HEALTH PRIVACY IN PUBLIC SPACES

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ABSTRACT

This Article examines the recording of individuals traveling through public spaces to access health care clinics. Although such image capture negatively impacts both individual and public health by discouraging people from seeking sensitive health care treatment, privacy torts do not sufficiently address this growing problem. In recent years, courts have moved increasingly toward recognizing a constitutional right to record in public places. Yet current jurisprudence and scholarship fail to examine the unique concerns related to public image capture by individual—as opposed to government—actors. And while a major justification for failing to extend privacy protections to public spaces has been the idea that individuals consent to being recorded by virtue of passing through public spaces, the consent model does not take into account modern land-use policies that effectively push private business into public spaces by emphasizing walkability and mixed-use development. Drawing upon other constitutional safe spaces where states and localities limit image capture due to concerns of intimidation and interference with competing constitutional rights, this Article proposes local government ordinances creating camera-free zones outside of health clinics as a democratic, balanced solution to a complex policy problem. More broadly, this Article highlights local governments as important public health policymakers in an era of rapidly shifting technology and urban growth.

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INTRODUCTION

Imagine walking to the doctor's office in a dense, urban area. Because your city has fostered anti-sprawl initiatives, making parking downtown expensive and difficult to find, you take mass-transit into the city and walk along the sidewalk to the office's entrance. Just outside the door of the office, you see an individual with a cell phone recording each person who enters or exits the office. Given the ease of publishing mobile video to any number of websites, as well as the rise of face-recognition technology,[1] it is perfectly reasonable to assume that the person recording the clinic can extract and publish not only the images of every patient, but also their identities. Are these recordings something the law should protect or prevent? If the latter, what should the mechanism of regulating image capture of health care access be? And by what entity? This Article will use this puzzle to examine what role public health regulators might have to play in the current dialogue about whether and how privacy should be protected in public spaces, and to consider the appropriateness of local governments as public health policymakers.

In the past decade, courts have begun to recognize a burgeoning right to record events taking place in public spaces.[2] At the same time, the rise of

1. *See, e.g.*, Natasha Singer, *When No One Is Just a Face in the Crowd*, N.Y. TIMES, Feb. 2, 2014, at BU3, *available at* http://www.nytimes.com/2014/02/02/technology/when-no-one-is-just-a-face-in-the-crowd.html?_r=0. (discussing privacy implications and commercial availability of face-recognition technology).

2. A number of courts have determined that "photography or videography that has a communicative or expressive purpose enjoys some First Amendment protection." Gilles v. Davis, 427 F.3d 197, 212 n.14 (3d Cir. 2005); *see* Bery v. City of New York, 97 F.3d 689, 699 (2d Cir. 1996) (holding that sale of art and photographs is protected activity); Porat v. Lincoln Towers Cmty. Ass'n, No. 04 Civ. 3199(LAP), 2005 WL 646093, at *4 (S.D.N.Y. Mar. 21, 2005) (noting that photography for

technologies facilitating recording, facial recognition, and swift, permanent publication have created what some commentators have termed a society of pervasive image capture.[3] From Google Glass[4] to cell phone cameras,[5] Americans are increasingly able to record the world around them; social media platforms offer quick, easy, and often permanent publication of these images;[6] and the increasing reliability of face-recognition software allows both individuals and corporations to identify[7] those people depicted.[8]

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more than mere aesthetic or recreational purposes enjoys some First Amendment protection); Baker v. City of New York, No. 01 CIV. 4888(NRB), 2002 WL 31132880, at *5 (S.D.N.Y. Sept. 26, 2002) ("It is undisputed that [plaintiff's] street photography is First Amendment expression[.]").

3. *See, e.g.*, Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image over the Internet*, 49 SANTA CLARA L. REV. 313, 314 (2009) (terming pervasive human monitoring "omniveillance"); Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 339 (2011) ("Three developments converge to form the new reality of pervasive image capture: digital photographic capability merges synergistically with the ubiquity of the cell phone camera and the growth of online venues for image sharing.").

4. In 2012, Google began publicly promoting its Glass product, a project involving enhanced-reality glasses capable of capturing images that the wearer is currently seeing. *See* Annalee Newitz, *Could This Photograph Change the Future?*, IO9.COM (May 10, 2012, 9:20 AM), http://io9.com/5909151/could-this-photograph-change-the-future ("With Glass, you can record everything you see. Literally.").

5. *See* Kreimer, *supra* note 3, at 340–41; *see also* MAEVE DUGGAN & LEE RAINIE, PEW RESEARCH CTR.'S INTERNET & AM. LIFE PROJECT, CELL PHONE ACTIVITIES 2012: PHOTO TAKING, TEXTING, AND ACCESSING THE INTERNET ARE THE MOST POPULAR ACTIVITIES PEOPLE PURSUE WITH THEIR MOBILE PHONES 2 (2012), *available at* http://www.pewinternet.org/files/old-media/Files/Reports/2012/PIP_CellActivities_11.25.pdf (Pew Internet poll results showed that of the 85% of Americans that use a cellular phone, 82% use their phone as a camera.).

6. Kreimer, *supra* note 3, at 341.

7. *See, e.g.*, Marc Jonathan Blitz, *The Dangers of Fighting Terrorism with Technocommunitarianism: Constitutional Protections of Free Expression, Exploration, and Unmonitored Activity in Urban Spaces*, 32 FORDHAM URB. L.J. 677, 681 (2005) (hereinafter Blitz, *Dangers*); Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World That Tracks Image and Identity*, 82 TEX. L. REV. 1349, 1390 (2004) (hereinafter Blitz, *Video Surveillance*); Elizabeth Paton-Simpson, *Privacy and the Reasonable Paranoid: The Protection of Privacy in Public Places*, 50 U. TORONTO L.J. 305, 342 (2000).

