

# RECORDING AS HECKLING

*Scott Skinner-Thompson\**

## ABSTRACT

*There are increasing calls for a right to public privacy, and often such calls are justified with reliance on the First Amendment. Similarly, there is a growing body of authority recognizing that citizen recording of public space is also protected by the First Amendment. Both purported rights serve important First Amendment values—recording information can be critical to future speech and, as a form of confrontation to authority, is also a direct form of expression. Likewise, functional efforts to maintain privacy while navigating public space may help create an incubator for thought and future speech, and can also serve as a form of direct expressive resistance to surveillance regimes.*

*But while recordings may be critical to government accountability and have important First Amendment benefits, they also have obvious privacy implications. How do we balance the right to record with the right to maintain privacy? When can the government regulate recording that attempts to breach the privacy shields erected by other citizens?*

*I suggest that the concept of the heckler’s veto provides a promising rubric for analyzing attempts to regulate these sometimes competing forms of “speech.” This piece argues that just as a heckler’s suppression of another’s free speech justifies government regulation of the heckler’s speech, so too when recording (a form of speech) infringes on and pierces reasonable efforts to maintain privacy (also a form of speech), then the government may—through direct regulation or even tort law—limit the ability to record.*

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\* Associate Professor, University of Colorado Law School. For helpful comments and conversations, thanks to [TK].

## OVERVIEW

Citizen video recording of public officials—police officers, politicians, and other government officers—serves important democratic functions. It documents and creates a record of government action, rendering that action susceptible to subsequent critique and helping ensure government accountability. For instance, increasingly citizen recording of police officers’ use of force against people of color has served as a catalyst for public debate regarding the appropriateness of that force and embedded racial bias.<sup>1</sup> The killings of Eric Garner, Keith Lamont Scott, Walter Scott, Alton Sterling, and Philando Castile, among others, were all captured on videos taken by citizen witnesses, catapulting their tragic deaths into public limelight and engendering greater scrutiny of police brutality.<sup>2</sup> While much attention has focused on police violence towards black men, black women, including Sandra Bland, Mya Hall, Rekia Boyd, and Michelle Cusseaux, are also too frequently (and frequently overlooked) victims of police violence<sup>3</sup> – and citizen recording has helped document some instances of that abuse.<sup>4</sup> The power of citizen recordings as catalyst for political change is further demonstrated by the role of such recordings in spurring large scale protests and social movements, both in the United States and abroad.<sup>5</sup>

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<sup>1</sup> Damien Cave & Rochelle Oliver, *The Raw Videos That Have Sparked Outrage Over Police Treatment of Blacks*, N.Y. TIMES (Oct. 4, 2016), [https://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html?\\_r=0](https://www.nytimes.com/interactive/2015/07/30/us/police-videos-race.html?_r=0).

<sup>2</sup> Nicole Narea, *Protecting the Right to Record Police Brutality*, THE NEW REPUBLIC (Oct. 7, 2016), <https://newrepublic.com/article/137533/protecting-right-record-police-brutality>. Of course, that public attention has not always resulted in concrete accountability for the officers at issue. See Kate Levine, *Police Suspects*, 116 COLUM. L. REV. 1197 (2016) (documenting the special procedural protections afforded to police suspects, and insightfully suggesting that these safeguards could be used to enhance protections for all criminal suspects).

<sup>3</sup> Kimberlé W. Crenshaw & Andrea J. Ritchie, *Say Her Name: Resisting Police Brutality Against Black Women*, AFRICAN AMERICAN POLICY FORUM (July 2015), [http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF\\_SMN\\_Brief\\_Full\\_singles-min.pdf](http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/560c068ee4b0af26f72741df/1443628686535/AAPF_SMN_Brief_Full_singles-min.pdf).

<sup>4</sup> Brittney Cooper, *America’s war on Black girls: Why McKinney police violence isn’t about “one bad apple”*, SALON (June 10, 2015), [http://www.salon.com/2015/06/10/americas\\_war\\_on\\_black\\_girls\\_why\\_mckinney\\_police\\_violence\\_isnt\\_about\\_one\\_bad\\_apple/](http://www.salon.com/2015/06/10/americas_war_on_black_girls_why_mckinney_police_violence_isnt_about_one_bad_apple/) (analyzing police violence against 14-year old black girl at a pool party as symptom of larger epidemic).

<sup>5</sup> See ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 6 (2017) (analyzing the role of cell-phone cameras in amplifying social movements, and observing that “[u]biquitous cell-phone cameras have greatly increased the ability of citizens to document wrongdoings and potentially move the

In addition to serving a post-hoc accountability function, citizen recording also serves as an in-the-moment form of expressive resistance to government officials—communicating a message of critique<sup>6</sup> and helping directly reclaim public space for the people.<sup>7</sup> As both a record of government action enabling future expressive critique and a direct form of expression, citizen recording serves important First Amendment functions, and is often entitled to First Amendment protections.

