III.C.2.

132. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 101-02, 136-38, 157-58 (Shapiro ed., 2003) (1690) (concluding that man in the state of nature is a private actor; an agent of the commonwealth is a public officer).

133. The Civil Rights Cases, 109 U.S. 3, 11-12 (1883); *see also Ex parte* Virginia, 100 U.S. 339, 346-47 (1879); Virginia v. Rives, 100 U.S. 313, 318 (1879); United States v. Cruikshank, 92 U.S. 542, 542-43 (1875).

134. This theory was broadly implemented in *Shelley v. Kraemer*, 334 U.S. 1, 13-15 (1948). Mark D. Rosen, *Was* Shelley v. Kraemer *Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 453-54 (2007).

for "conduct it could not control," while holding the state responsible for its own actions.[135]

This respect for the line drawing between public and private is maintained when looking at the photonegative of state action. Doing so shifts the focus away from the party *against whom* the Fourteenth Amendment offers protection and towards the party *to whom* Fourteenth Amendment rights are afforded. The text of the Due Process Clause affords protection to "person[s]."[136] Although people are necessarily the officers of the State,[137] the Court made it clear in its earliest decisions that the Fourteenth Amendment protects the rights of private individuals.[138] State action doctrine seeks to preserve the freedom of private individuals to act relative to the party protected by due process. Similarly, due process protection preserves the freedoms of each individual citizen's life, liberty, and property interests.[139] The goal in both instances is to shield individual freedom.

This allocation of rights is aligned with the general construction of the Constitution as well as the nature of any constitutionally declared right.[140] Because the Constitution is a source for grants of, and limitations on, government *power*, individuals necessarily retain any liberty *right* afforded by the Constitution. Therefore, if public officials wanted to exercise a similar ability to record, the constitutionality of their conduct would not be subject to the affirmatively protected due process liberty interest. That action would, instead, be measured by the constitutional grants and restraints imposed upon the exercise of government power.

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135. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (alteration in original) (quoting Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988)) (internal quotation marks omitted).

136. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

137. *See Ex parte Virginia*, 100 U.S. at 347.

138. *E.g.*, *Cruikshank*, 92 U.S. at 554.

139. U.S. CONST. amend. V; *id.* amend. XIV, § 1.

140. *See* Richard J. Peltz, *Limited Powers in the Looking-Glass: Otiose Textualism, and an Empirical Analysis of Other Approaches, When Activists in Private Shopping Centers Claim State Constitutional Liberties*, 53 CLEV. ST. L. REV. 399, 401-02 (2006).

*2. A Right to Record by Mechanical Device*

Observation is perceiving physical reality.[141] Recording is making that observation permanent. Recording can be accomplished naturally or by mechanical device. Although this Fourteenth Amendment right may intersect with First Amendment protection, it does so only with regard to the method of capture and not with regard to the substance of the constitutional protection. That is, while the First Amendment may extend protection to acquiring and disseminating a still- or moving-image capture,[142] this protection is present only because the particular recording contained a likely understood message.[143] In contrast, the Fourteenth Amendment protection of such image captures need not contain any message; instead, the protection derives from its deep roots in the nation's culture and traditions.

Analyzing this element of the right to record with the historical tradition method requires two separate lines of discussion. First is a focus on the historical treatment of mechanical recording to show that, prior to *Katz*, the American public by and large accepted citizens mechanically recording their observations in the public space.[144] The discussion will then turn to the tradition of protecting the natural process of recording.[145] Following this evaluation, the discussion will explain why mechanical recording is sufficiently similar to natural recording so as to benefit from its longstanding American support.[146]

*a. The Historical Treatment of Mechanical Recording*

The ability to record observations by mechanical device did not become readily available to the public until the Eastman Kodak Company invented the inexpensive snap camera in 1884.[147] With the

141. RANDOM HOUSE UNABRIDGED DICTIONARY (2d ed. 1993).
142. *See* Kreimer, *supra* note 55, at 339-41.
143. Texas v. Johnson, 491 U.S. 397, 404 (1989).
144. *See infra* Part III.C.2.a.
145. *See infra* Part III.C.2.b-d.
146. *See infra* Part III.C.2.e.
147. Neil M. Richards & Daniel J. Solove, *Privacy's Other Path: Recovering the Law of Confidentiality*, 96 GEO. L.J. 123, 128-29 (2007).

snap camera, just about any member of the public could easily and affordably take candid photographs in public.[148] The popularity of the snap camera with the general public was explosive.[149] In contrast, the bourgeois reacted with abhorrence to the technology's undermining of respectability and destruction of social barriers.[150] This negative response culminated six years later when Samuel Warren and Louis Brandeis published the now-infamous article *The Right to Privacy*.[151] Warren and Brandeis advocated against the publication of one's "inviolate personality" through the legal protection of the individual's right "to be let alone."[152]