8. In what may be a sign of things to come, Facebook purchased the face-recognition software company Face.com in 2012. Bianca Bosker, *Facebook Buys Facial Recognition Firm Face.com: What It Wants with Your Face*, HUFFINGTON POST (June 19, 2012, 5:50 PM), http://www.huffingtonpost.com/2012/06/19/facebook-buys-face-com_n_1608996.html. Shortly thereafter, Facebook altered its Terms of Use to require its users to allow information sharing between Facebook and its affiliates. *See Data Use Policy*, FACEBOOK, https://www.facebook.com/about/privacy/#!/full_data_use_policy (last visited July 29, 2013) (noting that, effective December 11, 2012, "[Facebook] may share information we receive with businesses that are legally part of the same group of companies that Facebook is part of, or that become part of that group (often these companies are called affiliates). Likewise, our affiliates may share information with us as well"). This move enabled Facebook to access the biometric information of any of its more than one billion users (and any other individuals photographed by those users). *See* Bosker, *supra*. Some industry insiders, including Google, remain troubled by the pairing of mobile tracking and face-recognition. *See id.* (noting that facial recognition was the one technology Google "developed, then withheld").

There has begun a vigorous scholarly debate over the utility and propriety of protecting such image capture in public spaces.[9] While many recognize the expressive and informational value of public image capture,[10] there has also been discussion of the downside of public image capture and publication without the subject's consent.[11] Missing from this debate, however, has been any discussion of the effect that public image capture and identification have—and will have—on access to health care services.

This Article is a first attempt to address this gap in the scholarship, and to take the broader discussion of public image capture and focus it upon the consequences of capturing health care access on camera.[12] Although health care privacy law is premised upon a good deal of speech restriction—the speech of doctors, nurses, and researchers—to prevent disclosure of health information, such protections have not to date included a prohibition on recording individual access to health care facilities. Nor have scholars or land-use planners considered the effects of thrusting urban populations into public spaces where they will increasingly face involuntary image capture. This Article does not suggest the expansion of existing privacy tort law or the creation of a new right, but rather suggests local government action to protect individual privacy and the public health.

Given the urban character of much of the country, most Americans often must pass through public spaces to access health care services.[13] Although in passing through urban spaces we are, by definition, doing something *publicly*, the character of crowded urban environments has lent an expectation of anonymity (or at least near-anonymity) in our movements.[14] In some ways, however, technology has turned our urban

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9. *See, e.g.*, Blitz, *Dangers*, *supra* note 7, at 681.

10. *See, e.g.*, Heidi Reamer Anderson, *The Mythical Right to Obscurity: A Pragmatic Defense of No Privacy in Public*, 7 J. L. & POL'Y FOR INFO. SOC'Y 543, 548, 571 (2012).

11. *See* Mary Anne Franks, *The Normative Jurisprudence of Creepshots*, CONCURRING OPINIONS (Oct. 23, 2012), http://www.concurringopinions.com/archives/2012/10/the-normative-jurisprudence-of-creepshots.html; *see also* Adrian Chen, *Unmasking Reddit's Violentacrez, The Biggest Troll on the Web*, GAWKER (Oct. 12, 2012, 5:00 PM), http://gawker.com/5950981/unmasking-reddits-violentacrez-the-biggest-troll-on-the-web.

12. Within Professor Jane Bambauer's framework for examining personal information flow, see Jane Yakowitz Bambauer, *The New Intrusion*, 88 NOTRE DAME L. REV. 205, 211–13 (2012), which describes four regulable stages: (1) observation; (2) capture; (3) dissemination; and (4) use. This Article will focus upon the potential regulation of capture.

13. *See* Blitz, *Video Surveillance*, *supra* note 7, at 1358 ("A person usually cannot enter a psychiatrist's office, marriage counseling center, or infertility clinic except from a public street.").

14. *See* GEORG SIMMEL, *The Metropolis and Mental Life*, *in* ON INDIVIDUALITY AND SOCIAL FORMS 324, 333 (Donald N. Levine ed., 1971); *see also* Luke A. Boso, *Urban Bias, Rural Sexual Minorities, and the Courts*, 60 UCLA L. REV. 562, 571 (2013) (noting that "actual or perceived lack of individual anonymity is a fundamental feature of rural life"); Lisa R. Pruitt, *Gender, Geography & Rural Justice*, 23 BERKELEY J. GENDER L. & JUST. 338, 360 (2008) (noting that a "lack of anonymity" flows from spatial isolation in rural spaces); Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 237 (2002) (distinguishing a right to anonymity in public spaces from a right to privacy (citing William H. Rehnquist, *Is an*

cores into small towns where patients can be identified, despite the urban clinic-goer's higher expectations of anonymity. Yet both courts and scholars have been skeptical of extending an expectation of anonymity, and have rejected for the most part claims to privacy for actions undertaken in public spaces.[15] Such rejections are often based on the idea that, simply by being in public spaces, individuals consent to being recorded.[16]

But it cannot be said that individuals seeking health care services are moving through public spaces entirely voluntarily. The move toward higher density, walkability, and mixed-use development are all in vogue at the state and local levels.[17] Though enacted for admirable reasons, these policies have the effect of pushing people into public spaces such as sidewalks and public transit, in order to transact even their most sensitive business. Thus, the downside of these policies is the potential loss of privacy for the people moving through those spaces. And for those individuals seeking health care, the choice may be stark: forego privacy or forego care.