Supplementing long-standing precedent recognizing that there are First Amendment limitations on the government’s ability to regulate or punish dissemination of information,<sup>8</sup> courts have begun to recognize that limits on recording—the collection of information in the public realm—also butt against the First Amendment.<sup>9</sup> For example, the Seventh Circuit Court of Appeals held that Illinois’s eavesdropping statute, which criminalized the creation of audio recordings without the consent of all the parties to the recording, impermissibly burdened the First Amendment when applied to recordings of law enforcement officers, because “[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment 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.”<sup>10</sup>

But citizen recording also has negative implications for the privacy rights of other citizens—it can expose them to unwanted attention and publicity, potentially capture them engaged in compromising or

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conversation beyond ‘authorities said, activists claimed,’” and pointing to the Gezi Park protests in Turkey as an example).

<sup>6</sup> Jocelyn Simonson, *Beyond Body Cameras: Defending a Robust Right to Record the Police*, 104 GEO. L.J. 1559, 1573 (2016).

<sup>7</sup> Cf. Scott Skinner-Thompson, *The Right to the Public Square: Hoodies, Head Veils, & Bathrooms*, MUFTAH (March 23, 2017), <https://muftah.org/right-public-square-hoodies-head-veils-bathrooms/#.WTln6E2rPtQ>.

<sup>8</sup> See, e.g., *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975) (cannot punish publication of truthful info already in court records); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (cannot punish truthful publication of info obtained from government agency); *Bartnicki v. Vopper*, 532 U.S. 514 (2001) (cannot punish publication of speech regarding matter of public concern, notwithstanding that info was illegally intercepted/obtained by third party in the first instance).

<sup>9</sup> See, e.g., *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (striking down Illinois eavesdropping statute as applied to recording of police, applying First Amendment intermediate scrutiny); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011) (reasoning similarly and holding that arrest of bystander who recorded police violated First Amendment). *But see* *Fields v. City of Phila.*, 166 F. Supp. 3d 528 (E.D. Pa. 2016) (no expressive conduct implicated where police detained citizen copwatcher who was videotaping interactions of police with protestors).

<sup>10</sup> *Alvarez*, 679 F.3d at 595 (emphasis in original).

embarrassing behavior, with potentially devastating downstream consequences.<sup>11</sup> For example, depending on the context, a citizen recording could out someone's sexuality or gender identity to unintended audiences or could make widely known that a person was engaged in unpopular or stigmatized kinds of political organizing.<sup>12</sup> These privacy threats are exacerbated with advances in technology, including smart phone video cameras, telephoto lenses that permit recording from long distances away,<sup>13</sup> and livestreaming software, such as Periscope or Facebook Live, that empower citizens to broadcast what they are recording in real time across the globe. The privacy threat of widespread cameras is further intensified by increasingly available facial recognition software, that may permit someone captured on film in public to be easily identified even if they were not well known previously.<sup>14</sup>

And these privacy harms impose corollary costs on First Amendment values. Efforts to maintain privacy while in public are increasingly understood as advancing expressive, democratic functions themselves.<sup>15</sup> The right to anonymity or privacy while in public—including while navigating the internet—is critical to the freedom of association, enabling people to gather together and politically organize without having their identities known or disclosed.<sup>16</sup> Privacy in public, like recording's

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<sup>11</sup> For that reason, the Witness organization, which provides guidance and training on how to effectively film law enforcement and protests for the purposes of accountability and to aid social movements, nevertheless cautions that before sharing video, activists should consider whether the video will negatively impact any of the people recorded. *See Filming the Police*, WITNESS, <https://library.witness.org/product/filming-protests-demonstrations-police-conduct/> (last visited June 9, 2017).

<sup>12</sup> *Cf.* Scott Skinner-Thompson, *Outing Privacy*, 110 NW. U. L. REV. 159 (2015) (arguing that government outing of one's status as a sexual minority or political beliefs implicates substantive due process privacy protections).

<sup>13</sup> *See, e.g., Foster v. Svenson*, 128 A.D.3d 150 (N.Y. App. Div. 2015) (no actionable privacy violation where artist used high powered camera lens to take photos of people through their apartment windows, because as art the photos were protected by the First Amendment).

