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## Producing Speech

Ashutosh Bhagwat

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# William & Mary Law Review

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## PRODUCING SPEECH

ASHUTOSH BHAGWAT\*

### ABSTRACT

*In recent years, a large number of disputes have arisen in which parties invoke the First Amendment, but the government action they challenge does not directly regulate “speech,” as in communication. Instead, the government is restricting the creation of communicative materials that are intended to be disseminated in the future—in other words, they restrict producing speech. Examples of such disputes include bans on recording public officials in public places, Los Angeles County’s ban on bareback (condom-less) pornography, restrictions on tattoo parlors, so-called “Ag-Gag” laws forbidding making records of agricultural operations, as well as many others. The question this Article addresses is whether such laws pose serious First Amendment problems.*

*I conclude that they do. Two distinct reasons justify First Amendment protection for conduct associated with producing speech: first,*

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*because such protection is necessary to make protection for communication meaningful; and second, because the Press Clause provides a textual and historical basis for such protection. However, because speech production involves conduct that can have substantial, negative social consequences, First Amendment protection of speech production must be limited, and is probably less extensive than protection of actual communication.*

*In the balance of this Article, I propose a doctrinal framework for how restrictions on speech production might be analyzed. The framework draws on broader free speech principles such as the content-based/content-neutral dichotomy, and the Supreme Court's repeated statements that the First Amendment accords special importance to speech relevant to the democratic process. However, the framework is distinct from general free speech analysis, and for the reasons discussed above, is generally more tolerant of regulation. I close by applying my proposed doctrinal rules to a number of recent disputes.*

TABLE OF CONTENTS

INTRODUCTION ..... 1032

I. REGULATION OF SPEECH PRODUCTION ..... 1036

*A. Taxing Ink and Paper* ..... 1036

*B. Recording Public Officials* ..... 1038

*C. Bareback Pornography* ..... 1044

*D. Tattooing* ..... 1046

*E. Ag-Gag* ..... 1048

*F. Photography* ..... 1049

*G. The Right to Gather Information* ..... 1052

II. PENUMBRAL RIGHTS AND THE PRESS CLAUSE ..... 1054

III. REGULATING SPEECH PRODUCTION ..... 1058

IV. APPLYING THE TEST ..... 1066

*A. Taxing Ink and Paper* ..... 1067

*B. Recording Public Officials* ..... 1068

*C. Bareback Pornography* ..... 1070

*D. Tattooing* ..... 1072

*E. Ag-Gag* ..... 1074

*F. Photography* ..... 1075

*G. The Right to Gather Information* ..... 1078

CONCLUSION ..... 1080

## INTRODUCTION

“Congress shall make no law ... abridging the freedom of speech, or of the press.”<sup>1</sup> These are the words of the Speech and Press Clauses of the First Amendment, and they have been recognized since at least the mid-twentieth century as protecting some of the most important rights granted by the Constitution.<sup>2</sup> But what exactly do these words refer to? Presumably the answer is oral and written communication, the former being protected by the Speech Clause, and the latter by the Press Clause.<sup>3</sup> Of course, in modern times there are many more forms of communication than oral speech and writing, and the Supreme Court has freely extended First Amendment protections to such technologies as video games<sup>4</sup> and the Internet.<sup>5</sup> In so doing, as numerous commentators point out, the Court has not in modern times distinguished between the Speech and Press Clauses.<sup>6</sup> It has rather used the Speech Clause as the primary source of protection, treating the Press Clause as “a superfluous subset of the Speech Clause.”<sup>7</sup> In short, under current law, the Speech and Press Clauses of the First Amendment protect communications in any and all forms, primarily though the Speech Clause.<sup>8</sup>

The Court’s focus on the Speech Clause, however, has obscured some important differences between various forms of communication.<sup>9</sup> The paradigmatic communication protected by the Speech

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1. U.S. CONST. amend. I.

2. *See, e.g.*, *Thomas v. Collins*, 323 U.S. 516, 530 (1945) (stating that the freedoms of speech and press, as well as religion, occupy a “preferred position”); *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944) (same); *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (same).

3. *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, 250 (2004).

4. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729 (2011).

5. *Reno v. ACLU*, 521 U.S. 844 (1997).

6. McDonald, *supra* note 3, at 258 & n.29.

7. *Id.* (citing David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430, 449-50 (2002)); *see also* 3 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 22:6 (2014).

8. The precise contours of the protection provided may depend on the medium of expression. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637, 657 (1994) (recognizing that the Court has treated different communications media differently for First Amendment purposes).

9. This is not the only area where the modern Court’s myopic focus on speech has caused it to lose sight of important historical and doctrinal principles. *See* Ashutosh Bhagwat,

Clause is in-person, oral communication.<sup>10</sup> Indeed, when the states ratified the First Amendment in 1791, this was of course the *only* form of oral communication and thus the only thing protected by the Speech Clause (assuming that the Press Clause protected written communication).<sup>11</sup> Pure, oral speech, however, has a distinct characteristic in that it is “created” simultaneously with its dissemination. The speaker makes noise, and the noise is heard at the same time.<sup>12</sup> The same is true for in-person, symbolic conduct. The “speaker” burns a draft card<sup>13</sup> or a flag,<sup>14</sup> and the audience instantaneously receives the message.<sup>15</sup> Critically, however, this characteristic does *not* hold for many other forms of communication. Rather, there is a time lag, sometimes a substantial one, between creating the message and its dissemination to its intended audience. Thus, a book is printed, but may not be distributed or read until much later. A movie is filmed, but probably will not be screened for several months, if not years. A photograph is taken, but may not be printed or posted to the Internet or shown to others for some time. Indeed, because books are reread over the years and movies are rescreened, the time lag between production and communication can be very significant, even centuries.

The existence of this time lag has an important implication. It means that a meaningful distinction can be drawn between the act of creating, of producing communication, and the act of actually communicating. The act of producing a communication—all of which the modern Court designates “speech” because of its focus on the

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*Associational Speech*, 120 YALE L.J. 978, 985-94 (2011) (discussing how the Court’s jurisprudence has been distorted by its dependence on the Speech Clause, rather than the Assembly Clause, to protect a right of association).

10. See McDonald, *supra* note 3, at 250.

11. This raises the difficult question of whether, and if so how, the First Amendment protected nonprinted written communications, such as handwritten letters. See *id.* The text of the Amendment would appear to give no protection to such letters, though such a result seems hard to justify in any principled way. Thankfully, however, the resolution of that question is beyond the scope of this Article.

12. Technically, I suppose, a time lapse exists between the speech and its reception because noise moves at the speed of sound, not instantaneously. But obviously, for in-person speech, that time lag is infinitesimal.

13. See *United States v. O’Brien*, 391 U.S. 367 (1968).

14. See *Texas v. Johnson*, 491 U.S. 397 (1989).

15. Or more accurately, the audience receives the message at the speed of light, even faster than sound.

Speech Clause<sup>16</sup>—can take many forms and involve many different steps. The question that obviously arises is whether, and if so to what extent, the First Amendment protects the antecedent act of producing speech, not just the eventual communication. Does a prohibition on openly recording public conversations between police officers and members of the public without the consent of both participants violate the First Amendment?<sup>17</sup> What about a ban on tattoo parlors?<sup>18</sup> A ban on making pornographic movies unless the actors wear condoms?<sup>19</sup> What about a tax on paper and ink used in publications?<sup>20</sup> More broadly, does the First Amendment protect a right to gather information, if that information is needed to produce, say, a news story?<sup>21</sup> In each of these situations, we are faced with a law that does not directly prohibit or regulate an act of communication, but makes it difficult or impossible to create the message to be distributed. As we shall see, courts are deeply divided, and even more deeply confused, about whether and when the First Amendment protects such conduct.<sup>22</sup>

Interestingly, despite the foundational nature of this question, it has received remarkably little scholarly attention. The most extensive recent discussion of these issues is in Seth Kreimer's article about image capture.<sup>23</sup> There is also an extensive literature about news gathering that touches upon this problem.<sup>24</sup> Indeed, there is

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16. This broader definition of speech as encompassing all communication can be contrasted to the historical meaning of speech as limited to oral, in-person communication.

17. See, e.g., *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (striking down such a statute); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (denying qualified immunity to police officers who arrested a citizen for filming them).

18. See *Anderson v. City of Hermosa Beach*, 621 F.3d 1051 (9th Cir. 2010) (striking down such a ban).

19. See *Vivid Entm't, LLC v. Fielding*, 965 F. Supp. 2d 113 (C.D. Cal. 2013) (rejecting First Amendment challenge to Los Angeles's "Measure B," which imposes such a condom requirement).

20. See *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983) (striking down a tax on paper and ink used in production of publications as violating the Press Clause).

21. See, e.g., Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1; McDonald, *supra* note 3.

22. See *infra* Part I.

23. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Disclosure, and the Right to Record*, 159 U. PA. L. REV. 335 (2011).

24. See, e.g., Marc Jonathan Blitz, *The Right to Map (and Avoid Being Mapped): Reconciling First Amendment Protection for Information-Gathering in the Age of Google Earth*, 14

even a burgeoning literature on protection for “bareback” (condomless) pornography.<sup>25</sup> However, all of this scholarship focuses on First Amendment protections for one particular form of conduct involved in producing speech, rather than on the broader questions of whether and why the First Amendment should be understood to protect *all* forms of conduct associated with producing speech. Those are questions this Article addresses.

My conclusion is that the First Amendment should be read to provide some protection for producing speech, but that the protections cannot and should not be absolute, or even as strong as the protections accorded to actual communication. The theoretical reason to protect speech production is that failure to do so would largely denude protection for communications. Moreover, there is a logical historical and textual source for such protections: the Press Clause. The Press Clause protects technology—in 1791 the printing press, today of course many other things as well—used to produce communications intended for later mass dissemination. On the other hand, the reason that protection for producing speech must be limited is because producing speech can involve a wide range of conduct that can cause social harm entirely independent of the communicative impact of the eventual speech. Therefore, although rules for protecting speech production can draw upon free speech doctrine, they cannot import the doctrine wholesale. Instead, courts need to develop a more nuanced jurisprudence.

Part I summarizes a number of recent disputes, all of which raise the question of whether restrictions on producing speech implicate the First Amendment. Part II presents a theoretical framework for why conduct associated with producing speech should receive First Amendment protection. Part III begins to sketch out some limiting principles and doctrinal formulations regarding how courts should

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COLUM. SCI. & TECH. L. REV. 115, 120-21 (2012); Steven Helle, *Reconsidering the Gathering/Publication Dichotomy: Recording as Speech? What Next?*, 33 N. ILL. U. L. REV. 537, 537-38 (2013); Helle, *supra* note 21, at 2-3; McDonald, *supra* note 3, at 254; Diane L. Zimmerman, *Overcoming Future Shock: Estes Revisited, or a Modest Proposal for the Constitutional Protection of the News-Gathering Process*, 1980 DUKE L.J. 641, 642-43.

25. See generally Alexander S. Birkhold, *Poking Holes in L.A.'s New Condom Requirement: Pornography, Barebacking, and Speech*, 90 WASH. U. L. REV. 1819 (2013); Christopher A. Ramos, Note, *Wrapped in Ambiguity: Assessing the Expressiveness of Bareback Pornography*, 88 N.Y.U. L. REV. 1839 (2013).



analyze regulations of conduct related to the production of speech. Finally, Part IV applies my proposed test to some of the cases and conflicts discussed in Part I.

## I. REGULATION OF SPEECH PRODUCTION

In recent years, a number of lawsuits and other disputes have arisen in which parties invoked the First Amendment, but in fact, the challenged government action did not directly restrict an act of communication.<sup>26</sup> Instead, the restriction was on antecedent conduct necessary to produce a desired communication.<sup>27</sup> Courts have struggled with these cases and often resolved them in contradictory ways. However, on the whole, neither courts nor commentators have seen these disputes as related to each other or as posing a common, overarching problem. Rather, courts have treated each fact pattern as raising a distinct issue. I begin with an overview of some of these disputes in order to illustrate how and why courts have struggled with these cases and also to point to their underlying commonalities.

### A. *Taxing Ink and Paper*

The foundational case in this area is undoubtedly the Supreme Court's 1983 decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*.<sup>28</sup> The case involved a challenge to Minnesota's tax laws.<sup>29</sup> Minnesota exempted periodic publications from its general sales tax.<sup>30</sup> To compensate, however, it imposed a "'use tax' on the cost of paper and ink products consumed in the production of a publication."<sup>31</sup> Furthermore, the tax exempted smaller publications.<sup>32</sup> As a result, only eleven publishers in the state paid the tax, and the Star Tribune, the plaintiff, paid two-thirds of the total amount collected.<sup>33</sup> The Supreme Court struck down the

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26. See McDonald, *supra* note 3, at 258-59.