Health privacy is exceedingly important to achieving both individual and collective health goals.[18] Privacy protection relates to more than just individual rights. It also "furthers fundamental public policy goals relating to liberal democratic citizenship, innovation, and human flourishing, and those purposes must be taken into account when making privacy policy."[19] And the broader policy effects of privacy intrusions are certainly implicated in the loss of health care privacy. Without guarantees that health care can be accessed anonymously, individuals may delay care or forego it altogether.

In the case of certain sensitive health services, including reproductive health care, the mere act of being recorded entering or exiting a facility

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Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way, Baby, 23 KAN. L. REV. 1, 9 (1974))); Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 9 (2007) (noting that there is some expectation of privacy in public spaces, and positing that "there is at least a minimal First Amendment right to remain anonymous in certain public settings").

15. *See infra* Part IA.

16. *See infra* Part IA.

17. *See* Stephen R. Miller, *Legal Neighborhoods*, 37 HARV. ENVTL. L. REV. 105, 135–36 (2013). Walkable urban neighborhoods are also increasingly desirable, commanding premium prices. *See* Emily Badger, *Why We Pay More for Walkable Neighborhoods*, CITYLAB (May 28, 2012), http://www.citylab.com/work/2012/05/why-you-pay-more-walkable-neighborhoods/2122/ (describing increasing high demand for "mixed-use, dense and amenity-rich neighborhoods" with resulting price premium); *see also* John Andrew Brunner-Brown, Comment*, Thirty Minutes or Less: The Inelasticity of Commuting*, 43 GOLDEN GATE U. L. REV. 355, 368 (2013) (citing BELDON RUSSONELLO & STEWART LLC, THE 2011 COMMUNITY PREFERENCE SURVEY: WHAT AMERICANS ARE LOOKING FOR WHEN DECIDING WHERE TO LIVE 2–3 (2011), *available at* www.realtor.org/sites/default/files/smart-growth-comm-survey-results-2011.pdf).

18. *See infra* Section II.

19. Julie E. Cohen, *What Privacy Is For*, 126 HARV. L. REV. 1904, 1927 (2013).

may either deter individuals from accessing care or result in the "outing" of patients.[20] This sort of outing, while it may seem extreme or unlikely, has occurred in other spaces where individuals (often women) are viewed as having transgressed. For example, the "doxxing" and online harassment of women critical of the representation of women in computer games has led to a lively debate about the boundaries of public and private information online.[21] Though some commentators have noted the publication of individuals' home addresses merely gives a wider audience to already public information, such publication has arguably had real-world effects on the safety of these women. Similarly, while some might contend that patients are consenting to being recorded by virtue of passing through public spaces,[22] we should consider whether either the effects of such publication on public health or state and local government policies encouraging density and walkability ought to impact our view of such "consent."

Even given the rising recognition of protections for public image capture, both scholars and lawmakers ought to consider whether some limitations can and should be imposed in the recording of people accessing health care facilities. Such restrictions may not only help further public health responsibilities, but also may ameliorate some of the unintended effects of government attempts to combat urban sprawl and its public health effects. To this end, other limited recording restrictions may prove instructive. Many states have prohibited some speech activities, including recording, within a certain radius of polls on Election Day—even where

20. *See* Alice Clapman, Note, *Privacy Rights and Abortion Outing: A Proposal for Using Common-Law Torts to Protect Abortion Patients and Staff*, 112 YALE L.J. 1545, 1546 (2003) ("Having lost the legal battle to criminalize abortion, anti-abortion protestors have shifted to a strategy of extralegal deterrence through various techniques of shaming, harassment, and obstruction. Protestors publicize the names of patients and, in at least one case, their medical records. They film patients entering and leaving clinics, and post the images on the Internet."); *see also* Carol Sanger, *About Abortion: The Complications of the Category*, 54 ARIZ. L. REV. 849, 869 (2012) (noting judicial efforts to prevent anti-abortion activists from exposing the identities of late-term abortion patients); Jessica Ansley Bodger, Note, *Taking the Sting out of Reporting Requirements: Reproductive Health Clinics and the Constitutional Right to Informational Privacy*, 56 DUKE L.J. 583, 585 (2006) (noting the intimidation effect of public exposure threat to patients seeking reproductive health services).

21. *See, e.g.*, Alex Hern, *Felicia Day's Public Details Put Online After She Described Gamergate Fears*, THE GUARDIAN (Oct. 23, 2014), http://www.theguardian.com/technology/2014/oct/23/felicia-days-public-details-online-gamergate; Soraya Nadia McDonald, *'Gamergate': Feminist Video Game Critic Anita Sarkeesian Cancels Utah Lecture After Threat*, WASH. POST (Oct. 15, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/10/15/gamergate-feminist-video-game-critic-anita-sarkeesian-cancels-utah-lecture-after-threat-citing-police-inability-to-prevent-concealed-weapons-at-event/; Stephen Totilo, *Another Woman in Gaming Flees Home Following Death Threats*, KOTAKU (Oct. 11, 2014, 5:20 PM), http://kotaku.com/another-woman-in-gaming-flees-home-following-death-thre-1645280338.