At the outset, there was scant legal authority to provide a remedy to those individuals whose image had been captured.[153] But starting in 1905, state courts began to recognize in haphazard fashion the Warren and Brandeis right to privacy.[154] This adoption was, initially, a slow burn, whereby only fifteen states recognized the right to privacy as an actionable tort by 1940.[155] By 1950, most states recognized the privacy tort in at least some form.[156] Concurrent with judicial action, various states passed statutes that focused on individual privacy. The first statute to tackle the issue was passed in New York after the state court of last resort failed to find an actionable tort when a company used an individual's image as part of its trademark without that individual's consent.[157] Other states such as California, Pennsylvania, Virginia, and Utah enacted similar statutory protections soon thereafter.[158]

Although these judicial and legislative protections of privacy were not uniform, their common quality was that they concerned the

148. *Id.*

149. Robert E. Mensel, *"Kodakers Lying in Wait": Amateur Photography and the Right of Privacy in New York, 1885-1915*, 43 AM. Q. 24, 28 (1991).

150. *See* Lawrence M. Friedman, *The Eye That Never Sleeps: Privacy and Law in the Internet Era*, 40 TULSA L. REV. 561, 568-69 (2005); Mensel, *supra* note 149, at 28-32.

151. *See* Richards & Solove, *supra* note 147, at 128.

152. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

153. *See* DON R. PEMBER, PRIVACY AND THE PRESS 58-59 (1972); Mensel, *supra* note 149, at 35-38; Richards & Solove, *supra* note 147, at 129-33 & n.27.

154. Richards & Solove, *supra* note 147, at 147-48.

155. *Id.* at 148.

156. *Id.*

157. *See* Mensel, *supra* note 149, at 36-40.

158. PEMBER, *supra* note 153, at 75-76.

*divulgence* of a person's private information.[159] The *acquisition* —that is the recording—of the individual's "inviolate personality"[160] was not the focus of the vast majority of these privacy protections. Indeed, William Prosser, after reviewing the wealth of legal activity and cataloguing the "contours and limitations" of the right to privacy in 1960,[161] identified only one actionable tort pertaining to acquisition. This tort depended upon "[i]ntrusion" on an individual's "seclusion," "solitude," or "private affairs."[162] Prosser made no mention of consent to being recorded or the secrecy of the recording. This tort provided a cause of action only for recording within an individual's home or "in facilities remote from the public."[163] To this extent, it encompassed privacy—but as defined by places, not by people. It could be seen as a broad reflection of protecting against the intrusion upon communications held in zones of privacy, such as wiretapping.[164]

For all of the handwringing over the individual's privacy, America's near-universal acceptance[165] of the right to privacy never encompassed a rejection of the individual's right to record what was already within the public space.[166] Consent, privacy, and secrecy—at least as applied in recording statutes[167]—were never protected. It was only when the federal and state legislatures inappropriately applied the Court's jurisprudence regulating government conduct to permissible individual conduct[168] that this long-valued freedom was ignored. In passing their respective recording statutes, legislators infringed upon the eighty years worth of extensive acceptance of the citizen's ability to make permanent his or her observations in the public realm with a mechanical device.

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159. *See generally id.* at 71-73, 75-77, 89-93; Richards & Solove, *supra* note 147, at 147.

160. *See* Warren & Brandeis, *supra* note 152, at 205.

161. Richards & Solove, *supra* note 147, at 149-50; *see* William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 389 (1960).

162. Prosser, *supra* note 161, at 389.

163. Kreimer, *supra* note 55, at 352.

164. *See supra* note 17 and accompanying text.

165. Richards & Solove, *supra* note 147, at 149-50 & n.191.

166. *See supra* notes 159-64 and accompanying text.

167. *See supra* notes 31-39 and accompanying text.

168. *See supra* notes 41-47 and accompanying text.

This liberty right is well-established on its own merits, but it also arose from a more basic concept. Individuals are allowed to observe —and record—those things in the public realm by natural means. The following sets forth the longstanding American tradition of protecting this natural recording process by evaluating that process sequentially.

*b. Natural Recording—Step 1: Matter Exists in Physical Reality*

In physical reality, all matter exists.[169] Existence of matter is defined, in its most reduced state, by the presence of elementary particles.[170] These elementary particles, being the "building blocks" of all matter in physical reality,[171] define the qualities and limits of each thing's physical existence.[172] Matter therefore exists to the extent and in the manner that elementary particles form such matter. This is how physical reality has existed since its inception.[173] This brief reflection on how things exist in physical reality merely operates to establish that even the first step in the natural recording sequence is of a fundamental character.