27. See *id.* at 259.

28. 460 U.S. 575 (1983).

29. *Id.* at 575.

30. *Id.*

31. *Id.* at 577.

32. See *id.*

33. *Id.* at 578.

tax, holding that because the use tax “singled out the press,” the State bore “a heavier burden of justification” with respect to generally applicable regulations.<sup>34</sup> The Court concluded that Minnesota could not carry this burden because taxes singling out the press posed the risk of retaliation against unpopular speakers, and the State could not explain why its revenue needs could not be satisfied by a generally applicable tax.<sup>35</sup> Finally, the Court held that because the tax’s exemption for smaller publications “target[ed] a small group of newspapers,” it “present[ed] such a potential for abuse that no interest suggested by Minnesota c[ould] justify the scheme.”<sup>36</sup>

The Court’s analysis in *Minneapolis Star & Tribune* is revealing, but frustrating. Early on in its discussion, the Court recognized that one of the distinct features of the use tax at issue was that “it taxes an intermediate transaction rather than the ultimate retail sale,” yet the majority assigned no constitutional significance to this fact.<sup>37</sup> Instead, the nature of the use tax was treated as relevant only because it was not a normal use tax designed to prevent evasion of a sales tax—as there was no sales tax here to evade.<sup>38</sup> It should be obvious, however, that a tax on ink and paper is not a direct tax on communication as is a sales tax on a newspaper sale. Instead, such a tax financially burdens the publisher’s ability to create the newspaper, to produce communication. Another interesting point is that even though the plaintiffs here invoked only the Press Clause and not the Speech Clause, the Court never suggested that this mattered.<sup>39</sup> Instead, the Court discussed in general terms whether the use tax violated “the First Amendment.”<sup>40</sup> In short, *Minneapolis Star & Tribune* simply presumed, without analysis, that the First Amendment protects activities associated with producing speech, in contrast to actually disseminating it. It also failed to consider whether the Speech and Press Clauses might play different roles in such cases.

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34. *Id.* at 583.

35. *Id.* at 586-90.

36. *Id.* at 591-92.

37. *Id.* at 581.

38. *See id.* at 582.

39. *See id.* at 579. The plaintiffs also invoked the Equal Protection Clause of the Fourteenth Amendment, but the Court did not consider this claim. *Id.*

40. *Id.* at 582-83, 591-93.

### *B. Recording Public Officials*

In recent years, one of the most controversial and heavily litigated set of speech-production disputes involves laws preventing citizens from making audiovisual recordings of public officials—usually police officers—engaged in their official duties in public places.<sup>41</sup> Although there have been a number of decisions on this point, the most prominent is the Seventh Circuit’s carefully considered opinion in *American Civil Liberties Union (ACLU) of Illinois v. Alvarez*.<sup>42</sup>

The Illinois eavesdropping statute prohibits audio recording any conversation unless all parties to the conversation consent and, unlike most such statutes, covers even conversations in public places that are openly recorded.<sup>43</sup> The ACLU challenged the law as applied to a proposed ACLU program to openly audio and video record police officers engaged in their duties in public places and speaking at audible volumes.<sup>44</sup> The district court dismissed the suit on the grounds that “the First Amendment does not protect ‘a right to audio record,’” and that “the police officers and civilians who would be recorded were not ‘willing speakers.’”<sup>45</sup> On appeal, the Seventh Circuit reversed and enjoined application of the Illinois statute to the ACLU program.<sup>46</sup> The court’s First Amendment analysis began by flatly asserting that “[a]udio and audiovisual recording are media of expression commonly used for the preservation and dissemination of information and ideas and thus are [protected by the First Amendment].”<sup>47</sup> Unlike in *Minneapolis Star & Tribune*, however, the *Alvarez* court appreciated the complexity of the issue it faced, because the Illinois law prohibited only the making of recordings,

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41. See Jesse Harlan Alderman, *Before You Press Record: Unanswered Questions Surrounding the First Amendment Right to Film Public Police Activity*, 33 N. ILL. U. L. REV. 485, 489-90 (2013) (stating that “untold hundreds—or thousands—of citizens have been arrested for” recording the police in public).

42. 679 F.3d 583 (7th Cir. 2012).

43. *Id.* at 595 & n.4.

44. *Id.* at 588.

45. *Id.* at 589 (quoting *ACLU of Ill. v. Alvarez*, No. 10 C 5235, 2011 WL 66030, at \*3-4 (N.D. Ill. Jan. 10, 2011)).

46. See *id.* at 584.

47. *Id.* at 595.

not their dissemination.<sup>48</sup> In a crucial passage the court concluded that the First Amendment was still implicated:

The act of *making* an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording. The right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of making the recording is wholly unprotected, as the State's Attorney insists. By way of a simple analogy, banning photography or note-taking at a public event would raise serious First Amendment concerns; a law of that sort would obviously affect the right to publish the resulting photograph or disseminate a report derived from the notes. The same is true of a ban on audio and audiovisual recording.<sup>49</sup>

The court then quoted heavily from an earlier Ninth Circuit opinion that struck down a ban on tattoo parlors to reemphasize this point, arguing:

The process of expression through a medium has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas, or that we could value Beethoven without the benefit of strings and woodwinds. In other words, we have never seriously questioned that the processes of writing words down on paper, painting a picture, and playing an instrument are purely expressive activities entitled to full First Amendment protection.<sup>50</sup>

Finally, and critically, the court concluded that the Illinois eavesdropping statute could not be sustained as a generally applicable statute because it “specifically targets a communication technology” and the law “directly” burdened First Amendment rights by “directly” regulating “the expressive element of an expressive activity.”<sup>51</sup>

The Seventh Circuit's *Alvarez* decision is notable for recognizing the distinction between regulations of communication and regula-

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48. *See id.*

49. *Id.* at 595-96.

50. *Id.* at 596 (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1062 (9th Cir. 2010)).

51. *Id.* at 602-03.

tions restricting the production of communication, and also for forthrightly holding that the First Amendment's protections extend to producing speech.<sup>52</sup> However, the opinion is not without its problems. First of all, the court extended First Amendment protections to speech production without fully explaining why, and without explaining whether protection extends to *all* conduct associated with the production of speech or merely some. In particular, by emphasizing the fact that this case involved producing speech regarding public officials, a category of speech receiving especially strong First Amendment protections,<sup>53</sup> the court raised doubts about protections for other kinds of recordings and other speech-producing conduct. However, the First Amendment does not *only* protect speech about public officials, making one wonder why that might be so. Second, and more critically, the court's analysis of incidental versus direct regulations is fatally flawed. The court concluded that because the law restricts "a communication technology," here the use of an audio recorder, it necessarily targets an "expressive activity."<sup>54</sup> This assumes that a law targeted at recording conversations necessarily targets the production of speech. That is not true. After all, a peeping tom or a stalker might make a recording of private or public conduct, without having any intention of later disseminating it. Speech requires an audience, so that is not "producing speech." In short, the *Alvarez* court's analysis demonstrates a far higher level of sophistication than the Supreme Court or, as we shall see, other lower courts; but it does not adequately resolve all of the hard issues.

The decision in *Alvarez* built on a fairly extensive line of cases dealing with recording police officers and other public officials. The most important precedent prior to *Alvarez* was the First Circuit's decision in *Glik v. Cunniffe*.<sup>55</sup> Police arrested Glik for using his cell phone to video record police officers arresting another young man on the Boston Common.<sup>56</sup> Glik was not charged, but brought a civil rights action against the arresting officers.<sup>57</sup> The First Circuit

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52. *See id.* at 595-96.

53. *See id.* at 597-98.

54. *Id.* at 602-03.

55. 655 F.3d 78 (1st Cir. 2011).

56. *Id.* at 79.

57. *Id.* at 80.

rejected the defendants' qualified immunity defense, concluding that the First Amendment protects the "filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities,"<sup>58</sup> and that this right was "clearly established" at the time of Glik's arrest.<sup>59</sup> On the crucial issue of whether First Amendment protections stretch beyond communication to filming, the court concluded that "the First Amendment's aegis extends further than the text's proscription on laws 'abridging the freedom of speech, or of the press,' and encompasses a range of conduct related to the *gathering* and dissemination of information."<sup>60</sup> Thus, like the Seventh Circuit, the First Circuit explicitly granted First Amendment protections beyond speech to antecedent conduct, such as "gathering ... information." Unfortunately, the court did so with an even more cursory analysis.<sup>61</sup> Notably, in establishing a right to gather information, the court cited various Supreme Court opinions that are completely off point<sup>62</sup> or that *rejected* First Amendment claims.<sup>63</sup> Thus as with *Alvarez*, the *Glik* decision unambiguously recognized a right to record police officers as an aspect of producing speech, but left unclear both the basis for and the contours of that right.

Other decisions in this area have also found that the First Amendment protects recording public officials, but with even less analysis than in *Glik*. For example, in *Smith v. City of Cumming*, a case cited in *Glik*,<sup>64</sup> the Eleventh Circuit flatly asserted that the First Amendment protects a right "to photograph or videotape police conduct" as an aspect of "the right to gather information about what public officials do on public property," but then found, without explanation, that the right had not been violated in that case.<sup>65</sup>

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58. *Id.* at 82.

59. *Id.* at 85.

60. *Id.* at 82 (emphasis added).

61. *Id.*

62. *Id.* (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978) (striking down ban on corporate campaign expenditures); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (finding First Amendment right to possess obscene materials in the privacy of one's home)).

63. *Id.* (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (rejecting claim that press have First Amendment right to photograph a jail and interview prisoners)).

64. *Id.* at 83.

65. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). "Our recognition that the First Amendment protects the filming of government officials in public spaces accords with the decisions of numerous circuit and district courts." *Glik*, 655 F.3d at 83.

Similarly, in *Blackston v. Alabama*, the Eleventh Circuit held that plaintiffs' First Amendment rights were potentially violated when the presiding officer refused to allow them to tape record a public meeting of the Alabama Supreme Court Advisory Committee on Child Support Guidelines.<sup>66</sup> The court, however, failed to recognize that a restriction on recording did not directly burden speech, holding instead that recording was "expressive conduct protected by the Free Speech Clause."<sup>67</sup> This is clearly incorrect. The act of recording is not itself expressive in the way that burning a flag is expressive because it does not communicate a message; it creates a message to be communicated later. Thus once again, the court unambiguously extended protection to speech production, but without a coherent explanation.

Finally, and most recently, in *People v. Clark*, the Illinois Supreme Court struck down on overbreadth grounds the same eavesdropping statute partially enjoined in *Alvarez*.<sup>68</sup> Clark was indicted for recording a hallway conversation with the opposing attorney, as well as a conversation between himself, the same attorney, and a judge during the course of a child custody hearing, all without the consent of the other participants.<sup>69</sup> On the crucial question of whether recording conversations was activity protected by the First Amendment, the court simply asserted:

[R]ecordings are medias of expression commonly used for the preservation and dissemination of information and ideas and thus are included within the free speech and free press guarantees of the first and fourteenth amendments. The act of making such a recording is necessarily included in the first amendment's guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.<sup>70</sup>

There is thus a substantial body of case law granting First Amendment protections to the recording of public officials in public places, albeit (with the important exception of the Seventh Circuit)

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66. 30 F.3d 117, 120 (11th Cir. 1994) (per curiam).

67. *Id.*

68. 6 N.E.3d 154 (Ill. 2014).

69. *Id.* at 156-57.

70. *Id.* at 159 (citing *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012)) (citation omitted).

based on fairly cursory analysis. It is important to note, however, that the cases are far from unanimous on providing protection. Most notably, in *Kelly v. Borough of Carlisle*, the Third Circuit dismissed a civil rights action brought by an individual who was arrested for recording a traffic stop by a police officer while a passenger in the stopped car on qualified immunity grounds.<sup>71</sup> Although acknowledging the existence of precedent such as *Smith*, the court concluded that other cases raised doubts about the existence and scope of a right to record police officers, and that in any event, none of the earlier cases “involved traffic stops, which the Supreme Court has recognized as inherently dangerous situations.”<sup>72</sup>

One of the other cases the *Kelly* court relied on was *Whiteland Woods, L.P. v. Township of West Whiteland*.<sup>73</sup> There, the Third Circuit upheld a ban on videotaping planning commission meetings, concluding that the recording ban did not “interfere[] with ... expressive activity,” but rather only restricted the “right to receive and record information.”<sup>74</sup> Because the plaintiffs were able to attend the meeting and record the information in other ways, such as by taking notes or making an audio recording, the video recording ban did not interfere with that right.<sup>75</sup> The court entirely ignored the fact that the ban effectively eliminated plaintiff’s ability to create a distinctive form of speech.