22. *See, e.g.*, Andrew Jay McClurg, *Bringing Privacy Law Out of the Closet: A Tort Theory of Liability for Intrusions in Public Places*, 73 N.C. L. REV. 989, 1039 (1995); Nancy Danforth Zeronda, Note, *Street Shootings: Covert Photography and Public Privacy,* 63 VAND. L. REV. 1131, 1142 (2010).

that radius includes sidewalks and other public spaces. In another potential source for comparison, many courts also prohibit recording within the courtrooms despite the guarantee of public access to those sites. Although there are, of course, some ways in which these comparisons are not totally apt, each restriction rests upon the premise that recording and other free-speech activities may be curtailed where their exercise may chill the exercise of competing constitutional rights. While a detailed examination of the constitutionality of a potential camera-free zone outside of health clinics is beyond the scope of this Article, the presence of both countervailing individual rights—here, the right to privacy in health care—and compelling public health interests aligns health-related recording restrictions with those near polling places and courtrooms.

Part I of this Article will explore the values underlying three separate bodies of jurisprudence: (1) the limitation on privacy tort remedies for actions taken in public places; (2) the growing recognition of a First Amendment right for individuals to record images and video in public spaces; and (3) the development of protective "speech free" zones surrounding health care facilities in certain jurisdictions. Because the recording of individuals accessing health care through public spaces implicates each of these bodies of law and scholarship, the societal values reflected by those parallel developments should be considered in considering and crafting any potential remedy. In this section, I lay out a framework for thinking about recording in public spaces that is dependent upon the identity of the party undertaking the act of recording, as well as the party being recorded.

Part II of this Article will examine the public health goals underlying the major federal health privacy law, the HIPAA Privacy Rule. In so doing, Part II explores the public health implications of image capture of individuals accessing health care, and also discusses the potential creation of health privacy zones to prevent such image capture. This section will also address why I focus on health care privacy from recording, as opposed to other potentially sensitive public interactions that may also benefit from camera-free zones.

Part III will examine the role of local-government policies related to the creation, and potential solution, of the problem. Many commentators would consider what people do in public places—where they go, when, and with whom—to be fair game for recording because, by simply being in public spaces, those people have waived their privacy rights or have consented to the publication of their whereabouts. But where public health and environmental considerations lead to land-use policies that push citizens into public spaces to transact even their most sensitive business, we should consider whether such a waiver/consent theory ought to apply.

Part IV of this Article will consider possible state or local government regulation to exclude health care facilities from image capture. Two other "camera-free" zones—the polling place and the courtroom—already exist. In these two spaces, legislatures and courts have limited the public's ability to capture images based on countervailing concerns that intimidation will chill the exercise of a constitutional right. A similar camera-free zone applied to a small slice of the urban public landscape, namely the entrances of health care facilities, may strike the correct balance between public health, private access to necessary care, and free speech.

I. PATIENTS IN PUBLIC SPACES

There are three co-existing bodies of law and scholarship applicable to the puzzle addressed by this Article. Individuals that are recorded through photo or video while accessing health care through public spaces are unlikely to be able to avail themselves of privacy tort remedies; scholars and courts alike are skeptical of a right to privacy in public places. The individuals making the recordings, on the other hand, are at least somewhat likely to be shielded by constitutional free-speech protections. And finally, in some locations, statutory protections shield patients from intimidating demonstration activities; these protections, however, generally do not include a prohibition on image capture. While this Article does not attempt to exhaustively catalogue each of these parallel arenas, an exploration of the values underlying each of them helps to inform the Article's later consideration of a statutory camera-free zone outside of health clinics in certain localities.

A. Public Places and Privacy Torts

Individuals captured by photograph or video in public have had a difficult time as plaintiffs vindicating a privacy right against being recorded. Put simply, the courts have not been eager to shield individuals captured by photo or video in public spaces. Despite the prescience of the Warren and Brandeis Article "The Right to Privacy" (1890), which warned of the growing intrusions of "[i]nstantaneous photographs and newspaper enterprise" into ordinary individuals' private lives,[23] courts have generally rejected the extension of the privacy torts spawned by that article to protect against actions taken in public spaces. And, as some have remarked, many privacy scholars "have given up on tort" as well.[24]

23. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

24. Bambauer, *supra* note 12, at 228.

The animating value behind removing a tort remedy for images taken in public seems to be one of consent or, on the opposite side of the same coin, waiver. Individuals seeking to sue in tort for violations of privacy based on images captured in public spaces have generally failed. A majority of courts have found that, in undertaking the "voluntary" action of appearing in a public space, these plaintiffs had waived their right to privacy.[25] While some scholars have suggested that the tort of intrusion upon seclusion could potentially protect plaintiffs in the case of particularly dogged observation of public actions,[26] those proposed extensions of the intrusion tort are limited to mere observation of public acts, rather than image capture.[27] Yet, privacy scholars acknowledge that capture, as opposed to mere observation, poses an increased risk of harm; as Professor Jane Bambauer notes, "[a] personal fact can only cause so much damage if it is never captured in a medium that can be easily shared and stored."[28] Even in the most intrusive, dignity-impairing circumstances—public "upskirt" shots taken of women's undergarments, published online, and distributed for others' prurient gratification—a majority of courts have held this line, finding that women have no expectation of privacy in public spaces (even of their own undergarments).[29]

Against this backdrop, groups that oppose particular types of health care—most notably abortion—have begun to capture still and video images of women entering and exiting clinics.[30] These images are taken in hopes not only of immediate deterrence,[31] but often are also posted online in hopes of identifying and shaming the patients as well as deterring future patients from accessing abortion care.[32] Given courts' general antipathy toward protecting individuals' privacy rights against being photographed in public spaces, various types of challenges to the abortion videos have failed.[33] One court has recognized that "[i]t is unavoidable that, in

25. *See, e.g.*, Zeronda, *supra* note 22, at 1142 (citing Gill v. Hearst Publ'g Co., 253 P.2d 441, 442 (Cal. 1953), in which the court found that privacy rights had been waived when plaintiffs, romantically embracing at a market, were captured in a photograph subsequently published by *Harper's Bazaar*).