*c. Natural Recording—Step 2: Humans Observe Things via the Body*

The composition of elementary particles constructs the innate characteristics of any particular thing in physical reality. External observations give those characteristics spatial and tangible relevance to physical reality. A thing's size is measured by how large it

169. This fundamental statement of existence should be accepted at face value. This Note does not tread into philosophical discussions. *See generally* Edgar Sheffield Brightman, *Modern Idealism*, 17 J. PHIL. PSYCHOL. & SCI. METHODS 533, 537-38 (1920) (discussing idealism); Lewis S. Feuer, *Materialism, Idealism, and Science*, 15 PHIL. SCI. 71, 71 (1948) (book review) (discussing materialism).

170. COMM. ON ELEMENTARY-PARTICLE PHYSICS, ELEMENTARY-PARTICLE PHYSICS: REVEALING THE SECRETS OF ENERGY AND MATTER 16-17, 19 (1998); HARALD FRITZSCH, ELEMENTARY PARTICLES: BUILDING BLOCKS OF MATTER 7 (2005).

171. FRITZSCH, *supra* note 170, at 7-8.

172. *See* COMM. ON ELEMENTARY-PARTICLE PHYSICS, *supra* note 170, at 16-17.

173. Only humanity's ability to know has changed. *See* FRITZSCH, *supra* note 170, at 2-7.

*looks*; a thing's weight is measured by how heavy it *feels*. The types of measurement are vast and need not all be repeated here.

So, too, the method of observation varies. Some observations are accomplished only by means that cannot be reproduced by human faculties[174] and are therefore foreign to the "natural" human experience. But humanity is well versed in its own methods of observation: humans have long understood their ability to use senses to measure those things in physical reality.[175] These senses allow the human brain to use the body's sensory receptors as a means to observe the innate characteristics of a thing's existence.[176] The process is so innate to the operation of human existence that, like breathing, it transcends the notion of tradition altogether. It is simply a part of human existence.

Separate from—but related to—this process of acquisition is the deprivation of the ability to perceive physical reality. In other societies, the cultural, religious, or social traditions may support such sensory deprivation.[177] But in America, methods of preventing natural observation have long been antithetical to this nation's traditions and values. This is showcased when evaluating those situations in which historically such deprivation was possible—as perpetrated by fellow citizens, government actors, and government-imposed punishment. The following discussion only underscores the American tradition against sensory deprivation; it does not assert that protecting the natural recording process was the specific rationale underlying this tradition. Nevertheless, the tradition against sensory deprivation signifies an embrace of principles that are in accord with protecting natural observation.

*Citizen conduct*. American tradition has long held that the conduct of private individuals that deprives fellow citizens of their

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174. *E.g.*, Shaun P. Collin, *Electroreception in Vertebrates and Invertebrates*, *in* ENCYCLOPEDIA OF ANIMAL BEHAVIOR 611, 611 (Michael Breed & Janice Moore eds., 2010) (electric fields); Gerta Fleissner & Guenther Fleissner, *Magnetoreception*, *in* ENCYCLOPEDIA OF ANIMAL BEHAVIOR, *supra*, at 324, 324 (magnetic fields).

175. *See* Richard Sorabji, *Aristotle on Demarcating the Five Senses*, 80 PHIL. REV. 55, 55-56 & n.3 (1971).

176. *See* Maureen Connolly & Tom Craig, *Stressed Embodiment: Doing Phenomenology in the Wild*, 25 HUM. STUD. 451, 453 (2002); Grant Gillett, *Perception and Neuroscience*, 40 BRIT. J. FOR PHIL. SCI. 83, 84-85 (1989).

177. *See, e.g.*, *Saudi Arabia: Court Orders Eye to Be Gouged Out*, HUM. RTS. WATCH (Dec. 10, 2005), http://www.hrw.org/news/2005/12/08/saudi-arabia-court-orders-eye-be-gouged-out.

senses is unacceptable. This unwanted intrusion upon an individual's bodily integrity has long been subject to the common law action for battery.[178] The Court has held this right out as the most "sacred" and "carefully guarded[ ] by the common law."[179] Similarly, the common law criminal prohibition against such deprivation was established as "mayhem" early in English law, though narrowly applied when the injury deprived the individual of the ability to provide military assistance to the King.[180] The Coventry Act of 1670 broadened "mayhem" beyond this focus on the ability to fight to include any maiming or disfiguring of another.[181] Historically, nearly every American state adopted mayhem as a distinct statutory offense, but over time it has largely been subsumed by other statutory criminal offenses.[182]

*Government actors*. Government actors—typically police officers—traditionally retain immunity from civil liability for tortious conduct when lawfully discharging their duties.[183] An equally longstanding tradition holds these government agents liable for battery when their conduct extends beyond the exercise of their duties.[184] Measuring the permissibility of such conduct requires determining if the force used against an individual was reasonably necessary.[185] Therefore, American tradition has long held government actors liable for depriving individuals of their senses when such conduct is not reasonably necessary. What conduct is not reasonably necessary is a fact-intensive question, but it is sufficient here for the purpose of establishing the American tradition to acknowledge that *some* government action resulting in sensory deprivation can lead to liability for battery.[186]

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178. *See* Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 269 (1990).