Finally, the *Kelly* court also cited *S.H.A.R.K. v. Metro Parks Serving Summit County*.<sup>76</sup> S.H.A.R.K. was an animal rights group that wished to record a planned deer culling by placing cameras on the ground and attaching them to trees in a public park.<sup>77</sup> Park officials removed the cameras, and S.H.A.R.K. sued.<sup>78</sup> The court began its analysis by emphasizing that “[t]he case before us is about access to information as opposed to the right to expression,” and therefore traditional free speech doctrine did not apply.<sup>79</sup> For such cases, the court held, the key question is whether the government

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71. 622 F.3d 248, 248-49 (3d Cir. 2010).

72. *Id.* at 262.

73. 193 F.3d 177 (3d Cir. 1999).

74. *Id.* at 183.

75. *Id.* at 183-84.

76. 499 F.3d 553 (6th Cir. 2007).

77. *Id.* at 557-58. The park was closed during the culling, for obvious reasons. *Id.*

78. *Id.* at 558-59.

79. *Id.* at 559.



is selectively limiting access—“if the rule does not selectively delimit the audience, we uphold the restriction if it is reasonably related to the government’s interest; if the rule does selectively delimit the audience, a stricter level of scrutiny will apply.”<sup>80</sup> On the facts, the court concluded that the removal of cameras was justified based on the government’s interests in protecting trees, and in establishing a uniform method of treating found property, neither of which was selective.<sup>81</sup>

What do these cases, taken together, suggest? First, the Third Circuit notwithstanding, it seems clear that most appellate courts have recognized some First Amendment right to record public officials, albeit the courts are unclear if the right is derivative of the right to speak or is an aspect of an independent right to gather information. Second, however, it is also clear that courts that have considered the issue agree that the right, if it exists, is subject to restrictions. What remains unclear is what sorts of restrictions are permissible, and what sorts are not.

### *C. Bareback Pornography*

In November of 2012, voters in Los Angeles County approved Measure B, the “County of Los Angeles Safer Sex in the Adult Film Industry Act.”<sup>82</sup> The Measure regulates the adult film industry in a number of ways, including banning the filming of anal or vaginal intercourse without use of a condom.<sup>83</sup> In other words, Measure B bans the production of so-called “bareback,” or condom-less, pornography.<sup>84</sup> Soon after Measure B was passed, Vivid Entertainment, a major porn producer, filed a lawsuit challenging Measure B under the First Amendment.<sup>85</sup> The official defendants in the case, county health officials, declined to defend Measure B, so the District Court permitted the official proponents of Measure B to intervene and defend it.<sup>86</sup> On the key issue, for our purposes, of whether the

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80. *Id.* at 561.

81. *Id.* at 562-63.

82. See *Vivid Entm’t, LLC v. Fielding*, 965 F. Supp. 2d 1113, 1121 (C.D. Cal. 2013); *Birkhold*, *supra* note 25, at 1819; *Ramos*, *supra* note 25, at 1840 & n.4.

83. See *Ramos*, *supra* note 25, at 1840.

84. *Id.*

85. *Vivid Entm’t*, 965 F. Supp. 2d at 1121-22.

86. *Id.*

condom requirement violated the First Amendment, the court reached a split decision. It denied defendants' motion to dismiss, concluding that the condom rule was a restriction on "expressive conduct," which targeted the "secondary effects" of the speech at issue, and therefore was subject to intermediate scrutiny.<sup>87</sup> Concluding that plaintiffs had at least alleged sufficient facts to suggest Measure B might not pass such scrutiny, the court refused to dismiss the First Amendment claim.<sup>88</sup> However, later in the same opinion, the court denied plaintiffs' request for a preliminary injunction, concluding that the First Amendment challenge to the condom requirement was unlikely to succeed on the merits because the law advanced the government's interest in preventing the spread of sexually transmitted diseases (STDs), and the government's evidence suggested that Measure B was narrowly tailored to do so.<sup>89</sup> However, the court did grant plaintiffs a preliminary injunction against certain other aspects of Measure B.<sup>90</sup>

The error in the court's analysis in *Vivid Entertainment* should by now be clear. Measure B's condom requirement is not a regulation of expressive conduct because it regulates filming, an act of producing speech, not disseminating it. If the Measure was directed at a live sex show, that would be an expressive-conduct regulation, but it is not. Interestingly, the limited commentary on this subject repeats the court's error. Alexander Birkhold describes Measure B as a regulation of the "manner of speech rather than the specific subject matter or message conveyed by the speech,"<sup>91</sup> though he concludes that Measure B cannot survive intermediate scrutiny.<sup>92</sup> In contrast, Christopher Ramos concludes that Measure B is content-based, but he nonetheless repeats the error of treating Measure B as targeting either "protected speech" or "expressive conduct."<sup>93</sup> Both descriptions are of course incorrect, also making suspect Ramos's

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87. *Id.* at 1125.

88. *Id.* at 1126-27.

89. *Id.* at 1135.

90. *Id.* at 1136. Interestingly, under *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2652-53 (2013), insofar as the proponents lost at the trial court level, they presumably lack standing to appeal.

91. Birkhold, *supra* note 25, at 1823.

92. *Id.* at 1825.

93. See Ramos, *supra* note 25, at 1843, 1860-64, 1868.

assumption that if Measure B is content-based, it automatically triggers strict scrutiny.<sup>94</sup>

The regulation of bareback pornography has thus created the same analytic difficulties, and mistakes, as other regulations of speech production, such as taxes on ink and paper and bans on filming public officials. To my knowledge, no commentator has connected these factually disparate areas of jurisprudence, but as this discussion indicates, there seems to be little doubt that they are logically linked.

#### *D. Tattooing*

One cutting edge question that has arisen in a number of recent cases is the extent to which the First Amendment protects the business of running a tattoo parlor.<sup>95</sup> In recent years, both the Ninth Circuit<sup>96</sup> and the Arizona Supreme Court<sup>97</sup> have unequivocally concluded that a tattoo is undoubtedly a form of expression, fully protected by the First Amendment. Furthermore, despite authority to the contrary,<sup>98</sup> this must be correct. A tattoo is a visual symbol, a combination of pictures and words. There is no question that the First Amendment protects pictures, such as paintings or photographs, and also protects words regardless of their content—unless they fall into some unprotected category, such as obscenity.<sup>99</sup> It is also well established that such protections do not depend on the medium used to convey those pictures and words, whether it be print,<sup>100</sup> video tapes,<sup>101</sup> words taped onto a denim jacket,<sup>102</sup> or video games.<sup>103</sup> Given these well-accepted principles, the fact that the medium used in tattoos—indelible ink inserted into skin<sup>104</sup>—is a bit

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94. *See id.* at 1870. I will explore the difficult question of whether Measure B is best understood as a direct, content-based, or incidental restriction on producing speech in Part III.

95. *See, e.g.,* *Coleman v. City of Mesa*, 284 P.3d 863, 869 (Ariz. 2012) (discussing the division of authority on this subject).

96. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1051-52, 1060-61 (9th Cir. 2010).

97. *Coleman*, 284 P.3d at 869-70.

98. *See id.* at 869 (citing cases rejecting full First Amendment protection for tattooing).

99. *See McDonald, supra* note 3, at 258-59.

100. *See, e.g.,* *Near v. Minnesota*, 283 U.S. 697 (1931).

101. *See, e.g.,* *United States v. Stevens*, 130 S. Ct. 1577 (2010).

102. *See Cohen v. California*, 403 U.S. 15 (1971).

103. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

104. *See Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1055-56 (9th Cir. 2010)

unconventional is surely no barrier to protection. Thus, if someone were to be arrested for wearing a tattoo criticizing President Obama, that is as clearly a First Amendment violation as an arrest for publishing a book critical of the President. Tattoos are obviously speech.

What about the act of creating a tattoo, and also the business of running a tattoo parlor? The Ninth Circuit in the *Anderson* decision explicitly addressed this question, and in language picked up by the Seventh Circuit in *Alvarez* and quoted above,<sup>105</sup> rejected “a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded.”<sup>106</sup> As such, the Ninth Circuit concluded that the act of tattooing was entitled to “full First Amendment protection,” as was the business of tattooing.<sup>107</sup> In *Coleman v. City of Mesa*, the Arizona Supreme Court adopted the Ninth Circuit’s analysis in its entirety, similarly holding that denying a business permit to a tattoo parlor raised serious First Amendment issues.<sup>108</sup> In the course of doing so, the Arizona court rejected earlier decisions that had concluded that the act of tattooing was not sufficiently expressive to qualify as protected expressive conduct, concluding to the contrary that tattooing is “pure speech.”<sup>109</sup>

These conclusions seem clear and unequivocal in extending full constitutional protection to the act and business of tattooing. They are, however, problematic because the act of creating a tattoo is not itself an act of communication; rather, it is an act of creating future communication, which is “spoken” when an audience eventually views the tattoo.<sup>110</sup> To say that the creation of a tattoo is intrinsi-

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(describing modern tattooing techniques).

105. See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012); *supra* text accompanying note 50.

106. *Anderson*, 621 F.3d at 1061.

107. *Id.* at 1062-63.

108. 284 P.3d 863, 869-72 (Ariz. 2012).

109. *Id.* at 869-70 (discussing *Hold Fast Tattoo, LLC v. City of North Chicago*, 580 F. Supp. 2d 656, 659-60 (N.D. Ill. 2008), and *Yurkew v. Sinclair*, 495 F. Supp. 1248, 1253 (D. Minn. 1980)).

110. See Clay Calvert, *Fringes of Free Expression: Testing the Meaning of “Speech” amid Shifting Cultural Mores & Changing Technologies*, 22 S. CAL. INTERDISC. L.J. 545, 565-66 (2013) (recognizing that the *Anderson* and *Coleman* courts rejected a “process-versus-product dichotomy” that other courts have embraced).

cally bound up in the eventual act of communication is of course true—the latter is impossible without the former. But tattooing itself is nonetheless not communication, it is conduct. As such, it can raise regulatory issues—primarily health concerns, as with bare-back pornography<sup>111</sup>—that are unrelated to the communicative impact of the message, and that may be far more serious than concerns raised by prototypical “pure speech.” The *Anderson* and *Coleman* courts’ flat assertion that tattooing receives the same level of protection as communication, therefore, at the least requires some greater discussion and justification than either court provided.

### *E. Ag-Gag*

In 2012, the Utah legislature passed H.B. 187, titled “Agricultural Operation Interference.”<sup>112</sup> The Act prohibits individuals from: (a) leaving a recording device at an agricultural operation without the owner’s consent; (b) gaining access to an agricultural operation under false pretenses; (c) obtaining employment at an agricultural operation with the intent of recording agricultural operations without the owner’s consent; and (d) recording an agricultural operation without the owner’s consent while committing criminal trespass.<sup>113</sup> The purpose of the statute is presumably to prevent animal rights activists from obtaining compromising recordings of the treatment of animals in agricultural facilities. The Utah bill resembles, and expands upon, a similar bill passed by the Iowa legislature in 2011.<sup>114</sup> Although neither of these bills, commonly called “Ag-gag” laws, has (to my knowledge) been challenged yet, laws such as these are certainly controversial and are of serious concern to animal rights organizations.<sup>115</sup> Some sort of legal challenge seems likely, especially if prosecutions are brought under these laws.

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111. See *Anderson*, 621 F.3d at 1056 (discussing health risks associated with tattooing).

112. H.B. 187, 59th Leg., Gen. Sess. (Utah 2012), available at <http://perma.cc/DAC9-BLE3>.

113. UTAH CODE ANN. § 76-6-112 (West 2012).

114. H. File 589, 84th Leg. Gen. Assemb., Gen. Sess. (Iowa 2012), available at <http://perma.cc/BVM2-YRMZ>.

115. See, e.g., *Anti-Whistleblower Bills Hide Factory-Farming Abuses from the Public*, HUMANE SOC’Y (Mar. 25, 2014), [http://www.humanesociety.org/issues/campaigns/factory\\_farming/fact-sheets/ag\\_gag.html#id=album-185&num=content-3312](http://www.humanesociety.org/issues/campaigns/factory_farming/fact-sheets/ag_gag.html#id=album-185&num=content-3312) [<http://perma.cc/6BVX-KEK3>].

Do they pose a serious First Amendment problem? The answer, of course, is that it is not clear. Except for the prohibition on gaining employment through false pretenses, the Utah law directly prohibits recording specific content. It does not, however, prohibit speaking on a particular issue, or even disseminating recordings legally obtained, for example from off the property. The law is thus a restraint not on expression, but on the production of specific expression. However, it is clear that the purpose and effect of the statute is to prevent speech. After all, the harm these recordings threaten is to the reputations of agricultural operations, which can only occur if the recordings are made available to the public. Indeed, given the nature of the recordings, it is hard to imagine any other reason to make them other than for public distribution. “Ag-gag” laws are a quintessential example of a restriction on producing speech of specific content, without directly restricting speech itself.