26. *See* Bambauer, *supra* note 12, at 231–35 & n.117 (citing Nader v. General Motors Corp., 255 N.E.2d 765 (N.Y. 1970)).

27. *Id.* at 238 (suggesting that only through disaggregating observation from capture can the intrusion tort be expanded by courts).

28. *Id.* at 213.

29. Zeronda, *supra* note 22, at 1145 (noting the majority approach in civil law leaves victims of upskirt photography without civil remedy).

30. *See* Rachel L. Braunstein, Note, *A Remedy for Abortion Seekers Under the Invasion of Privacy Tort*, 68 BROOK. L. REV. 309, 309 (2002); *see also* Clapman, *supra* note 20, at 1545–48.

31. *See* Clapman, *supra* note 20, at 1546 & n.6 (citing Yochi J. Dreazen, *In the Shadows: Photos of Women Who Get Abortions Go up on Internet*, WALL ST. J., May 28, 2002, at A1).

32. *Id.* at 1547.

33. *See, e.g.*, United States v. Vazquez, 31 F. Supp. 2d 85, 91 (D. Conn. 1998) (holding that women seen entering abortion clinic on videotapes had no constitutional, or common law, right to

exercising her right to have an abortion, a woman must momentarily travel on a public sidewalk or street in order to get to the doctor's office."[34] But even that court declined to enjoin the defendants' image capture, noting that it lacked any precedent to support such a restriction.[35]

Although image capture of individuals seeking health care has been occurring for the past few decades in the abortion context, tort law has failed to provide a remedy either for individual patients or for the clinics themselves. Further, even if a tort remedy were available for patients, it is unclear that a patient claiming harm based on an image capture meant to deter her from accessing health care (in part due to the stigma attached to that particular kind of care) would want to expose herself to further scrutiny by bringing a public civil suit. That is, even if courts were to allow a common-law privacy tort cause of action to protect individuals in public spaces from unwanted recording, a person whose privacy has already been violated is unlikely to welcome the further sacrifice of privacy inherent in becoming a tort plaintiff to vindicate her rights.

For these reasons, this Article does not propose any extension or application of tort law to image capture of individuals accessing health care, but instead examines a potential statutory solution as a superior structural solution. Rather than relying on tort law, or even a statutory private right of action for public recording, this Article proposes the creation of a cause of action allowing government entities to pursue relief on behalf of aggrieved individuals. As I will discuss below, states and localities are already the central bodies protecting patient access to health care from protestors and others who would seek to intimidate or deter those attempting to access sensitive care. In addition, as I will discuss in Part II, the public health interests that are supposed to be protected by local governments are deeply implicated by the recording of individuals accessing health care. And, in some ways, the anti-sprawl urban land-use policies of the past decade have greatly increased the likelihood that people will need to use public spaces to access health care.[36] Finally, government

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privacy for travel on public street outside clinic); A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1509 (2000). Nor have explicit state constitutional rights to privacy always been of assistance in the abortion outing context. *See* Chico Feminist Women's Health Ctr. v. Scully, 256 Cal. Rptr. 194, 200 (Cal. Ct. App. 1989) (holding that broad state constitutional right to privacy did not extend to public rights of way, especially in a small-town setting). *But see* Planned Parenthood v. Aakhus, 17 Cal. Rptr. 2d 510, 515 (Cal. Ct. App. 1993) ("[B]y photographing and videotaping respondent's clients, appellants actually did deny them their right to privacy under the California Constitution.").

34. Pro-Choice Network of W. N.Y. v. Project Rescue W. N.Y., 799 F. Supp. 1417, 1438 (W.D.N.Y. 1992), *aff'd in part, rev'd in part sub nom.* Pro-Choice Network of W. N.Y. v. Schenck, 67 F.3d 359 (2d Cir. 1995), *vacated in part on reh'g*, 67 F.3d 377 (1995) (en banc), *aff'd in part, rev'd in part sub nom.* Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997).

35. *Id.*

36. *See infra* Part III.

enforcement of patient privacy solves the potential conundrum facing patient-plaintiffs seeking to vindicate their right to access health care without exposing themselves to more potential publicity. Because state and local government policies are a cause of the problem, and because the public health harms potentially caused by image capture implicate public health concerns, it is fitting that some local governments seek to provide protection for patients.

B. Image-Capture as Speech: Protections for Recording in Public Places

Courts have begun to recognize a fairly expansive right to capture images in public spaces.[37] This right seems to sound in one of two ways—either as impacting the freedom of expression or as related to the right to gather news. In the past twenty years, a number of courts have determined that "photography or videography that has a communicative or expressive purpose enjoys some First Amendment protection."[38] The Supreme Court recognized in 1978 "an undoubted right to gather news 'from any sources by means within the law.'"[39] This information-gathering right has been interpreted by at least four federal courts of appeals to include a right to film matters of public interest.[40] In *ACLU v. Alvarez* (2012), in enjoining the Illinois eavesdropping statute, the court noted that

> [t]he 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 . . . . 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.[41]

37. *See, e.g.*, Margot E. Kaminski, *Drone Federalism: Civilian Drones and the Things They Carry*, 4 CALIF. L. REV. CIRCUIT 57, 61 (2013).