<sup>14</sup> *Cf.* Clare Garvie et al., *The Perpetual Line-Up: Unregulated Police Face Recognition in America*, GEORGETOWN LAW CENTER ON PRIVACY & TECHNOLOGY (Oct. 18, 2016), <https://www.perpetuallineup.org/report> (documenting that one in two Americans is in a law enforcement facial recognition database).

<sup>15</sup> Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 252-58 (2002) (explaining that anonymity in public helps give practical meaning and effect to the freedoms of movement, speech, and association).

<sup>16</sup> Deven R. Desai, *Constitutional Limits on Surveillance: Associational Freedom in the Age of Data Hoarding*, 90 NOTRE DAME L. REV. 579, 590 (2014) (arguing that data aggravates the threats to associational and expressive freedoms posed by government surveillance); Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 747-48

information-gathering function, may also be critical to the cultivation of ideas and serve as an incubator for the cultivation of future speech.<sup>17</sup> Functional efforts to maintain privacy while in public, also like recording, can also serve as direct statements of resistance and critique to surveillance regimes.<sup>18</sup> For example, efforts to wear masks or hoodies at protests or use Tor to cloak online activity are often read by the state as expressing something intimidating, and are therefore targeted by the state for additional surveillance, highlighting the expressive quality of efforts to maintain privacy.<sup>19</sup> To the extent citizen recording further burdens or infringes on individual efforts to maintain privacy, it further erodes the expressive, First Amendment purposes served by public privacy.

In this way, citizen recording can actually serve as a threat not just to privacy rights, but also the expressive rights upon which the right to record itself has often been defended.

How should we balance or mediate the democratic purposes served by citizen recording with the similar purposes served by efforts to maintain privacy in public? I believe that the First Amendment, rather than serving only as a limit on government regulation of citizen recording, actually provides a path forward in terms of balancing the competing First Amendment interests at stake. Specifically, I suggest that the concept of the heckler's veto provides insight into how courts should permit regulation of citizen recording when it infringes on the corresponding First Amendment rights of those trying to maintain their privacy. Put differently, by understanding that speech rights are implicated on both sides of the ledger—by those recording and by those trying to avoid it—and by understanding that sometimes speech, including recording, has downstream, tangible, perlocutionary, impacts, the proper balance can be struck between

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(2008) (explaining that surveillance of networked communications implicates the freedom to associate); Katherine J. Strandburg, *Membership Lists, Metadata, and Freedom of Association's Specificity Requirement*, 10 I/S 327, 356-65 (2014) (arguing that the freedom of association's protections extend to NSA's telephony metadata program).

<sup>17</sup> Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1905 (2013) (“[F]reedom from surveillance, whether public or private, is foundational to the practice of informed and reflective citizenship.”); Neil M. Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387, 408-25 (2008) (explaining why intellectual privacy is critical to freedom of thought); Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1945-46 (2013) (arguing “that new ideas often develop best away from the intense scrutiny of public exposure” and “that a meaningful guarantee of privacy — protection from surveillance or interference — is necessary to promote this kind of intellectual freedom”)

<sup>18</sup> Scott Skinner-Thompson, *Performative Privacy*, 50 U.C. DAVIS L. REV. 1673 (2017) (explaining that in the social context of ubiquitous surveillance, individual efforts to maintain privacy while in public take on an outward-facing expressive dimension).

<sup>19</sup> *Id.*

guaranteeing the right to record in most instances, while preserving the interests of private citizens seeking to remain anonymous.

An examination of the law surrounding the so-called heckler's veto demonstrates how so. There are two conceptions of the heckler's veto in American law.

The first provides that absent legal intervention regulating a heckler, a heckler's disruptive speech would silence another speaker, thereby justifying regulation of the heckler's speech under the First Amendment notwithstanding that it is government silencing of a person's speech. In other words, the law recognizes that in certain instances facilitating speech may require limiting another person's disruptive speech. This framing of the heckler's veto is often used to justify limiting or shutting down protests of a public speaker when those protests begin to prevent or disrupt the public speaker from continuing.<sup>20</sup> It also finds parallels in law recognizing that students have a right to free speech at school, until such time as their speech becomes disruptive to educational attainment of others.<sup>21</sup> Under this conception, to the extent that a citizen recording—a form of speech— infringes on the expressive activities of another, it could be legitimately regulated consistent with the First Amendment. In other words, if the recording violates or pierces efforts of others to maintain privacy in public, exposing their identity, infringing on their associational rights and impairing their ability to express resistance to surveillance, it could be limited either through direct government regulation or even through privacy tort law.