#### *F. Photography*

Although most of the litigation regarding recording has involved audiovisual recording of public officials, the same basic concerns are raised by *any* restrictions on recordings, including on photography. Of course, such restrictions are rare except at sensitive places, such as military facilities, where presumably any applicable standard of review can be satisfied. But two recent controversies demonstrate that the problem exists.

One of those controversies is the topic of a recent article by Marc Jonathan Blitz: the constitutionality of potential restrictions on Google’s ability to take images for use in Google Maps and Google Earth.<sup>116</sup> As Blitz notes, Google has already been subject to legal restrictions on its ability to capture needed images in other countries.<sup>117</sup> In the United States, there is an ongoing dispute over whether restrictions, or civil liability, should be imposed on Google in the name of privacy.<sup>118</sup> Blitz recognizes that Google’s image capture is not itself speech, but only the collection of information needed to produce speech.<sup>119</sup> However, citing the *Alvarez* and *Glik*

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116. Blitz, *supra* note 24.

117. *See id.* at 188 & n.13.

118. *Id.* at 118-19.

119. *Id.* at 121.

cases striking down restrictions on filming public officials, Blitz argues that the First Amendment should be interpreted to provide some form of “constitutional protection for those seeking to explore and record their environment,” at least insofar as the information gathered is going to be used to produce communications on a matter of public interest, such as a map.<sup>120</sup> Blitz then develops this argument further by citing *Griswold v. Connecticut* for the proposition that constitutional protections go beyond “primary” rights to also protect the “peripheral rights” needed to give that primary right meaningful effect.<sup>121</sup> In short, Blitz’s arguments for protection of image capture needed for mapmaking largely parallel and build upon earlier judicial and scholarly arguments for extending protections to such activities as filming public officials, bareback pornography, and tattooing.

The question of constitutional protections for photography also arose in a different but related context in *Elane Photography v. Willock*.<sup>122</sup> The issue in that case was whether New Mexico could, consistent with the First Amendment, apply its antidiscrimination laws to impose liability on a professional wedding photographer who refused to photograph a same-sex commitment ceremony.<sup>123</sup> As our discussion of Google’s image-capture indicates, there seems little doubt that photography is, in general, a means of producing speech, because photographs displayed to an audience clearly constitute protected communication. Unlike the other disputes we have discussed, however, *Elane Photography* did not involve a prohibition on producing speech. It involved the state compelling an unwilling individual to produce speech. This, however, does not mean that the First Amendment is not implicated because, in the context of pure speech regulations, the First Amendment has long been read to protect individuals from being forced to articulate a message of the government’s choosing.<sup>124</sup> Ultimately, the New Mexico Supreme

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120. *Id.* at 144-46.

121. *Id.* at 154-55 (citing *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965)). In *Griswold*, the Court held that the Constitution protected a right of privacy of married couples to use contraceptives. *Griswold*, 381 U.S. 479, 485-86 (1965).

122. 309 P.3d 53 (N.M. 2013).

123. *Id.* at 59-60.

124. *See, e.g.*, *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that individuals may not be fined for covering up the New Hampshire state motto “Live Free or Die” on their automobile license plate); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (ruling that

Court rejected Elane Photography's constitutional claim on the grounds that application of state antidiscrimination law did not compel Elane Photography to speak; it only required that "if Elane Photography operates a business as a public accommodation, it cannot discriminate against potential clients based on their sexual orientation."<sup>125</sup> Similarly, the court rejected the argument that New Mexico was controlling the content of Elane Photography's expression, concluding that all it was doing was controlling the identity of the firm's clients.<sup>126</sup> Finally, the court suggested that Elane Photography's claim was distinguishable from successful compelled-speech claims because the application of New Mexico antidiscrimination law to it did not even require Elane Photography to speak to the public, but only express a message to its clients.<sup>127</sup>

It is worth taking some time to consider the New Mexico Supreme Court's reasoning. First of all, the last argument seems clearly incorrect. The argument that Elane Photography's compelled speech was directed only at clients, not the public, seems factually wrong because presumably the pictures will eventually be displayed to others. In any event, the recipient is legally irrelevant because the U.S. Supreme Court has clearly held that the First Amendment protects private speech between individuals.<sup>128</sup> The other arguments, while not as obviously incorrect, are also somewhat suspect. The New Mexico court drew a sharp distinction between compelling speech, or determining the content of speech, and the selection of clients.<sup>129</sup> This distinction would make perfect sense if Elane Photography was in the business of renting barware for weddings. But as applied to a business whose sole function is to create speech, the distinction is suspect. Elane Photography is, after all, hired to photograph its clients. The identity of the clients is entirely determinative of the content of the resultant photography. Presumably, a statute requiring a photographer to create photographs of same-sex weddings would raise serious constitutional concerns. But to

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public school students may not be compelled to recite the Pledge of Allegiance).

125. *Elane Photography*, 309 P.3d at 64.

126. *Id.* at 66-68.

127. *Id.* at 68.

128. *Rankin v. McPherson*, 483 U.S. 386-78, 387 n.11 (1987) (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414-16 (1979)).

129. *Elane Photography*, 309 P.3d at 66-68.



require Elane Photography to serve same-sex couples is indistinguishable from requiring it to photograph same-sex weddings—the two are inextricably interconnected. This is not to say that the court’s ultimate conclusion is incorrect. As we shall see, it can be argued that the New Mexico statute is constitutional because it is not specifically directed at speech (it is not because it would apply on the same terms to a hypothetical barware provider).<sup>130</sup> But the issue is a hard one, and the New Mexico Supreme Court’s analysis on the point is inadequate.

### *G. The Right to Gather Information*

One final issue worthy of some attention in this Part is the extent to which the Speech and Press Clauses of the First Amendment should be read to protect some sort of a broader right to gather information needed to produce news. There is an extensive scholarly literature arguing in favor of such a right, on the grounds that without it, the press cannot effectively perform its constitutional functions of informing the public and acting as a watchdog over government.<sup>131</sup> The Supreme Court, however, has flatly rejected such a general right in every single case in which it has been argued.<sup>132</sup> It is quite obvious, and the Court has never denied, that gathering information is an essential precondition of the media’s ability to create news for the public. In other words, information gathering is necessary to produce speech. Thus, there is clearly—as the commentary argues—a nontrivial argument that the First Amendment should accord *some* protection to such activities. Why, then, has the Court been so consistently hostile to such claims?

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130. See *infra* notes 226-35 and accompanying text.

131. See, e.g., McDonald, *supra* note 3, at 347-48 (2004); Rodney A. Smolla, *Privacy and the First Amendment Right to Gather News*, 67 GEO. WASH. L. REV. 1097, 1127-28 (1999); Zimmerman, *supra* note 24, at 655-56.

132. See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (rejecting journalist’s claim to have access to prison inmate); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974) (same); *Pell v. Procunier*, 417 U.S. 817 (1974) (same); cf. *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (finding that the First Amendment does not relieve the media from complying with generally applicable laws, even if the laws impede their ability to gather news). The Court has, however, recognized a narrow right of access to judicial proceedings. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

One basic and perhaps insoluble problem here relates to the identity of the rights-holders. Most claims to a right to gather information have been rooted in the Press Clause, and have been described as a right of the “press”—that is, the institutional press. The reason for this, of course, is the sense that if all members of the public had such a right, the burdens on the government would be unmanageable.<sup>133</sup> This argument, however, is entirely incompatible with the fact that the Supreme Court has never read the Press Clause to provide any special protections to the institutional press or any other specific group of speakers. To the contrary, the Court has always and explicitly rejected such a position.<sup>134</sup> Moreover, the most careful extant academic examination of this question agrees that both historically and in modern times, the dominant understanding of the Press Clause has been that it protects a particular technology (the printing press) rather than a particular group of speakers (the institutional press).<sup>135</sup> Finally, it should be obvious that even if there had been an argument, either a historical one (unlikely) or an instrumental one (perhaps more defensible), to grant the institutional press special privileges during the twentieth century, under modern circumstances, that argument has collapsed. In the age of the Internet, in which blogs, websites, social media, and the like allow every one of us to communicate with broad audiences, and in which increasingly large numbers of citizens obtain their information and ideas from nontraditional sources, the distinction between a favored “institutional press” and other speakers is simply not plausible. If the First Amendment protects an information-gathering right, it must be for all potential speakers, not a select few.<sup>136</sup>

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133. See McDonald, *supra* note 3, at 268, 349-50.

134. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 352 (2010); *id.* at 390 n.6 (Scalia, J., concurring); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 797-801 (1978) (Burger, C.J., concurring); *Branzburg v. Hayes*, 408 U.S. 665, 703-05 (1972); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937).

135. Eugene Volokh, *Freedom of the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012); see also David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446-47 (2002); Michael W. McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L.J. 412, 429-46 (2013).

136. Barry McDonald has argued that information-gathering rights should be restricted to persons who have “membership in a group or organization whose recognized *function* was to obtain information for the purpose of public dissemination.” McDonald, *supra* note 3, at 349-50. Even though this formulation extends protection beyond journalists to others such as

Another source of difficulty in this area is that a right to gather information is even more distantly related to actual speech than the other forms of speech production we have discussed. The other examples all involve regulations that impede the actual production of communicative materials, whether it be a newspaper, pornographic film, tattoo, photograph, or an audiovisual recording. Gathering information is conduct that occurs even earlier in the chain of events that eventually results in speech, in that it predates the creation of the message. Instead, information gathering produces the content that makes the creation of speech possible.<sup>137</sup> Once the First Amendment's protections are extended beyond actual production of speech, however, the question that arises is how far back in the chain of causation will protection stretch. Presumably, a law regulating logging will not raise constitutional problems even though less logging almost certainly will raise the price of paper, no less so than the tax struck down in *Minneapolis Star & Tribune*. But when in the chain of events between the logging and the actual selling of a newspaper do First Amendment protections kick in? No obvious answer emerges.

In short, there are good arguments that the First Amendment should provide some protection to conduct associated with the production of speech, if free speech protections themselves are to be meaningful. On the other hand, extending protections to speech production raises difficult questions regarding *why* the First Amendment protects anything other than acts of communication, as well as regarding the kinds of speech-producing conduct deserving of protection and the extent of that protection. It is to those questions that we now turn.

## II. PENUMBRAL RIGHTS AND THE PRESS CLAUSE

In *Griswold v. Connecticut*, Justice Douglas famously wrote that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and

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academics and researchers, it still begs the question of why professional speakers should be favored under the First Amendment over the general public.

137. Barry McDonald acknowledges this point, though he continues to support a limited right to gather information. *Id.* at 268.

substance.”<sup>138</sup> Admittedly, the *Griswold* Court’s conclusion that one of those penumbral rights was “marital privacy” to use contraceptives is rather questionable, as the asserted right has no close relationship to any textual right.<sup>139</sup> Nonetheless, there is more than a grain of truth in Justice Douglas’s assertion—the Court undoubtedly has regularly recognized that a constitutional provision is best understood to protect conduct beyond what the bare text would require, if that protection is necessary to effectuate the textual right. In particular, in the context of the First Amendment, the Court has long protected a right to expend money in order to purchase the means to disseminate speech,<sup>140</sup> as well as the right to sell and profit from the sale of books.<sup>141</sup> More generally, as Seth Kreimer points out, the Court has regularly extended protection to conduct associated with the distribution of speech such as “handing out leaflets that may end up as litter, placing newsracks on public property, or distributing books to stores.”<sup>142</sup> Moreover, Robert Post is surely correct that the First Amendment would not permit a state to “prohibit the use of projectors without a license.”<sup>143</sup>

All of these examples involve restrictions on the distribution of speech, in which the connection between the regulated conduct and speech is both extremely close and obvious. The Court has also protected conduct preceding speech, that is, conduct related to the production of speech. An example of such protection that we have already discussed is the Court’s conclusion in *Minneapolis Star & Tribune* that a tax on ink and paper used by publishers violated the

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138. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

139. It is noteworthy that in later cases the Court located the right of privacy in the Due Process Clause rather than in penumbras of the Bill of Rights. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

140. *See Citizens United v. FEC*, 558 U.S. 310, 339 (2010); *McConnell v. FEC*, 540 U.S. 93, 251-52 (2003) (Scalia, J., concurring in part and dissenting in part); *Buckley v. Valeo*, 424 U.S. 1, 19 (1976) (per curiam); Kreimer, *supra* note 23, at 382.

141. *See, e.g.*, *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991); *Butler v. Michigan*, 352 U.S. 380 (1957).

142. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 65 n.6 (1963); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *see also Bartnicki v. Vopper*, 532 U.S. 514, 526-27 (2001) (finding that delivery of an audio tape constitutes “pure speech” because, like the delivery of a handbill or pamphlet, it communicates a message); Kreimer, *supra* note 23, at 384 & nn.170-71, 387 n.182 (citing *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 762-72 (1988)).

143. Robert Post, *Encryption Source Code and the First Amendment*, 15 BERKELEY TECH. L.J. 713, 717 (2000).

First Amendment.<sup>144</sup> Presumably, a special tax on celluloid film would also have raised serious First Amendment issues, when that film was necessary for photography. Another prominent example of penumbral protections for conduct related to the production of speech can be found in the Court's "expressive association" jurisprudence. In a series of cases extending back to the Civil Rights Era, the Court recognized that as a corollary to its explicit protections, the First Amendment also protects an implicit right to associate with others for expressive purposes.<sup>145</sup> The protected act of association need not be itself expressive. In the leading case on this subject, the Court protected the right to maintain anonymous membership in a civil rights organization because of the attendant risk of retaliation, even though the act of anonymous membership is not itself expressive.<sup>146</sup> The First Amendment protects association because it is a necessary precondition of speech.<sup>147</sup>

There is thus doctrinal and logical support in the Supreme Court's jurisprudence for the proposition that the First Amendment extends some protection to conduct associated with the production of speech. The Press Clause of the First Amendment provides a textual foundation for such protection.<sup>148</sup> As discussed earlier, the dominant historical and modern understandings of the Press Clause is that the Clause protects the technology of the printing press, not certain favored speakers, such as the institutional press.<sup>149</sup> It should be noted, however, that regulation or licensing of printing presses does not impact actual communications. It rather constrains the production of a printed item (for example, a leaflet or a newspaper) which, when distributed to the public, will communicate thoughts

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144. See 460 U.S. 575 (1983); *supra* Part I.A; see also Kreimer, *supra* note 23, at 384 & n.172.

145. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647-48 (2000); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

146. *NAACP*, 357 U.S. at 461-62.

147. See Kreimer, *supra* note 23, at 385.

148. U.S. CONST. amend. I ("Congress shall make no law ... abridging the freedom ... of the press.").

149. See *supra* notes 132-34 and accompanying text. It is also well understood that at the time of the Framing, the archetypal (though probably not the only) form of regulation that would violate the Press Clause was a prior restraint on the press, in the form of licensing. See David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 495 (1983). However, as the *Minneapolis Star & Tribune* case among others demonstrated, the modern understanding is no longer so narrow.

and ideas. Regulation of the press is thus regulation of the production of communication rather than of communication itself, and so the Press Clause by its terms protects the production of written speech.

It might not, however, protect all speech-producing acts. The printing press is a means to produce speech for broad distribution. Indeed, at the time of the Framing,<sup>150</sup> the printing press was the *only* technology available for the mass dissemination of messages.<sup>151</sup> There is no particular reason to think that the Press Clause would have been understood at the time of the Framing to extend to the production of other forms of speech such as oil paintings or handwritten letters. It does, however, seem eminently sensible, if the Press Clause is to have any meaning in the modern, electronic world, that its protections must be extended to all modern technologies that create messages for mass dissemination.<sup>152</sup> In other words, the press today is not just a printing press, but also a television studio or a reporter's camera. This seemingly innocuous insight, however, has profound implications in the era of the Internet and social media. In our time, many citizens speak instantaneously to audiences larger than those available to the average colonial printer. In the age of Youtube, Facebook, and Twitter, we are all publishers of mass communications. This in turn means that while the Press Clause may not originally have protected the speech-productive conduct of most speakers, today it does, at least with respect to the production of digital speech intended for electronic dissemination. If I record a photograph or video on my cell phone intending to post it to Facebook, that act of recording is no less the creation of mass speech than is the printing of a paper copy of the *New York Times* (or for that matter the posting of an electronic copy to the *Times's* website). The Press Clause should be understood to provide some degree of protection for all of these acts.

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150. The same holds true in 1868, when the technology of speech remained much the same. The year 1868 is of course relevant because it is the date of the Fourteenth Amendment's ratification, and the First Amendment applies to the states only through the Due Process Clause of the Fourteenth Amendment. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

151. See Volokh, *supra* note 135, at 462 n.10 (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 800 n.5 (1978) (Burger, J., concurring)).

152. See *id.* at 462-63.

Finally, it should be noted that even if the Press Clause does not, by its terms, protect the creation of “private” speech—speech intended for limited audiences—that does not necessarily mean such conduct receives no protection. As just noted, the Court has long interpreted the Speech Clause to extend penumbral protection to conduct closely associated with speech, notably distribution of speech but also some speech-preceding conduct. Furthermore, there seems no reason not to read the Press Clause to also provide some penumbral protections. Indeed, this is arguably what the Court did in *Minneapolis Star & Tribune*, albeit by implication. In combination, it seems clear that these penumbral protections should provide some degree of protection for some conduct associated with the production of even private speech.

At the same time, however, it seems unlikely that *all* conduct related in any way to the production of speech can be protected—remember the example of regulating logging<sup>153</sup>—nor can protection be absolute, any more than protection for speech itself.<sup>154</sup> Furthermore, given the penumbral nature of the protection of speech production, and the fact that the production of speech entails *conduct* that can cause social harms entirely independent from any communicative impact, the protections for speech-production should arguably be less rigorous than protections for actual communication.

### III. REGULATING SPEECH PRODUCTION

As the above discussion suggests, it seems clear that the First Amendment protects not only literal acts of communication but also penumbral conduct associated with the distribution and production of speech. Protection of distribution appears to be coextensive with protection of speech itself, and is uncontroversial. Production, however, raises more complex problems. For one thing, it has long been clear that the press is not immune from generally applicable regulations of conduct.<sup>155</sup> This is in contradistinction to speech—the

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153. *See supra* text accompanying notes 137-38.

154. *See, e.g.*, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (upholding a content-based restriction on political speech on national security grounds); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180 (1997) (upholding content-neutral restriction on the speech of cable providers).

155. *See, e.g.*, *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) (promissory estoppel claims);

extant doctrine at least purports to subject generally applicable regulations of conduct that incidentally impinge on expression to a moderately rigorous level of scrutiny.<sup>156</sup> Why then is speech production treated differently?

One source of the difficulty lies in the fact that there are no clear boundaries delineating the scope of conduct related to the production of speech. The distribution of speech is typically a straightforward, time-limited event. That is not so in the chain of events that eventually produces speech. The physical act of producing speech may be time limited, but many preceding steps are necessary before actual production can commence. Most notably, as discussed earlier, the process of gathering information is necessary to many forms of speech, even though it predates the actual writing/recording of speech.<sup>157</sup> And indeed, necessary steps go further back, including logging trees to produce paper, or quarrying sand to produce the silicon needed to manufacture the modern memory chips used for digital photography. It seems facially implausible that the First Amendment would provide substantial protection to all of this conduct, nor is it clear that penumbral protections are entirely missing for conduct prior to the actual, physical production of speech. After all, a ban on the importation, production, or sale of memory chips would be a pretty effective means to suppress digital photography, just as restrictions on ink could destroy print publishing.

Moreover, even if one chose to limit protection to acts of production, the level of protection that should be accorded is unclear. The difficulty lies in the fact that the production of speech is itself conduct, which can cause social harm. When the main forms of speech production were publishing and writing (and oral speaking), the risk of noncommunicative harms was obviously limited. Today, however, speech production covers conduct ranging from making audio and visual recordings to photography, tattooing, or having sex before a camera. All of these forms of conduct can cause social harm. Some of those harms, such as the health risks associated with

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Associated Press v. United States, 326 U.S. 1, 20 (1945) (antitrust laws); Associated Press v. NLRB, 301 U.S. 103 (1937) (labor laws).

156. See *United States v. O'Brien*, 391 U.S. 367 (1968); *Univ. City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir. 2001).

157. See *supra* Part I.G.



tattooing or making bareback pornography, have no link whatsoever to communicative impact. In other situations, the nature of the harm is more complex. Thus, in the cases involving recording of police officers in the course of their duties,<sup>158</sup> one potential social harm is that the actions of the recording citizen might physically interfere with the officers' ability to conduct a safe arrest, a harm completely unassociated with communicative impact. On the other hand, another concern expressed by police is that knowing that their actions are being recorded may cause officers or other public officials to avoid taking necessary risks.<sup>159</sup> This is a harm tied to the communicative impact of the recording, as it is only if the recording is likely to be shared with the public that officers' conduct is likely to be deterred. Finally, some social harms are directly linked to communicative impact. Consider, for example, privacy concerns and national security concerns, both of which are common justifications for restricting photography or recordings. Both harms, however, occur only from, and as a direct consequence of, the communication of the speech. Privacy is lost and national security is threatened when an unintended audience receives private or secret information, not when the information is recorded. This is evidenced by the fact that individuals record themselves in intimate settings and the government records secret information all the time. Yet despite the fact that these harms are related to communicative impact, they are nonetheless real and legitimate, and the government surely has some power to protect against them. The question that obviously arises, then, is how to reconcile protection for speech production with such legitimate social interests.

At least part of the answer emerges from the Press Clause jurisprudence regarding generally applicable laws. As noted earlier, the Court has long held that members of the press have no immunity from generally applicable regulations of conduct.<sup>160</sup> Indeed, this result would appear to be necessitated by the fact that the Press Clause protects not a particular industry, but rather a specific set

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158. *See supra* Part I.B.

159. For example, this was the concern underlying the restriction on recording upheld in *S.H.A.R.K. v. Metro Parks Serving Summit County*, 499 F.3d 553 (6th Cir. 2007). *See supra* notes 76-81 and accompanying text.

160. *See supra* note 155 and accompanying text.

of technologies.<sup>161</sup> Moreover, even if exemptions from general laws for publishers were plausible in earlier times, in today's world, where we are all potential mass publishers, such exemptions are obviously impossible. The doctrinal implication of this insight, however, is clear: generally applicable regulations of conduct that incidentally burden conduct associated with the production of speech are subject to no constitutional scrutiny beyond the default and highly deferential rational basis standard applicable to all regulations restricting liberty.<sup>162</sup> This approach grants less protection for speech production than for speech, but that is probably appropriate given the fact that speech-producing conduct is broader in range, and far more likely to be associated with noncommunicative harms, than speech itself.<sup>163</sup>

What then of laws which are not generally applicable, but which rather target speech-producing conduct? Within this category, there is a further distinction to be drawn between laws that target speech production on a content-neutral basis and laws that restrict the production of speech because of its specific content. Examples of laws falling into the former, content-neutral category include laws restricting filming or recording in particular places or at particular times, eavesdropping statutes like the Illinois statute struck down in *Alvarez*,<sup>164</sup> bans on tattooing (probably),<sup>165</sup> and the tax on ink and paper struck down in *Minneapolis Star & Tribune*.<sup>166</sup> Other laws, however, are best understood not just to regulate the production of speech, but to impose restrictions based on the content of the speech to be produced. One example of such content-based laws is

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161. See Volokh, *supra* note 135, at 508-09 (citing *Branzburg v. Hayes*, 408 U.S. 665, 703-05 (1972)).

162. See, e.g., *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.* 438 U.S. 59, 82-84 (1978); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 486-88 (1955).

163. The primary authority for the position that the institutional press *does* receive special exemptions from at least some generally applicable laws would appear to be Justice Powell's concurring opinion in *Branzburg*. See Volokh, *supra* note 135, at 508-09 (citing *Branzburg*, 408 U.S. at 709-10 (Powell, J., concurring)), and lower court decisions relying on Powell to create a newsgathering privilege. *Id.* at 523-25. As Eugene Volokh points out, however, almost all lower courts have extended this privilege of newsgathering to all potential speakers to a mass audience. *Id.* And again, in the world of Facebook it is hard to see how this distinction can be maintained any longer.

164. See *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).

165. See *infra* Part IV.D.

166. See *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983).

a provision in the Illinois eavesdropping statute that imposes a penalty enhancement when a prohibited recording is of a police officer, prosecutor, or judge.<sup>167</sup> Los Angeles's Measure B, prohibiting bareback pornography, is also a content-based restriction on speech production. It is a restriction on speech production (as opposed to a generally applicable law) because it does not ban all sex without condoms, but only sex without condoms on film.<sup>168</sup> Measure B is content-based because it only prohibits the creation of speech with that specific content.