38. Gilles v. Davis, 427 F.3d 197, 212 n.14 (3d Cir. 2005); *see* sources cited *supra* note 2.

39. Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978).

40. *See, e.g.*, Glik v. Cunniffe, 655 F.3d 78, 82–83 (1st Cir. 2011); *Gilles*, 427 F.3d at 212 n.14; Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995).

41. ACLU of Ill. v. Alvarez, 679 F.3d 583, 595–96 (7th Cir. 2012).

Although the vast majority of these cases have been raised in the context of a recording prohibition applied to citizens filming police officers in the course of their public duties, their analysis has not uniformly hinged on this fact. This is, perhaps, a flaw of the right-to-record jurisprudence. Most courts have either failed to recognize, or have given short shrift to, suggestions that a right to record should hinge on the party making the recording or the party being recorded. Envisioned in a matrix, there are four ways to think about the parties recording and being recorded:

Individuals recording other individuals' actions (reporting/intimidation)	Individuals recording government agents acting in the course of their duties (citizen monitoring)
Government recording individuals (surveillance/police body cameras)	Government recording other governments (intra-government monitoring)

Although individuals recording government action occupies only one quadrant of the above chart, cases examining the right to record have failed to fully distinguish those actions from the other types of public recording. Scholars, noting this trend, have expressed with some trepidation that restricting some kinds of recording in public places would result in the loss of citizen monitoring of police and other government actors.[42]

At least some courts developing the right-to-record jurisprudence have applied an intermediate scrutiny test to the restriction on recording.[43] Applying this test in *Alvarez*, the court noted that there are three elements required for the law to pass constitutional muster: "(1) content neutrality []; (2) an important public-interest justification for the challenged regulation; and (3) a reasonably close fit between the law's means and its ends."[44] After finding the recording prohibition to be content neutral and noting that

42. For example, Professor Heidi Reamer Anderson notes that, "[i]n many ways, the current debate over citizen exposures of public police conduct mirrors a broader exposure versus privacy debate among legal scholars: When should something done 'in public' nevertheless be 'private' and, thus, legally protected from exposure?" Anderson, *supra* note 10, at 548. In conflating the recording of police with the recording of private individuals, Professor Anderson notes that the academic debate parallels the courts' unwillingness to distinguish between the two types of public recording. *See generally id.*

43. *See, e.g.*, Marc Jonathan Blitz, *The Fourth Amendment Future of Public Surveillance: Remote Recording and Other Searches in Public Space*, 63 AM. U. L. REV. 21, 75 n.254 (2013); 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, 501 (2013).

44. *Alvarez*, 679 F.3d at 605.

conversational privacy is an important government interest,[45] the court turned to the means–ends fit of the recording prohibition. In its analysis, the *Alvarez* court distinguished between surreptitious recording and open recording; while it implied that the former implicated at least some privacy concerns,[46] it found that the latter did not implicate the government's interests, because the parties being recorded had no reasonable expectation of privacy.[47]

The distinction between the right to record government officials and a broader right to record in public has at least been occasionally noted. The dissent in *Alvarez* highlights the position that at least some individuals (though not necessarily the police officers implicated by the ACLU's suit) have a reasonable expectation of privacy in their conversations, even on public sidewalks: "[P]rivate talk in public places is common, indeed ubiquitous, because most people spend a lot of their time in public places . . . [These people] rely on their anonymity and on the limited memory of others to minimize the risk of publication."[48]

An application of an intermediate scrutiny to a potential prohibition on private recording of individuals accessing health care through public spaces would have an uncertain outcome. As discussed below, courts evaluating speech limitations in areas around health care clinics have usually found such laws to be content neutral.[49] And, as this Article will discuss at length in Part II, both individual privacy rights and broader public health concerns are implicated by the recording of health care facilities. The more difficult application comes with testing the means–end fit of such a law. Though the practical aim of the law—preventing the recording of individuals accessing health care—fits neatly with the actual prohibition, there are three harms the law seeks to prevent: (1) the intimidation and/or deterrence of current patients; (2) harms caused by the publication of captured images, especially after identification of the individuals therein; and (3) deterrence of future patients by virtue of such publication. While the first harm is neatly prevented by a recording restriction, some critics might consider a ban on

45. *Id.* at 605 (citing Bartnicki v. Vopper, 532 U.S. 514, 532 (2001)).

46. *Alvarez*, 679 F.3d at 607 n.13 ("We are not suggesting that the First Amendment protects only *open* recording. The distinction between open and concealed recording, however, may make a difference in the intermediate-scrutiny calculus because surreptitious recording brings stronger privacy interests into play.").

47. *Id.* at 606. It is difficult, however, to untangle how much of this ruling is also dependent upon the fact that the individuals that the ACLU wished to record were public officials—police officers—engaging in their official duties in public places. That is, the court did not need to address the harder question regarding recording (whether open or surreptitious) of private individuals engaged in private business in public places.

48. *Id.* at 613 (Posner, J., dissenting); *see also* Blitz, *supra* note 43, at 75–76 (noting that an individual with the right to record police officers may also have the right to avoid being recorded herself, even in public spaces).

49. *See infra* Part IC.

image capture, rather than publication, as overbroad to prevent the latter two harms.