179. *Id.* (quoting Union Pac. R.R. Co. v. Botsford, 141 U.S. 250, 251 (1891)).

180. Eugene R. Milhizer, *Maiming as a Criminal Offense Under Military Law*, ARMY LAW., May 1991, at 5, 5.

181. *Id.* at 6.

182. *Id.*

183. *See, e.g.*, State v. Wilson, 243 P. 359, 362 (Idaho 1925); Plummer v. State, 34 N.E. 968, 969 (Ind. 1893); Golden v. State, 1 S.C. 292, 297 (1870).

184. *See Union Pac. R.R. Co.*, 141 U.S. at 251.

185. *See, e.g.*, *Wilson*, 243 P. at 362; *Plummer*, 34 N.E. at 969; Zube v. Weber, 34 N.W. 264, 267 (Mich. 1887); *Golden*, 1 S.C. at 297.

186. *See, e.g.*, Grawey v. Drury, 567 F.3d 302, 315 (6th Cir. 2009).

*Government-imposed punishment*. In the early American colonies, it was not altogether uncommon for criminal punishment to consist of bodily mutilation, such as the removal or destruction of an offender's ears.[187] But the 1791 ratification of the Eighth Amendment to the Constitution[188] prohibited the infliction of "cruel and unusual" punishment.[189] Prior to ratification, individual states used this language to proscribe "the imposition of torture and other cruel punishments."[190] The Court has applied this interpretation to the Eighth Amendment text.[191]

Although the nature of the phrase "cruel and unusual" is ambiguous,[192] the debate over ratification of the Eighth Amendment is telling. One congressman opposed ratification because the Amendment threatened the then-accepted practice of cutting off ears as criminal punishment.[193] Rather than providing specific restraints on punishmnents, the ratifiers implicitly accepted that such mutilation would become unconstitutional.[194] Not waiting for the Court to find such punishment unconstitutional, the states themselves turned away from such drastic corporal punishment. Beginning at the turn of the nineteenth century, especially in the northern states, the attitudes of legislatures across America began shifting away from corporal punishment and public humiliation.[195] And though there were both regional exceptions and differing attitudes toward slaves,[196] the American tradition against punishment resulting in sensory deprivation took root during the nation's formative years.

The Court therefore had to catch up with state legislatures when it finally reviewed punishment under the Eighth Amendment. In its first decision directly concerning the constitutionality of a punish-

187. LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 39-40 (1993).

188. Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 121 (2010).

189. U.S. CONST. amend. VIII. *See generally* Catherine Rylyk, *Lest We Regress to the Dark Ages: Holding Voluntary Surgical Castration Cruel and Unusual, Even for Child Molesters*, 16 WM. & MARY BILL RTS. J. 1305, 1307-10 (2008).

190. Ingraham v. Wright, 430 U.S. 651, 665 (1977).

191. *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2021 (2010) (dating back to 1879).

192. Rylyk, *supra* note 189, at 1310-11.

193. Weems v. United States, 217 U.S. 349, 369 (1910).

194. *See Ingraham*, 430 U.S. at 666.

195. FRIEDMAN, *supra* note 187, at 74-76.

196. *Id.* at 81-82.

ment,[197] the Court recognized that "punishments of torture [leading to death] and all others in the same line of unnecessary cruelty" are prohibited by the Eighth Amendment.[198] Less than fifteen years later, the Court recognized that the prohibition extended to barbarous methods of punishment,[199] with some Justices focusing on merely those punishments that "inflict[ed] ... acute pain and suffering."[200] And by 1910, there was widespread recognition at the state level that some corporal punishment, such as cutting off limbs and ears, would be unconstitutional.[201]

Considering the above, it is therefore apparent that, from America's infancy, this nation has valued the protection of the individual's natural ability to use the body as a vehicle to observe physical reality. Historically, the common law has provided citizens with both civil and criminal recourse against fellow citizens who deprive them of this ability.[202] Starting shortly after America's founding and evolving in the next century, the public—and then the Court—rejected the imposition of punishments resulting in sensory deprivation.[203] The recognition that government actors, outside of the punishment context, cannot deprive a citizen of her ability to observe physical reality unless such conduct is within the reasonable exercise of government duties is equally longstanding.[204] The focus here is on the actual protection against sensory deprivation; this Note does not presume to project any rationale for that protection. And the expansive scope and history of this protection establishes that the second step in the natural recording process has long been enshrined in American history and tradition.

197. Rylyk, *supra* note 189, at 1311.
198. Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878).
199. *In re* Kemmler, 136 U.S. 436, 447 (1890).
200. O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting).
201. Weems v. United States, 217 U.S. 349, 406-07 (1910) (White, J., dissenting).
202. *See supra* notes 178-82 and accompanying text.
203. *See supra* notes 187-201 and accompanying text.
204. *See supra* notes 183-86 and accompanying text.