It is of course familiar grounds in First Amendment jurisprudence that content-based laws are of greater constitutional concern than content-neutral laws. For restrictions on speech itself, the doctrine imposes strict scrutiny on content-based laws<sup>169</sup> and a relatively deferential form of intermediate scrutiny for content-neutral laws.<sup>170</sup> It is tempting to conclude that the same rules should be extended to regulations of speech production: strict scrutiny for content-based restrictions, intermediate scrutiny for content-neutral ones. Indeed, that appears to be precisely what many of the lower court decisions discussed in Part I did.<sup>171</sup> The analogy between content-based regulations of speech and content-based regulations of speech-producing conduct, however, is imperfect. When governments regulate or suppress speech based on content, the reason is typically because the message conveyed by the speech is believed to cause some sort of social harm—that is, the harm to be prevented is linked to the communicative impact of the speech. Thus, when the government seeks to ban flag burning, it is because of the harm caused by the *message* sent by flag burning;<sup>172</sup> and when the government regulated sexually oriented cable television channels, it was because the

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167. *Alvarez*, 679 F.3d at 604 n.11.

168. Of course, a general ban on sex without condoms would almost certainly violate the Fourteenth Amendment. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending *Griswold* to unmarried individuals); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (striking down a Connecticut law banning the use of contraceptives, as applied to a married couple); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (finding that a law requiring particular recidivist felons to be sterilized violated the Equal Protection Clause).

169. *See, e.g., Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011).

170. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

171. *See, e.g., Alvarez*, 679 F.3d at 605; *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1064 (9th Cir. 2010); *Blackston v. Alabama*, 30 F.3d 119, 120 (11th Cir. 1994) (per curiam).

172. *See Texas v. Johnson*, 491 U.S. 397, 410 (1989).

content of the channels was believed to harm children.<sup>173</sup> In contrast, in one set of cases in which the Court concluded that facially content-based statutes—zoning regulations of adult businesses—were not directed at harms associated with communicative impact, the Court declined to impose strict scrutiny under the “secondary effects” doctrine.<sup>174</sup> What this suggests is that strict scrutiny generally applies to content-based laws because the Court is highly suspicious of the proposition that particular messages can cause social harm.

As illustrated by Los Angeles’s Measure B, the difficulty is that the same presumption does not extend to regulations of speech production. Measure B is undoubtedly content-based, for reasons discussed above; but the harm it is directed at is the spread of STDs, which has no relation to the communicative impact of pornographic films.<sup>175</sup> Watching pornography cannot give you an STD. Similarly, at least one of the potential harms motivating restrictions on recording police officers—concerns about physical risk in inherently dangerous situations—has no relationship to the communicative impact of the recording. For that reason, it is not clear that the strong presumption of unconstitutionality associated with strict scrutiny is appropriate for these sorts of laws.<sup>176</sup> Instead, in these cases, the conclusion that a law targets the production of specific content is probably best considered as the first step. The second step is to then determine whether the government can make a strong, plausible case that the harm it is combatting is unrelated to the message or communicative impact. Absent that showing, that is, only if the reviewing court is convinced that the regulation targets

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173. See *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813-14 (2000).

174. See *City of L.A. v. Alameda Books*, 535 U.S. 425 (2002); *City of Renton v. Playtime Theatres*, 475 U.S. 1 (1986). Admittedly, the logic of the “secondary effects” is questionable because it seems likely that the crime and blight associated with adult businesses is drawn to them precisely due to the pornographic nature of the materials they sell. But at least for now, the Court does not appear to have abandoned the test, even though in *Alameda Books* five justices questioned its validity. See *Alameda Books*, 535 U.S. at 448 (Kennedy, J., concurring) (describing secondary effects doctrine as a “fiction”); *id.* at 457 (Souter, J., dissenting) (questioning secondary effects doctrine as well).

175. See *supra* note 168 and accompanying text.

176. The only instance that I am aware of when a majority of the Supreme Court upheld a restriction on speech under strict scrutiny is *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010), and that case involved national security. Cf. *Burson v. Freeman*, 504 U.S. 191 (1992) (plurality opinion) (finding strict scrutiny satisfied in free speech case).

communicative impact, is strict scrutiny appropriate.<sup>177</sup> If the government's regulatory interest is truly unrelated to communicative impact, then some form of intermediate scrutiny may well suffice. However, it is important that such scrutiny not be excessively deferential to the government. Particular attention should be paid to whether the effect of the law is to completely eliminate particular content, as opposed to merely limit its creation.

Finally, what about laws that target speech production, but in a truly content-neutral manner? Such laws do not impede the creation of any particular message or content, but do restrict speech production, and so presumably these laws must be subject to some scrutiny. At the same time, such laws are ubiquitous and often advance very important social interests. Thus, properly tailored eavesdropping statutes, which require consent before recording private conversations, and wiretapping statutes protect important privacy interests. Restrictions on tattooing can protect the public health. And time, place, and manner restrictions on, for example, filming movies, can protect against traffic disruption.

The Supreme Court and lower courts have long assumed the constitutionality of at least some such laws. In *Bartnicki v. Vopper*, the Court presumed the constitutionality of a statute forbidding wiretapping,<sup>178</sup> even though it subsequently held that the broadcasting of an illegally wiretapped conversation by a third party uninvolved in the original wiretap was protected by the First Amendment, at least as long as the topic of the conversation was "a matter of public concern."<sup>179</sup> Similarly, in *Anderson v. City of Hermosa Beach*, although the Ninth Circuit struck down a flat ban on tattoo parlors, it presumed the constitutionality of imposing health regulations on tattoo parlors, even if such regulations increased the cost of running such businesses.<sup>180</sup> These assumptions have strong reasons behind them. The creation of speech is a form of conduct that can produce a wide variety of social harms that the government can legitimately regulate. Moreover, such regulations are ubiquitous. It seems unlikely that every regulation impinging on speech creation, from

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177. This approach has obvious parallels to the "secondary effects" doctrine, but does not share the weaknesses of that test.

178. 532 U.S. 514, 525 (2001).

179. *Id.* at 535 (Breyer, J. concurring).

180. 621 F.3d 1051, 1065-68 (9th Cir. 2010).

health regulations of tattoo parlors to safety regulations imposed on film crews, are presumptively unconstitutional. Clearly, any reasonable constitutional regime must give governments some space to regulate conduct associated with speech production.

At the same time, a highly deferential standard for all such rules is also problematic because it permits the elimination of highly socially valuable speech. For example, if content-neutral rules were subject only to rational basis review, cases like *Alvarez* and *Glik* would come out the other way, which is quite troublesome. The question then becomes: How does one protect valuable speech without hamstringing legitimate regulation?

The court's analysis in *Alvarez* may point the way. Recall that the question in *Alvarez* was the constitutionality of the Illinois eavesdropping statute, as applied to openly recording police officers in public.<sup>181</sup> The court did not strike down the statute on its face, but only as applied to the ACLU's program to record police officers, because of the very high value the First Amendment accords to speech about how government officials perform their duties—a value rooted in the crucial role of the First Amendment in fostering democratic self-governance.<sup>182</sup> The parallels here to the Supreme Court's decision in *Bartnicki* are obvious. In both cases, the First Amendment protections were extended not to all speech, but only speech relevant to democratic self-government, or as the Supreme Court put it, "about a matter of public concern."<sup>183</sup>

I propose that this approach should be extended to content-neutral regulations of speech production. Such regulations are presumptively constitutional on their face, but may be challenged as applied to speech that contributes in some substantial way to democratic self-governance.<sup>184</sup> It should be emphasized that restricting protection to speech on matters of public concern, or relevant

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181. See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 586 (7th Cir. 2012).

182. *Id.* at 599-601.

183. *Bartnicki*, 532 U.S. at 535; see also *Snyder v. Phelps*, 131 S. Ct. 1207, 1215-16 (2011).

184. Elsewhere, I have explored in greater detail how a court might determine whether speech makes such a contribution, and why the Supreme Court's current formulation of the "matter of public concern" test fails to do so adequately. Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 50-53 (2012); see also Robert Post, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* 164-69 (1995). A detailed consideration of this issue is beyond the scope of this Article, but could largely build on that earlier analysis.

to democratic self-governance, is not a general First Amendment principle—indeed, the Court has explicitly rejected such a limitation.<sup>185</sup> However, we are dealing here with laws regulating not speech, but speech production, itself a penumbral right, and doing so in content-neutral terms, thereby reducing the risk of censorship. In that context, limiting serious First Amendment scrutiny to speech at the core of the First Amendment’s purposes seems a reasonable means to balance free speech values against other legitimate social goals, just as the Court has done in other contexts.<sup>186</sup>

Finally, even if the speech to be produced lies at the “core” of First Amendment values, laws regulating speech production can sometimes be enforced if the government’s interest is strong enough. In that situation, however, searching judicial scrutiny is certainly required, under which a reviewing court ensures that the government has a strong regulatory interest, that the interest would be undermined if the speech-creation at issue was granted an exemption, and that the strength of the regulatory interest outweighs the burden on speech. Such an approach seems to properly balance society’s interest in producing and receiving valuable speech against legitimate regulatory interests unrelated to expression.

#### IV. APPLYING THE TEST

I close by briefly considering how the analysis proposed in the previous part would apply to some of the disputes described in Part I. As we shall see, even under the unified approach proposed here, some difficult questions remain. But on the whole, my framework introduces a much-needed level of coherence and consistency in resolving closely related disputes.

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185. See *United States v. Stevens*, 559 U.S. 460, 479-80 (2010); *Winters v. New York*, 333 U.S. 507, 510 (1948).

186. See, e.g., *Snyder*, 131 S. Ct. at 1215-16 (considering speech inflicting emotional distress); *Bartnicki*, 532 U.S. at 534 (illegally intercepted information); *Fla. Star v. B.J.F.*, 491 U.S. 524, 534 (1989) (private facts); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (libel).

*A. Taxing Ink and Paper*

The first case discussed in Part I was the tax on ink and paper struck down by the Supreme Court in *Minneapolis Star & Tribune*.<sup>187</sup> The Minnesota tax was clearly targeted at speech production, both because the only possible use of ink and paper is to produce speech, and more specifically because the tax was imposed only on ink and paper used by publications. However, it is equally clear that the tax was content-neutral, because it did not turn on what was printed using the taxed products. Finally, by restricting the tax to mass publications, the tax undoubtedly ended up primarily restricting speech relevant to democratic self-governance, because surely most, if not all, speech published in newspapers and similar mass-circulation publications constitutes core, protected speech. These factors demonstrate that this was a genuinely difficult case—as illustrated by the fact that the Minnesota Supreme Court upheld the tax, only to be reversed by the U.S. Supreme Court,<sup>188</sup> accompanied by a dissent<sup>189</sup> and a partial dissent.<sup>190</sup> Ultimately, however, the Court probably was correct to invalidate the tax. The fundamental problem with Minnesota's position, as the majority opinion emphasizes, was that the state simply could not identify a strong, plausible government interest in enacting a tax singling out speech production by the press.<sup>191</sup> Minnesota's revenue-raising goals could instead have been easily achieved by subjecting publications to the generally applicable sales tax, which the Court emphasized would have been perfectly constitutional,<sup>192</sup> and would be under my analysis as well because it is a permissible generally applicable regulation. Given the lack of a strong governmental interest, a fortiori, the burden on speech outweighs the state interest.

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187. *See supra* Part I.A.

188. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 579 (1983).

189. *Id.* at 596-604 (Rehnquist, J., dissenting).

190. *Id.* at 593-96 (White, J., concurring in part and dissenting in part).

191. *Id.* at 586-88 (majority opinion).

192. *Id.* at 586 n.9.



### *B. Recording Public Officials*

My analysis suggests that decisions striking down eavesdropping laws as applied to recording public officials in public places, such as *Alvarez* and *Glik*,<sup>193</sup> are also correct, both in protecting the conduct at issue but also in limiting the holdings to recording public officials. Eavesdropping statutes are clearly regulations on speech production, because recordings are undoubtedly speech when played back.<sup>194</sup> On the other hand, because such statutes typically require consent to record any conversation, regardless of the subject matter of the conversation or the identity of the participants,<sup>195</sup> such statutes are also quite clearly content-neutral. Thus, when applied to speech that is not relevant to democratic self-governance—for example, the recording of conversations on truly private matters—such laws are permissible.

When the statute is applied to speech that is highly relevant to democracy, such as recording public officials in public places, the balance shifts dramatically. For one thing, as the Seventh Circuit pointed out, the usual justification for eavesdropping laws, the protection of privacy, has little or no relevance to this situation, because by definition the conversations being recorded are audible to the public, and the recordings are made openly.<sup>196</sup> Beyond this, police officers clearly have no *legitimate* interest in preventing recordings from being made that provide the public with objective information about how the officers go about their jobs. As such, we are left with weak or no governmental interests supporting application

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193. *See supra* Part I.B.