The second conception of the heckler's veto found in American law is that a heckler's disruptive, protesting speech or reaction to another's speech cannot generally be used to justify *government* regulation or silencing directed toward speaker one—the non-heckler.<sup>22</sup> In other words, the state cannot “silence a speaker to appease the crowd.”<sup>23</sup> For example, in a recent case, *Bible Believers v. Wayne County*, the Sixth Circuit Court of Appeals, sitting en banc, held that so long as speech does not fall into a

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<sup>20</sup> Indeed, as noted constitutional law scholar and law school dean Erwin Chemerinsky has explained, “The law is well established that the government can act to prevent a heckler's veto -- to prevent the reaction of the audience from silencing the speaker. There is simply no 1st Amendment right to go into an auditorium and prevent a speaker from being heard, no matter who the speaker is or how strongly one disagrees with his or her message.” Erwin Chemerinsky, *UC Irvine's Free Speech Debate*, L.A. TIMES (Feb. 18, 2010), <http://articles.latimes.com/2010/feb/18/opinion/la-oe-chemerinsky18-2010feb18>

<sup>21</sup> *Cf.* *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (there must be evidence that speech would constitute a substantial disruption with schoolwork or discipline in order to silence that speech consistent with the First Amendment).

<sup>22</sup> *See, e.g., Cantwell v. Conn.*, 310 U.S. 296 (1940) (reaction of audience can't generally be used to justify suppression of speech).

<sup>23</sup> *Bible Believers v. Wayne County*, 805 F.3d 228, 234 (6th Cir. 2015) (en banc).

category of less-protected speech, such as fighting words or incitement of violence, the government cannot silence the speech based on the negative reactions of speakers. According to the court, “[w]hen a peaceful speaker, whose message is constitutionally protected, is confronted by a hostile crowd, the state may not silence the speaker as an expedient alternative to containing or snuffing out the lawless behavior of the rioting individuals.”<sup>24</sup> In that case, the court held that the police violated the First Amendment when they silenced a group of evangelical Christians spreading anti-Islamic speech at an Arab International Festival in Dearborn, Michigan.<sup>25</sup>

This framing of the heckler’s veto is less directly analogous to situations involving “recording as speech” because the citizen recording/speech is not being used to directly justify government invasion of “privacy as speech”—instead the private individual recording is directly impacting another’s privacy.<sup>26</sup> Nevertheless, this body of law, too, serves to highlight that under the First Amendment, competing speech interests must be balanced and when individuals’ actions begin to infringe on the speech rights of others, the government has an affirmative obligation to actually protect the speech of those being silenced—here, the speech of those trying to maintain privacy.

In short, there are both discursive and doctrinal benefits to understanding contests between those who want to record public activity with those who want to maintain privacy as contests over expression—as battles over the heckler’s veto. On a discursive level, the heckler’s veto framing helps us understand that expressive values are implicated on both sides of the debate. Currently, the expressive value of privacy plays a less prominent role in the discussions, with the expressive importance of recording taking precedent. But the heckler’s veto frame also foregrounds that democratic governance and liberated but vibrant public space is contingent on a balance between the ability to maintain privacy in public and information gather in public.

On a doctrinal level, the heckler’s veto framing makes it easier to strike that balance in courts of law—with expressive values being seen only with regard to the right to record, that right will likely continue to trump any

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<sup>24</sup> *Id.* at 252.

<sup>25</sup> *Id.* at 236.

<sup>26</sup> That said, to the extent that the government does rely on widespread citizen surveillance to claim that there is no reasonable expectation of privacy in public and, therefore, that the government’s concomitant surveillance is justified, the government is, in one sense, relying on the expression-suppressing acts of others to justify its own expression-suppressing surveillance. *See, e.g.,* *United States v. Houston*, 813 F.3d 282, 289-90 (6th Cir. 2016) (holding that there is no Fourth Amendment violation where police recorded an individual’s activity outside his home for 10 weeks with a camera mounted on a utility pole by the utility company without a warrant because the individual’s activities were exposed to “the public”).

efforts to maintain privacy. The analogy to the heckler's veto helps build off and enhances arguments that recording infringes on situated/physical harms to privacy and, therefore that recording can be regulated pursuant to time, place, manner restrictions (nuisance, trespass laws),<sup>27</sup> by highlighting the expressive harms to recording. But, as the above discussion of heckler's veto law makes clear, the government has a freer hand in regulating speech (recording) when it infringes on other people's expressive rights. Recognizing the expressive value of privacy helps, in turn, justify regulation of recording and helps highlight how recording may be disruptive to other speech. If recording is, as some have argued, directly expressive and outward facing, then technology such as Periscope and telephoto lenses that "amplify" the expression, also increase the speech's "disruption" toward other's speech (privacy), justifying its regulation.

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<sup>27</sup> See Margot E. Kaminski, *Privacy and the Right to Record*, 97 B. U. L. REV. 167 (2017).