*d. Natural Recording—Step 3: Humans Record Observations via Memory*

The final sequence of recording is the act of making the observation permanent. "Permanent" simply means "[t]o continue indefinitely" until "change [is] made," but is not to be conflated or confused with forever, perpetual, or for any "fixed or certain" timeframe.[205] As the body provides the mind a vehicle to observe reality,[206] the human mind enables the individual's "self" to keep those observations permanent.[207] The mind therefore records observations by the natural method of memory.

Natural recording is more deeply engrained in American values than even the longstanding protection of the ability to observe. As John Locke once recognized, "the inward persuasion of the mind ... cannot be compelled to the belief of anything by outward force."[208] The protection against government control of the individual's mind was fundamental and widespread during the time when there were no means by which the government could pervade the individual's mind.[209] This inability indicates why, as a practical matter, there existed no common law or statutory prohibition against such government intrusion.[210] Nevertheless, the sanctity of the mind was a core value enshrined in the Constitution. The Court has repeatedly acknowledged the freedom of thought as "the matrix ... of nearly every ... form of [constitutional] freedom."[211] The freedom of thought, and thus necessarily the freedom of memory, is one of the few fundamental American freedoms upon which there is extensive—perhaps near universal—agreement.[212]

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205. BALLENTINE'S LAW DICTIONARY 935 (3d ed. 1969).

206. *See supra* notes 175-76 and accompanying text.

207. *See* Leslie G. Ungerleider, *Functional Brain Imaging Studies of Cortical Mechanisms for Memory*, 270 SCIENCE 769, 771-74 (1995).

208. LOCKE, *supra* note 132, at 219.

209. *See* Marc Jonathan Blitz, *Freedom of Thought for the Extended Mind: Cognitive Enhancement and the Constitution*, 2010 WIS. L. REV. 1049, 1051-52.

210. *Id.* at 1051.

211. Palko v. Connecticut, 302 U.S. 319, 326-27 (1937); *see also* Wooley v. Maynard, 430 U.S. 705, 714 (1977).

212. *See* Blitz, *supra* note 209, at 1051-52 & nn.4, 6-7. *Contra* Evangeline Wright, Note, *Mind-Control Experimentation: A Travesty of Human Rights in the United States*, 9 J. GENDER RACE & JUST. 211, 213-29 (2005).

*e. The Tradition of Natural Recording Extends to Mechanical Recording*

The history of American culture regarding the natural recording process[213] shows a longstanding tradition of holding the protection of the process in high regard. The remaining question, then, is whether this deeply rooted value can appropriately be extended to mechanical recording due to the substantial similarity between the two different modes of recording. To resolve this issue, the recording methods must be compared.

Because a video camera records a vast array of types of observations, it is perhaps the best representative of a mechanical device that records.[214] The video camera's basic operation utilizes technology to replicate the natural human methods of observation and recording.[215] The core concepts of observation and recording are therefore the same for both natural and mechanical recording. The substance of the recording—those objects in physical reality—is also shared between the two methods of recording. The broad concept and application of these two recording methods are therefore substantially similar. What potentially distinguishes the two methods are any differences in their nature and application.

*Format*. One obvious distinction between the two methods of recording is the format of recording. Natural recording utilizes the body and mind,[216] whereas mechanical recording uses magnetism, digital devices, electrical charges, and a host of other means accomplished by scientific development.[217] This alone does not present a compelling argument to distinguish the two for these purposes. Mechanical recording, to the extent it is a replication of the natural process by alternative means, captures only what is readily observable by human senses and not that which is otherwise imperceptible

213. *See supra* Part III.C.2.b-d.

214. The "right to record by mechanical device," however, encompasses devices that record less than a video camera and future devices that may record additional sensory observations.

215. *See* ALAN P. KEFAUVER, THE AUDIO RECORDING HANDBOOK 1-2, 9, 20, 28-29, 273 (2001) (auditory recording parallels); HERBERT ZETTL, VIDEO BASICS 6, at 53-60 (2010) (natural vision parallels).

216. *See supra* notes 175-76, 207 and accompanying text.

217. *See supra* note 215 and accompanying text.

by humans.[218] The mechanical format, when it replicates the natural process, does not change the substance of the physical reality that is being recorded.

*Limitations*. The scope of recording can be limited in both duration and focus,[219] and mechanical issues may undermine the clarity of the recorded observation.[220] Conversely, natural recording is associated with more inclusive observation, whereby the recorded observation is not undermined by such technological limitations. These issues of limitation speak to the quality of the mechanical recording, which should be vulnerable to questions of reliability. This does not mark a distinction but instead parallels similar issues associated with natural recording.[221] For example, in litigation, the credibility of natural memory—including the perceptive, quality, and communicative aspects—is open to attack by counsel under the Federal Rules of Evidence.[222] These potential deficiencies in recording are therefore common to natural and mechanical recordings.