194. One might imagine a narrow class of secret recordings, created for example by Peeping Toms, which are never intended to be shared with an audience, and thus, they might not constitute speech. However, the vast, vast majority of recordings are of course created for the express purpose of being played back to others, and so the overwhelming impact of a restriction on recording is to restrict speech production. It would therefore be highly disingenuous to characterize such a law as a generally applicable conduct regulation.

195. As noted earlier, a provision in the Illinois statute struck down in *Alvarez* adding a penalty enhancement for recording public officials probably does qualify as a content-based restriction. *See supra* note 17 and accompanying text. However, the *Alvarez* court declined to consider that provision because the ACLU was seeking an injunction against the statute as a whole, not the penalty enhancement. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 604 n.11 (7th Cir. 2012).

196. *Id.* at 605-06. This is also the reason why the Illinois Supreme Court found the same statute to be overbroad. *See People v. Clark*, 6 N.E.3d 154, 161-62 (Ill. 2014).

of a law that, in this situation, prevents the production of highly socially valuable speech, and thus pushes the balance obviously in favor of speech. Furthermore, this reasoning seems to extend to *most* situations involving public officials acting in public places, suggesting that the Third Circuit was wrong in *Whiteland Woods* to uphold a ban on recording a planning commission meeting.<sup>197</sup>

Two caveats are necessary here, however. First, there may be specific instances where the government does have a special regulatory interest in prohibiting recordings even of public events. In this case a prohibition may be justifiable. Cameras in the courtroom come to mind as a possible example. Second, nothing here suggests any barrier to the adoption of narrowly tailored rules regulating recordings in such a way as to ensure that there is no physical interference with, for example, police work. However, tailoring and factual justification are important here, suggesting that the Third Circuit's blanket assumption that a ban on recording traffic stops would be permissible probably goes too far.<sup>198</sup>

Finally, the analysis above also points the way to how the decisions in *Alvarez* and related cases can be reconciled with the Supreme Court's assumption in the *Bartnicki* decision that a ban on using an illegal wiretap to record a conversation on a matter of public concern was permissible.<sup>199</sup> In both *Alvarez* and *Bartnicki*, the impact of the law was to prohibit the creation of a recording, the content of which was highly relevant to politics. Furthermore, in both cases, the law at issue was content-neutral. The difference, however, is that the government's interest in prohibiting electronic wiretaps is far stronger than its interest in prohibiting the recording of public conversations. Such wiretaps directly intrude on private conversations—in *Bartnicki*, the wiretap was of a cell phone conversation<sup>200</sup>—in a way that recording public conversations does not. Furthermore, in a legitimate attempt to protect privacy, the government has a clear and strong regulatory interest in prohibiting *all* wiretaps. Put differently, it is hard to see how an exemption from wiretap laws for intercepting conversations “on matters of public

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197. See *supra* notes 73-76 and accompanying text.

198. See *supra* notes 71-72 and accompanying text (discussing *Kelly v. Borough of Carlisle*, 622 F.3d 248, 262-63 (3d Cir. 2010)).

199. See *supra* text accompanying notes 178-83.

200. *Bartnicki v. Vopper*, 532 U.S. 514, 518-19 (2001).

concern” would be manageable. Given these factors, flat prohibitions on surreptitious wiretaps are almost certainly permissible, even as applied to the creation of recordings containing materials relevant to self-governance.<sup>201</sup>

### C. Bareback Pornography

Los Angeles County’s ban on bareback pornography, Measure B,<sup>202</sup> poses a much more difficult problem than the eavesdropping and wiretapping statutes discussed above. Like those statutes, Measure B clearly targets the production of speech. As noted earlier, the law forbids only the filming of sex without condoms; it does not regulate use of condoms more generally.<sup>203</sup> Measure B is also content-based, because it prevents the creation of specific content—video recordings of sex without condoms. However, it is equally clear that the government interest motivating Measure B, controlling the spread of STDs among actors, is not related to the communicative impact of the speech being suppressed.<sup>204</sup> Thus, under my proposed approach, the proper analysis for this law is some form of intermediate scrutiny, with special attention to whether the law completely suppresses specific content because the government interest here obviously is powerful.

Also, unlike in *Minneapolis Star & Tribune*, there are good reasons why the legislation singles out the production of speech. Theoretically, the best way to prevent the spread of STDs is to mandate the use of condoms for all sex, or perhaps for all promiscuous sex. However, that is obviously not plausible and probably unconstitutional.<sup>205</sup> Furthermore, the creation of pornography is distinguish

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201. One complication here is that even though privacy interests are invaded by any secret wiretaps, the intrusion on privacy is substantially increased if the recording is later broadcasted to an audience. In other words, the government’s interest in protecting privacy is partially independent of communicative impact, but partially not. This may be why in *Bartnicki*, the Court presumed the constitutionality of forbidding the initial wiretap, but struck down an effort to punish a subsequent broadcast of the taped conversation. *See id.* at 525, 535.

202. *See supra* Part I.C.

203. *See supra* note 168 and accompanying text.

204. Note that if the intent behind Measure B was not to protect actors but rather to prevent the creation of films that glorify unprotected sex, then the government interest *would* be directly linked to communicative impact, and Measure B would be presumptively unconstitutional.

205. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *supra* note 168 (citing *Eisenstadt*

able from other sex because it is necessarily promiscuous, and it is commercialized sex. This matters because commercialization makes regulation both easier and more appropriate, and because it would be rather difficult to identify and regulate noncommercial promiscuous sex. Note that if prostitution were legal in California, Measure B would be more suspect if it did not require the use of condoms in prostitution, as Nevada does.<sup>206</sup> But since it is not, there is no under-inclusiveness.

The more difficult questions posed by Measure B are whether it is truly necessary to prevent the spread of STDs, and whether it completely eliminates particular content—in the argot of intermediate scrutiny, whether it “leave[s] open ample alternative channels for communication of the information.”<sup>207</sup> In *Vivid Entertainment*, the plaintiffs argued that Measure B was not necessary because the existing system of universal testing in the adult film industry effectively prevented the spread of STDs.<sup>208</sup> The district court accepted this argument for the purpose of denying defendants’ motion to dismiss,<sup>209</sup> but rejected it for the purpose of denying a preliminary injunction.<sup>210</sup> The question of whether Measure B is truly necessary to achieve the government’s regulatory goals is thus open to dispute.

As for alternative channels, Alexander Birkhold argues that Measure B fails this test because it eliminates any outlet for expressing the message associated with bareback, especially gay bareback pornography.<sup>211</sup> That conclusion, however, is also open to dispute. For one thing, as Birkhold acknowledges, Measure B leaves open the option of using a condom during filming, but then using digital technology to eliminate it.<sup>212</sup> He argues that this option is inadequate because of the costs associated with the technology and because if viewers know a condom was used during filming, the

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v. Baird, 405 U.S. 438 (1972); *Skinner v. Oklahoma*, 316 U.S. 535 (1942)).

206. Barbara G. Brents & Kathryn Hausbeck, *State-Sanctioned Sex: Negotiating Formal and Informal Regulatory Practices in Nevada Brothels*, 44 SOC. PERSP. 307, 314 (2001).

207. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

208. *Vivid Entm’t, LLC v. Fielding*, 965 F. Supp. 2d 1113, 1126 (C.D. Cal. 2013).

209. *Id.* at 1126-27.

210. *Id.* at 1135.

211. Birkhold, *supra* note 25, at 1823-24.

212. *Id.* at 1824.

message is watered down.<sup>213</sup> Given the government's strong interest here, however, the cost argument is not altogether convincing, especially because, presumably, many commercial studios could bear the cost. And as for the watering-down argument, this is based on the proposition that viewers will know how the film was made, which is far from clear. It also remains true that because Measure B applies only in Los Angeles County, in practice it does not eliminate bareback pornography.<sup>214</sup> This last argument, however, strikes me as dubious, because if other jurisdictions adopt similar measures, the effect would be to eliminate true (as opposed to digital) bareback pornography.

Measure B thus poses a genuinely difficult problem. It is supported by strong government interests and is well tailored, both weighing in favor of its validity. On the other hand, its necessity is subject to dispute and its impact on a particular category of speech production is significant. On the whole, however, I am inclined to think that because of the strength of the government's interest in controlling STDs, and because the industry retains the option of creating digital bareback pornography, Measure B should be upheld.

#### *D. Tattooing*

Like Measure B, regulation of tattooing requires a fairly nuanced First Amendment analysis. There can be little doubt that the creation of a tattoo is normally the production of speech. Many tattoos communicate specific messages through words or symbols, which would of course be fully protected speech. And even with respect to purely pictorial tattoos, if the First Amendment protects traditional pictorial art such as oil paintings, there seems no logical reason why a tattoo would not be equally protected. Of course, the content of many, if not most, tattoos are not relevant to democratic government, but some tattoos undoubtedly have sufficient political or cultural content to justify protection. On the other hand, most

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213. *Id.*

214. See Susan Abram, *One Year Later, Condom-in-Porn Law Reshapes Industry in L.A. County*, L.A. DAILY NEWS (Nov. 4, 2013, 12:01 AM), <http://www.dailynews.com/social-affairs/20131104/one-year-later-condoms-in-porn-law-reshapes-industry-in-la-county> [<http://perma.cc/8HE6-AVA3>] (indicating that since the adoption of Measure B, most of the pornographic industry has moved production outside Los Angeles).

regulations of tattoo parlors—such as licensing, inspection, and health rules—are content-neutral and not motivated by hostility to messages conveyed by tattoos. Rather, they are driven by entirely legitimate concerns such as public health or safeguarding minors. Therefore, although such regulations are, under my analysis, subject to some scrutiny, they would generally be easily upheld even if they impose costs on the creation of tattoos on topics of public concern, unless they impose substantially excessive and unnecessary costs.

Much more problematic are complete bans on operating tattoo parlors, such as the ban struck down in *Anderson v. City of Hermosa Beach*.<sup>215</sup> Such bans are on their face content-neutral. In *Anderson*, the court analyzed the ban as such.<sup>216</sup> But even on this issue, a question might be raised about precisely why a jurisdiction might choose to ban tattoo parlors. Many of the possible reasons—primarily health concerns and concerns about access by minors—are certainly content-neutral. But insofar as part of the motivation is connected to the (allegedly) counter-culture connotations of tattoos, that may well be an interest somewhat related to specific messages. In all probability, most courts could follow the lead of the *Anderson* court in treating flat bans as content-neutral, given the difficulty of proving bad motive and the Supreme Court's ambiguity regarding whether such an inquiry into motive is appropriate.<sup>217</sup> But the question remains open to dispute.

Moreover, even if flat bans are analyzed as content-neutral, their validity is doubtful. Under my proposed analytic framework, content-neutral regulation of tattooing poses constitutional concerns only as applied to speech relevant to self-governance. However, some tattoos do send cultural or political messages, and so are protected, and a flat ban by definition prevents their creation. As such, these bans are subject to constitutional scrutiny. Once scrutiny is conceded, however, such bans are hard to justify. As the *Anderson* court pointed out, given the possibility of adopting targeted health regulations, it is hard to see how a flat ban on tattoo parlors is

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215. 621 F.3d 1051, 1068 (9th Cir. 2010).

216. *Id.* at 1064.

217. Compare *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 811-12 (1985) (authorizing an inquiry into administrative motivation), with *United States v. O'Brien*, 391 U.S. 367, 382-86 (1968) (rejecting propriety of inquiries into legislative motive).

necessary to achieve the government's regulatory objectives.<sup>218</sup> Moreover, a ban on tattooing has a substantial impact on speech by completely eliminating a distinctive and, to some speakers, uniquely personal means of communication.<sup>219</sup> Given the weakness of the government's interest in banning tattoo parlors altogether and the substantial impact on speech, the constitutional balance would seem to tilt against such laws.

### *E. Ag-Gag*

If Measure B and regulations of tattooing pose difficult problems, analysis of Utah's Ag-Gag legislation is much more straightforward. Most of the law (except for subsection (b)) explicitly regulates making recordings of agricultural operations.<sup>220</sup> These subsections thus directly restrict producing speech. Subsection (b) admittedly does not directly target speech; it rather prohibits gaining access to an agricultural operation on false pretenses.<sup>221</sup> However, insofar as this provision is likely to be invoked only against animal-rights activists seeking to make recordings, it is likely to be directed at producing speech in practice, even if not on its face. Furthermore, Ag-Gag laws are clearly content-based. They prohibit the creation of specific content: recordings of agricultural operations. Finally, the only plausible purpose behind Ag-Gag laws is to protect sales by preserving the goodwill and business reputations of owners of agricultural operations. However, these interests are directly tied to communicative impact, because agricultural operators' good will and reputations will only be affected if members of the public are offended or repulsed after viewing the recordings of agricultural operations. Therefore, strict scrutiny should apply to such laws, and is likely to be fatal.<sup>222</sup> Needless to say, Utah's interest in protecting the sales and reputations of agribusiness, even if legitimate (which

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218. *Anderson*, 621 F.3d at 1065.