In sum, courts are increasingly recognizing the value of image capture in public spaces, and using fairly broad language to describe it as a speech right. Although these cases have generally focused upon the right of citizens to record government actors, the capacious language used to describe the right has not contemplated such a limited understanding of the right to record. Against that backdrop, the fate of a statutory bar on recording patient access to health care clinics is uncertain. Though the right-to-record cases emphasize the important place that recording holds within our society—namely that, without the ability to record, one's expressive rights may be significantly less—the courts have occasionally been willing to limit even core speech rights in the face of countervailing values. As will be discussed below, an analogue to such a speech limitation already exists in the established statutory creation of speech-free zones outside reproductive health care facilities.

C. The Bubble and the Buffer: Speech-Free Zones and Patient Protection

A separate but parallel body of cases has approved regulation of speech in public for spaces adjoining health care facilities. In the forty-odd years since *Roe v. Wade*,[50] reproductive health clinics have become the focus of intense protests aimed at influencing the health care choices of those who seek to enter those facilities.[51] This trend has only been furthered in the last few years, as abortion has become a central issue in both the "culture wars"[52] and the even-more-recent "war on women."[53]

Individuals seeking reproductive-health services, and potentially other stigmatizing health care like mental health, substance abuse, and LGBT-focused services, may face literal barriers to entry. Though at present actions physically barring clinic entrances are rare and usually illegal,[54] the

50. 410 U.S. 113 (1973).

51. *See* Note, *Regulating Preimplantation Genetic Diagnosis: The Pathologization Problem*, 118 HARV. L. REV. 2770, 2777 (2005) (noting the use of protests outside abortion facilities to "attempt[] to influence the decisions of others").

52. *See, e.g.*, Francisco Valdes, *Anomalies, Warts and All: Four Score of Liberty, Privacy and Equality*, 65 OHIO ST. L.J. 1341, 1390 (2004); Francisco Valdes, *Testing Democracy: Marriage Equality, Citizen-Lawmaking and Constitutional Structure*, 19 S. CAL. REV. L. & SOC. JUST. 3, 19 n.75 (2010).

53. *See* Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63, 80 (2013) (citing Luisita Lopez Torregrosa, *U.S. Culture War with Women at Its Center*, N.Y. TIMES, Apr. 3, 2012, http://www.nytimes.com/2012/04/04/us/04iht-letter04.html).

54. *See* Freedom of Access to Clinic Entrances Act (FACE) of 1994, 18 U.S.C. § 248 (2012) (barring various acts, including blocking a person's access to the entrance of a facility).

mere presence of protesters often makes accessing care stressful and may even deter people from receiving care altogether.[55]

Individuals seeking health care services are not without at least some protection from those who would seek to deter them from accessing health care. Many states and localities have passed "bubble" or "buffer"-zone laws to protect physical access to health care facilities.[56] Both "bubble"- and "buffer"-zone laws have survived First Amendment challenge, with courts finding them generally to be appropriate time, place, and manner restrictions on speech.[57] These laws, which tend to focus on reproductive health facilities,[58] establish limitations on the speech of those who want to gather outside covered health care facilities, whether that speech is in favor of or against the services offered within.[59] And once patients enter health care facilities, their identities must be maintained privately by the care

55. *See* Leslie Gielow Jacobs, *Nonviolent Abortion Clinic Protests: Reevaluating Some Current Assumptions About the Proper Scope of Government Regulations*, 70 TUL. L. REV. 1359, 1423 n.277 (1996) (citing Pro-Choice Network of W. N.Y. v. Project Rescue W. N.Y., 799 F. Supp. 1417, 1438 (W.D.N.Y. 1992), *aff'd in part, rev'd in part sub nom.* Pro-Choice Network of W. N.Y. v. Schenck, 67 F.3d 359 (2d Cir. 1995), *vacated in part on reh'g*, 67 F.3d 377 (1995) (en banc), *aff'd in part, rev'd in part sub nom.* Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357 (1997), for the proposition that "the risks associated with an abortion increase if the patient suffers from additional stress and anxiety. Increased stress and anxiety can cause patients to: (1) have elevated blood pressure; (2) hyperventilate; (3) require sedation; or (4) require special counseling and attention before they are able to obtain health care. Patients may become so agitated that they are unable to lie still in the operating room thereby increasing the risks associated with surgery.").

56. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 735 (2000) (upholding statutory eight-foot floating bubble zone within one hundred feet of covered facility); Brown v. City of Pittsburgh, 586 F.3d 263, 274–75 (3d Cir. 2009) (fifteen-foot buffer zone); McCullen v. Coakley, 571 F.3d 167, 176 (1st Cir. 2009), *rev'd and remanded*, 134 S. Ct. 2518 (2014) (thirty-five-foot buffer zone); Edwards v. City of Santa Barbara, 150 F.3d 1213 (9th Cir. 1998) (eight-foot buffer zone).

57. *See supra* note 56. Courts have long recognized that the government may place time, place, and manner limitations on the exercise of speech rights. *See* Burson v. Freeman, 504 U.S. 191, 197 (1992) (plurality opinion) (allowing restrictions on "expressive activity"); Zemel v. Rusk, 381 U.S. 1, 17 (1965) (indicating that the "right to gather information" is not "unrestrained"). Even in public fora such as city sidewalks, "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

58. The Massachusetts law at issue in *McCullen*, for instance, is limited solely to reproductive health care facilities. *McCullen*, 571 F.3d at 173; *see* MASS. GEN. LAWS ch. 266, § 120E1/2(b) (2008) (defining covered reproductive health care facilities as those offering abortion). In contrast, under the protective laws enacted by the City of Santa Barbara, and addressed by the Ninth Circuit in *Edwards*, all facilities providing health care services (as well as places of worship) are covered by the buffer zone. *Edwards*, 150 F.3d at 1215; *see* SANTA BARBARA, CA., MUN. CODE, ch. 9.99, § 9.99010 (1999); *see also* PITTSBURGH, PA., CODE tit. 6, §§ 623.01-623.07 (2005) (buffer zone law that applies to broad category of health care facilities); S.F., CAL., POLICE CODE art. 43, § 4303 (2013) (disclaimer: the author was involved in the drafting of this ordinance).