*Bias and manipulation*. A recording is one person's observations made permanent. That person's recording is inherently the consequence of the individual's subjective bias.[223] The fundamental right here is to use mechanical recording to make permanent the bias which would otherwise be captured by natural recording. The right is not predicated on providing a more objective record than what a natural recording could present. Instead, the two methods of recording reflect the same bias.[224] Similarly, the recording can be subject to conscious and unconscious manipulation.[225] Once again, this does not distinguish between the methods of recording as they are both subject to this type of misuse. These qualities, like the limitations of mechanical recording, are merely factors that should be considered when evaluating the recording's credibility and reliability.

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218. *See supra* notes 174-76, 214-15 and accompanying text.

219. *See* Wasserman, *supra* note 57, at 631.

220. *See, e.g.*, Jessica M. Silbey, *Cross-Examining Film*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 17, 34 (2008).

221. *See id.* at 29-31.

222. *See* 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 6:75(2) (3d ed. 2007).

223. *See* Silbey, *supra* note 220, at 18.

224. *See id.* at 29-31.

225. *See id.* at 26-31.

*Audience interpretation*. It is possible that the above issues, or even the viewer's own bias,[226] may implicate problems of interpretation. Issues of interpretation are pertinent only to subsequent viewing of the observations. As such, these issues are beyond the scope of *recording* those observations. To any degree audience interpretation actually differs between the two methods of recording, this difference does not distinguish natural from mechanical recordings within the boundaries of the fundamental right.

*Legal fiction*. Mechanical recording that captures the same physical reality as a citizen's observations is not actually that individual's natural observations and recording. It is instead a substitute—one that might not precisely capture what the individual observed and, indeed, may capture more than what the individual observed. These are two legitimate distinctions to make. But neither is substantial enough to distinguish the two methods of recording for the purposes here.

First, the "actual difference" distinction is not a significant distinction between the two methods. The physical reality that can be recorded is the same,[227] regardless of the method of recording. And courts routinely recognize that mechanical recording, notwithstanding any manipulation, is an objective record of that physical reality.[228] So the mechanical recording is merely a change to a more objective perspective of the physical reality that is recorded. The change in perspective does not alter the fact that both methods record the same substance, and therefore it does not adequately distinguish the two methods.

Second, the "greater quantity of recorded material" distinction is not one that separates these two methods to any substantive degree. Because of the presence of both the individual and the mechanical device, both recording methods have the potential and ability to record the exact same observations. Indeed, the nature of the right is one whereby the mechanical device captures *something* that the individual's natural recording also observed.[229] Otherwise, the me-

226. *See* Dan M. Kahan et al., *Whose Eyes Are You Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837, 903 (2009).

227. *See supra* text accompanying notes 216-18.

228. Wasserman, *supra* note 57, at 630-31; *see also* Scott v. Harris, 550 U.S. 372, 379 (2007).

229. *See infra* Part III.C.4.

chanical method does not follow from the natural method as a supplement, but instead operates to replace the individual's natural recording altogether. Therefore, everything that is recorded by the mechanical device could also be naturally recorded. Happenstance and circumstantial arbitrariness may alter the precise substance of the recordings. Mere chance is not given so much weight that the methods of recording can be said to be entirely distinct when the mechanical recording includes additional material that was available to be captured—but unsuccessfully acquired—by natural recording. The additional substance of a mechanical recording is merely a contextual frame to the shared observations of natural and mechanical recording.

This final difference suggests an important practical application of the right. If a recording made by a mechanical device is not actually a citizen's observations, then the law must decide to what degree it is acceptable for the device's observations to be an adequate supplement to the citizen's actual experiences. The extremes, as they often are, are easily ascertained. If a mechanical recording is made from a device in the individual's physical control, the device is acting as a supplemental method to the individual's natural recording process. In direct contrast, a mechanical device that records observations when the private citizen is not present does not *supplement* that individual's natural recording. It is an observation and recording that the private citizen had no occasion to acquire by natural means, and therefore is beyond that witness's right to record. The open question is at what point a mechanical recording device is no longer a supplement to, but rather a substitution of, the witness's natural ability to record via memory.

Practical considerations suggest that the right to record should not be limited to devices that are only on the citizen's person. Issues of ability and safety sometimes prevent such recording. And simply removing the device from the citizen's person does not provide the type of unacceptable substitution falling outside of the right to record. As long as the device is within the citizen's constructive possession while that individual is *actually* present, the device is operating at a sufficient level of supplementation instead of substitution. The debate over what constitutes constructive possession is

merely acknowledged here without being resolved, as that issue is better treated by other commentators and the courts.[230]

In considering the above, differences between the two methods of recording certainly do exist. These differences, however, are not of such a degree as to significantly distinguish the two methods. The deeply rooted American tradition, devoted to preserving natural recording, can therefore be appropriately extended to the right to record by mechanical device. This extension not only underscores the inappropriate reversal of the treatment of mechanical recording following *Katz*[231] but also further fixes the fundamental nature of the right to record by mechanical device.