219. *See id.* at 1065-67; *cf. City of LaDue v. Gilleo*, 512 U.S. 43, 54-55 (1994) (striking down ban on residential signs, partly on the grounds that such signs are a distinct and personal medium of communication).

220. *See supra* text accompanying note 112-13.

221. UTAH CODE ANN. § 76-6-112 (West 2012).

222. *See supra* note 176 (noting that a majority of the Supreme Court has upheld only one law under strict scrutiny in a free speech case, and that case involved national security).

is doubtful), certainly does not rise to the level of a compelling interest sufficient to justify censorship.

### *F. Photography*

The regulations of photography discussed in Part I raise perhaps the most difficult analytic issues of all of the restrictions on speech production that we have discussed.<sup>223</sup> With respect to limits on Google's image capture, the problem is complex. On the one hand, such laws at first appear to be content-neutral restrictions on producing speech—akin to time, place, and manner regulations of speech. But that analogy is deceptive. Insofar as restrictions on image capture are designed to protect privacy, they will typically be written to prohibit image capture in particular places, such as residential neighborhoods. But such a law is in effect a ban on taking pictures of homes, which is *not* content-neutral because it singles out specific content (pictures of homes). On the other hand, a privacy law that requires consent before a photograph is taken is probably best understood as content-neutral. Thus, whether the law is content-based will depend heavily on the exact nature of the restriction.

Another difficult question is the value of the speech created by Google. At least some of that speech, by imparting important information to the public regarding geography, is at least marginally relevant to democratic self-governance. Furthermore, regulations on image capture have the potential to substantially restrict Google's ability to capture the data needed for Google Maps and Google Earth. These factors, in combination, argue against the permissibility of regulation. Realistically, however, much of the speech at issue here—driving directions, street views, et cetera—have little real relevance to self-governance. Rather, this speech appears to be commercial services provided by Google.

There are thus real questions about both the value of the speech, and the level of scrutiny that restrictions on Google's image capture should receive. The analysis is further complicated by the fact that the privacy concerns raised by Google's image capture are quite substantial, because they involve photographs, often of private

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223. *See supra* Part I.F.



residences, taken without consent.<sup>224</sup> In short, regulation of Google's image capture involves a situation in which there are strong interests on both sides, and scrutiny is significant but probably not highly searching, so long as the relevant restriction is written in content-neutral terms.<sup>225</sup> How to resolve such cases tends to confound judges because it requires the weighing of incommensurate values—speech versus privacy—with no particular presumption either way.

The facts of *Elane Photography* pose a similarly difficult problem, though for different reasons. Recall that in *Elane Photography*, the New Mexico Supreme Court rejected a First Amendment challenge to the application of an antidiscrimination law against a commercial wedding photographer who declined to photograph a same-sex commitment ceremony.<sup>226</sup> The court concluded that Elane Photography's rights were not violated because the impact of the antidiscrimination statute was simply to prohibit discrimination in choice of clients, not to compel Elane Photography to create speech of which it disapproved.<sup>227</sup> In effect, the court treated the antidiscrimination statute as a generally applicable regulation of conduct. In the course of doing so, the court emphasized that New Mexico law "does not, nor could it, regulate the content of the photographs that Elane Photography produces,"<sup>228</sup> and that "[t]he government has not interfered with Elane Photography's editorial judgment; the only choice regulated is Elane Photography's choice of clients."<sup>229</sup> If the court's analysis is correct, the result is a fortiori correct as well.

But the issue is more difficult than the court acknowledged. For most businesses, prohibiting discrimination would not interfere with their speech, or production of speech.<sup>230</sup> When, however, such a law

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224. For example, the street view of my house on Google Maps provides (admittedly blurry) glimpses into my living room and bedroom.

225. If a restriction is found to be content-based, the problem becomes more substantial, especially because privacy concerns are directly linked to the communicative impact of the eventual speech. The Supreme Court's current speech doctrine suggests that such restrictions may not be enforced if the resultant speech is of public concern, but probably can be enforced against purely private speech. *See, e.g.*, *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975).

226. *Elane Photography v. Willock*, 309 P.3d 53, 64, 66-68 (N.M. 2013).

227. *Id.* at 66-68.

228. *Id.* at 66.

229. *Id.* at 67.

230. *See Wisconsin v. Mitchell*, 508 U.S. 476, 490 (1993) (concluding that a statute imposing a penalty enhancement on criminals who select their victims based on race or other

is imposed on a business that sells photographs (or for that matter, video recordings, oil paintings, or any other depictions) of clients, restricting the business's choice of clients restricts what speech it may produce. In this situation, New Mexico is not restricting Elane Photography's choice of clients; it is forcing the firm to serve particular clients that it does not want to serve. However, the direct, predictable, and indeed desired impact of that action is to force Elane Photography to produce photographs of a same-sex ceremony, which it prefers not to do. That certainly looks like compelled production of speech of a particular content and interference with editorial judgment.

What makes *Elane Photography* such a difficult case is that both characterizations of the law—as a generally applicable regulation of conduct, or as a law compelling production of particular content—are justifiable on the facts. The question posed is whether a law which, as applied, directly and necessarily compels speech production of specific content, but on its face and in most applications has nothing to do with speech, should be subject to serious scrutiny. Put differently, the question is whether the First Amendment compels excusing purely creative or expressive businesses from a generally applicable law that has the practical effect of regulating its speech-producing activities. The New Mexico court simply asserted that the answer was “no,” relying on cases that raised quite different questions.<sup>231</sup> Yet, that conclusion is far from obvious.

Ultimately, however, I do think the court's conclusion was probably correct, at least as applied to commercial businesses.<sup>232</sup> Antidiscrimination statutes do not, on their face or by intent, suppress speech or target the production of speech. Almost all of their applications raise essentially no First Amendment issues. The fact that they may affect the content of speech in some applications does not change the fact that they are, at heart, regulations of conduct. Put differently, even though for Elane Photography, the choice of clients *is* the choice of content, for analytic purposes it seems better to treat them as distinct things. It should be added that this

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protected classifications did not burden free speech rights).

231. *Elane Photography*, 309 P.3d at 71-73.

232. Application of antidiscrimination law to noncommercial associations raises serious constitutional problems, which the Court has recognized. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

approach is consistent with the Supreme Court's decision in *Cohen v. Cowles Media*.<sup>233</sup> There, the Court upheld liability based on promissory estoppel against a media defendant, even though the act that triggered the liability was publication of specific information.<sup>234</sup> Similarly, in *Elane Photography*, I would argue that the fact that application of antidiscrimination law ends up compelling the production of particular speech should not change our characterization of the law as one of general applicability. It must be conceded, however, that this is a very close issue on which precedent is largely lacking—and indeed, on which the *Cohen* Court divided five to four.<sup>235</sup>

### G. *The Right to Gather Information*

Finally, what about the purported right to gather information?<sup>236</sup> To what extent does the above analysis provide support for such a right? The answer, I think, is that it does not. For reasons discussed above, there are sound grounds to conclude that the First Amendment should be understood to provide some protection for the actual production of speech. The Press Clause provides textual and historical support for such a right, and in any event, the production of speech, like the distribution of speech, is so closely connected to acts of communication that penumbral protection seems necessary. The same simply cannot be said of gathering information. For one thing, as noted earlier, the causal and temporal connection between gathering information and speech is more distant than the connection between producing speech and actual speech.<sup>237</sup> More fundamentally, unlike speech production, information gathering often has no connection to speech at all. Admittedly, much speech requires information, and when the institutional media or other professional speakers gather information, it is generally to produce speech. For much of the population, however, information gathering may be an end in itself, a matter of self-education, with no plan to use the

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233. See 501 U.S. 663 (1991).

234. *Id.* at 670-71; *cf. id.* at 675-76 (Blackmun, J., dissenting) (arguing that because liability was triggered by publication, the case did not involve generally applicable regulations).

235. See *id.* at 665, 672, 676.

236. See *supra* Part I.G.

237. See *supra* notes 9-17 and accompanying text.

information to create speech. Of course, open government is generally desirable, and government efforts to withhold information from citizens are problematic under democratic theory. But it is hard to come up with a strong argument that the First Amendment requires open government, especially if one accepts, as I believe one must, the technology reading of the Press Clause.

One might imagine a counterargument that some access to information is essential if the speech and press rights are to have meaning.<sup>238</sup> The problem is that there are many things that are necessary for meaningful communication that the First Amendment does not protect. For example, in campaign finance cases, the Supreme Court has held that spending money is protected by the First Amendment, because spending money is essential to speaking effectively.<sup>239</sup> No one, however, believes that this undeniable fact creates a right to government funding for one's speech.<sup>240</sup> Indeed, a right to gather information has much in common with a subsidy, in that the government will rarely be able to provide information to citizens without incurring costs. Similarly, some forms of speech require paper, but surely that does not mean that the government must permit public forests to be logged to create that paper. Fundamentally, what remains true is that although the First Amendment prohibits the government from suppressing speech and speech production, it does not require the government to enable the creation of speech. A right to gather information is more akin to the latter than to the former.

Though I reject a broad right to gather information, there is one situation in which government interference with information gathering might raise a First Amendment issue. If the government generally provides the public with access to information, but then tries to block access to those who would use the information to create speech, for instance those who would record and disseminate that information, that action seems more like a restriction on speech creation than a restriction on information, because the actual target of such a law is the creation of speech. Such selective restrictions on

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238. See, e.g., McDonald, *supra* note 3, at 313-20, 347-48.

239. Citizens United v. FEC, 558 U.S. 310, 339-40 (2010); Buckley v. Valeo, 424 U.S. 1, 19 (1976).

240. Cf. Rust v. Sullivan, 500 U.S. 173, 192-200 (1991) (holding that when the government subsidizes speech, it may select what content or viewpoint it wishes to subsidize).

access, therefore, do raise First Amendment concerns. The most obvious example of such a restriction would be if the public generally was allowed access to an event, but members of the press were selectively excluded. This principle, however, is *not* limited to discrimination against the press, whomever that is, because the Press Clause does not favor any particular group of speakers. Any rule crafted to exclude potential speakers is suspect. Indeed, it is hard to envision any legitimate reason, unrelated to the communicative impact of speech, why the government would create such a selective exclusion. Such exclusions thus should be presumed to be unconstitutional—though I do not exclude the possibility that under unusual circumstances, such as the exclusion of cameras from courtrooms, a noncommunicative government interest sufficient to justify selective exclusion, might exist.

It should be noted that the conclusions I have reached regarding information gathering essentially reflect the current state of the Supreme Court's jurisprudence. As noted earlier, the Court has consistently rejected a right to gather information for either the institutional press, or the public generally.<sup>241</sup> However, all of the cases have involved generally applicable laws restricting access to information, not selective restrictions. If the Court did face a selective restriction, I am confident that it would be as suspicious of such a law as it was of the selective tax struck down in *Minneapolis Star & Tribune*. In short, this is one area where the Court appears to have gotten it right.

#### CONCLUSION

The First Amendment does not only protect speech, meaning an act of communication. It also protects the creation of communicative materials—in other words, producing speech. The Press Clause of the First Amendment provides a strong textual basis for such protection, because what the Press Clause protects—the printing press—is and was a technology used for the creation of speech meant for mass dissemination. Unlike pure communication, however, the production of speech entails conduct, and often conduct with negative social consequences. As a result, while some protection for

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241. See *supra* notes 131-35 and accompanying text.

producing speech is essential, that protection cannot be as extensive as the protection accorded to communication itself. The objective of this Article has been to develop and defend the principle that the First Amendment protects speech production, and to propose a doctrinal framework to implement that protection.

The larger question raised by my analysis is the extent to which constitutional provisions generally, and the First Amendment in particular, should be understood to extend beyond their literal text and to create penumbral principles which are necessary to make the central constitutional protections meaningful. Justice Douglas proposed such an approach in *Griswold v. Connecticut*, but then gave it a bad name by adopting an unmoored and excessive understanding of what penumbral protection might look like.<sup>242</sup> The analysis presented here suggests, however, that even if we reject the reasoning of the *Griswold* majority, we should not reject penumbras altogether. It is possible to envision penumbral principles that are truly tied to constitutional text and that do not entail either unlimited rights or unlimited judicial discretion. What remains to be considered is what sorts of penumbras emanate from parts of the First Amendment other than the Speech and Press Clauses, or from the Bill of Rights and Fourteenth Amendment more generally.

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242. 381 U.S. 479, 483-84 (1965).