*3. All Things Within Public Space*

The right of a private citizen to mechanically record is limited to those observations within public space. There is a basic divide between the public and private spheres.[232] Pertaining to the right to record, this distinction between the public and private can be tracked along notions of property rights. The Court heralded the right to exclude as "one of the most essential sticks in the bundle of rights that are commonly characterized as property"[233] and added that the right to exclude is "universally held to be a fundamental element of the property right."[234] It is this element—the ability to exclude—that helps distinguish the physical boundaries of the right to record. Indeed, this tracks the boundaries of the right recognized before the states incorrectly relied upon *Katz* to modify their recording statutes.[235]

The right to record therefore does not extend to those locations in which the owner is not a government actor and has the ability to exclude members of the public who otherwise wish to exercise their

230. *See, e.g.*, Benjamin C. McMurray, *Hands Off the Gun! A Critique of* United States v. Jameson *and Constructive Possession Law in the Tenth Circuit*, 85 DENV. U. L. REV. 531, 536-39, 551-62 (2008); George H. Singer, Note, *Constructive Possession of Controlled Substances: A North Dakota Look at a Nationwide Problem*, 68 N.D. L. REV. 981, 1001-02 (1992).

231. *See supra* notes 41-47 and accompanying text.

232. *See generally* Samantha Barbas, *The Death of the Public Disclosure Tort: A Historical Perspective*, 22 YALE J.L. & HUMAN. 171, 183-84 (2010).

233. Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

234. *Id.* at 179-80.

235. *See supra* notes 159-68 and accompanying text.

constitutional rights.[236] Because the private owner decides what "sticks" are bundled with the right of entry onto her property, the owner retains the discretion to decide if exercising the right to record is allowed. This cleanly inserts the right to record into this nation's system of compatible constitutional rights envisioned by the Framers.[237]

*4. Legally Observable by a Private Citizen*

The private citizen's ability to move freely about the public sphere has never been absolute. Both historically and in modern times, this right has been restrained by public nuisance laws,[238] loitering laws,[239] and other state statutes.[240] If the Court recognized a citizen's right to freely move in the public space,[241] it would not derive from the citizen's right to record. The right to record merely enables citizens to mechanically record what can be naturally observed. And the ability to naturally observe is restricted by the individual's ability to move within public space.

Traditional protections of natural recording make apparent which public observations and recordings fall within the right to record. Natural observation has been protected from government infringement that exceeds the reasonable exercise of government duties.[242] This history of natural observation shares a general principle with the constitutional right to mechanically record: that some government deprivation is impermissible. To this end, the right to record offers some degree of protection of public observation and recording from direct deprivation. The difference is the test evaluating what infringement is permissible. The "reasonable exercise" test was used

236. *See supra* notes 133-35 and accompanying text; *cf.* Lloyd Corp. v. Tanner, 407 U.S. 551, 567-70 (1972).

237. *See Lloyd*, 407 U.S. at 570.

238. *See* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 WASHBURN L.J. 541, 543-48 (2006).

239. *See* Angela L. Clark, Note, City of Chicago v. Morales*: Sacrificing Individual Liberty Interests for Community Safety*, 31 LOY. U. CHI. L.J. 113, 115-26 (1999).

240. *See, e.g.*, Kathryn E. Wilhelm, Note, *Freedom of Movement at a Standstill? Toward the Establishment of a Fundamental Right to Intrastate Travel*, 90 B.U. L. REV. 2461, 2480-92 (2010).

241. *See id.* at 2469-80.

242. *See supra* notes 183-86 and accompanying text.

when the observation was not a sequential part of a constitutional right. Because the right to record is a fundamental right, direct deprivations should be subject not to a reasonable exercise analysis but rather to strict scrutiny review.[243]

Related to direct deprivation is the ability of government actors to prohibit mechanical recording by dictating that an individual may not legally be within a public space. This indirectly frustrates the right to record by depriving the citizen of the ability to record specific public observations. Because there is no fundamental right to freedom of movement in public space, and the right to record does not include such a right,[244] these spatial constraints implicate two separate levels of review. Such constraints are valid as an internal mechanism of the right, and therefore are not an infringement, only to the extent the restriction targets a legitimate purpose other than infringing the right to record. If the location restriction is implemented to specifically target the right to record, rather than incidentally, then the restriction is akin to direct deprivation and subject to a strict scrutiny review.

### *D. Subsequent Steps of the Substantive Due Process Analysis*

Finding that there is a fundamental right to record is not the end of substantive due process analysis. The remainder of this Note reflects on the additional steps that will need to be addressed in litigation to protect the right to record from government infringement.

#### *1. The Fundamental Liberty Interest Must Be Substantially Infringed*

The liberty interest may be impinged in a number of ways. State legislatures may pass recording statutes that directly prohibit a citizen from fully exercising her right to record.[245] Police also use broad, "catchall" criminal statutes to deter citizen recording.[246] Even when a legislature has refrained from prohibiting a citizen from

243. *See infra* Part III.D.2.
244. *See supra* notes 238-41 and accompanying text.
245. *See supra* Part I.
246. Kreimer, *supra* note 55, at 361-62.

exercising the right to record, other state actors have taken it upon themselves to infringe upon the right simply because it is being exercised. Citizens are subjected to arrests and threats of arrest for recording in public even when there are inadequate legal grounds for such arrests.[247]

These situations either prevent the private citizen from exercising the fundamental right or punish the citizen for having exercised the right. Not only does this harm the individual who seeks to exercise the right, but it also deters other citizens from exercising the right.[248] As a result, each situation presents a substantial infringement of the right to record. Judicial intervention is therefore permitted and necessary.

*2. The Infringement Cannot Survive Strict Scrutiny*

Government infringement upon individual liberty will survive only if it satisfies the appropriate level of judicial scrutiny. The level of scrutiny depends upon the liberty interest at issue. If no constitutional right has been substantially impinged, the court will employ only a rational basis standard of review.[249] To survive rational basis review, all that must be shown is a legitimate state interest, achieved by rationally related means.[250] But the liberty interest here is a fundamental right, and as such would be entitled to heightened protection. Infringement upon a fundamental constitutional right is subject to strict scrutiny.[251] Strict scrutiny requires that the state not only have a compelling government interest but also that the means be narrowly tailored to achieve that interest.[252]

Determining what government interests are sufficiently important to be "compelling" is an opaque process.[253] The related analysis —determining if the means are narrowly tailored to that compelling

247. *Id.* at 363-66.

248. *Id.* at 366.

249. Washington v. Glucksberg, 521 U.S. 702, 766 (1997) (Souter, J., concurring).

250. *See id.* at 728 (majority opinion).

251. *Id.* at 766-67 (Souter, J., concurring).

252. *See* Grutter v. Bollinger, 539 U.S. 306, 326 (2003); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1283-84, 1315-16 (2007).

253. *See* Fallon, *supra* note 252, at 1321-25.

interest—similarly employs a variety of ambiguous mechanisms that may substantially impact a court's decision.[254] Although the process is recognized here, a competent and thorough strict scrutiny analysis of the infringements on the right to record is well beyond the scope of this Note. Though only a cursory foray into this analysis will be provided, it must be noted that strict scrutiny is a difficult standard for the government to satisfy.[255]

The legislative constraints on the right to record—consent, privacy, and secrecy[256]—are, in their most broadly conceived notions, possibly compelling state interests. When these interests are narrowed in terms of what type of consent, privacy, and secrecy the state seeks to protect from recording, the "compelling" nature loses much of its luster.

Concerns regarding harassment and public safety are most certainly compelling state interests and could justify restricting the ability of all citizens to record in public.[257] Accepting this as true, however, fails to resolve the problem that none of the methods of infringement are narrowly tailored to achieve these compelling interests. Admittedly, this analysis is far from thorough. But it provides a glimpse of the strict scrutiny analysis of these infringements upon the fundamental right to record.

## CONCLUSION

There exists a fundamental, yet unrecognized, right for a private citizen to record with a mechanical device all things within public space that can be legally observed by that individual. This right is deeply rooted in tradition and implicit in the concept of ordered liberty. It was a liberty interest first established in 1884 and later developed by both common and statutory law until it was inappropriately restricted by misguided legislatures eighty years later. The right is further established as fundamental due to its substantial

254. *See id.* at 1326-32.

255. *See* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV., 793, 806-08 (2006) (collecting authority of the "widely accepted" notion that strict scrutiny is "fatal in fact"); *id.* at 862-64 ("Overall, the strict scrutiny survival rate [of statutes] in fundamental rights cases is 24 [percent].").

256. *See supra* notes 31-39 and accompanying text.

257. *See* Kreimer, *supra* note 55, at 364-66.

relation to the longstanding American tradition of valuing and protecting natural recording.

The scope of the right is limited by the development of America's traditions. Nonetheless, both legislative and executive conduct has infringed upon the right and the judiciary has, to an alarming degree, allowed such infringement. Although proponents of the right have utilized First Amendment doctrine, it has proven to be unreliable and insufficient to protect the full extent of the right to record. As this Note has suggested, courts and litigants should instead look to the Fourteenth Amendment's substantive due process to fully protect the fundamental right to record.

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