59. Jurisdictions seeking to enforce "bubble"- or "buffer"-zone laws have been warned not to apply these laws to speakers supportive of the health activities within a covered facility differently than they would apply the same laws to speakers critical of those activities. *See*, *e.g.*, Hoye v. City of Oakland, 653 F.3d 835, 852 (9th Cir. 2011) ("To distinguish between speech facilitating access and speech that discourages access is necessarily to distinguish on the basis of substantive content.").

provider; both state and federal laws have made health care privacy, including patient anonymity, priorities for public and private providers of health care alike.[60]

In the "bubble"-zone laws, the protection from speech travels with a person seeking service.[61] An example of one such law is offered in *Hill v. Colorado*.[62] Typically, such laws state that within one hundred feet (or similar distance) of the entrance of a covered facility, protesters cannot "approach" within a particular distance (usually eight feet) of individuals entering or exiting the facility.[63] This is meant to preserve the personal space of individuals seeking treatment at a particular facility, while allowing protesters to position themselves where their message is most effectively conveyed to their proposed audience.[64] Savvy protesters, however, may position themselves directly adjacent to the facility's entrance before patients arrive, thereby forcing the patients to come much closer than the bubble would otherwise allow.[65]

The "buffer"-zone laws have a broader reach. In these state and local ordinances, *all* speech is prohibited within a certain distance of the health facility entrance.[66] So, for example, a "buffer"-zone law might prohibit all political speech within thirty-five feet of a qualifying facility's entrance.[67] The "buffer"-zone laws are somewhat controversial, as they create

60. *See infra* Part II.

61. *See* Note, *Too Close for Comfort: Protesting Outside Medical Facilities*, 101 HARV. L. REV. 1856, 1858 (1988).

62. 530 U.S. 703, 735 (2000) (upholding statutory eight-foot floating bubble zone within one hundred feet of a reproductive health care facility as proper time, place, and manner restriction on speech).

63. *Id.*; *see also* Oakland, Ca., Ordinance 12860, §3(b) (2008) (within one hundred feet of a reproductive health care facility, barring willful and knowing approach within eight feet of any person seeking to enter).

64. *See, e.g.*, *Hill*, 530 U.S. at 738 ("[T]he intended recipient can stay far enough away to prevent the whispered argument, mitigate some of the physical shock of the shouted denunciation, and avoid the unwanted handbill. But the content of the message will survive on any sign readable at eight feet and in any statement audible from that slight distance.").

Some commentators have distinguished the right to free speech from the right to forced proximity, especially in the medical context where a patient seeking treatment may not be able to avoid the forum. *See, e.g.*, Note, *Too Close for Comfort*, *supra* note 61, at 1864 ("Patients outside medical facilities merit greater protection from forced proximity than do the average passers-by on public streets, because the former are more vulnerable to capture than the latter.").

65. *Cf.* Petition for Writ of Certiorari, McCullen v. Coakley, 134 S. Ct. 2518 (2014) (No. 12-1168), 2013 WL 1247969, at *29–30 (noting that "buffer"-zone laws, unlike "bubble"-zone laws, do not allow protesters to "pre-position" themselves in close proximity to the clinic entrance, thereby forcing patients to pass as near as possible to them).

66. MASS. GEN. LAWS, ch. 266, § 120E1/2(b) (2008).

67. The Massachusetts law, for example, has been interpreted by that state's attorney general to prohibit political speech not only by protestors, but also by government officials and clinic employees who are not simply passing through the buffer zone as part of their official business. *See* McCullen v. Coakley, 571 F.3d 167, 184 app. I (1st Cir. 2009), *rev'd and remanded*, 134 S. Ct. 2518 (2014).

"speech-free" zones outside of covered health care facilities.[68] Although three circuits upheld buffer zone laws against First Amendment challenge, finding the laws to be acceptable content-neutral time, place, and manner regulations,[69] the United States Supreme Court reversed this trend in *McCullen v. Coakley*, striking down the Massachusetts "buffer"-zone law.[70] In *McCullen*, although the Court found that a wholesale ban on all speech within a particular area near reproductive health care clinics was insufficiently tailored to the public safety interests purportedly advanced by the buffer zone,[71] it did find such a law to be content-neutral even where the zone only applied to reproductive health care facilities.[72]

Similar legislative records support "buffer"- and "bubble"-zone ordinances. People seeking health care services, especially sensitive services like reproductive health care, are likely to be deterred if they must run a "gauntlet" of protesters to access care.[73] Access to such services serves an important public health function,[74] and access to reproductive health services is protected not only by the United States Constitution,[75] but also by federal statute[76] and even some state constitutions.[77] State and local legislatures balance these important interests against the First Amendment right of demonstrators to speak where their messages will actually be heard by those they are targeting.[78]

"Buffer"- and "bubble"-zone laws do provide a modicum of protection to patients seeking services. Yet neither type of law solves the peculiar problem of recording women as they access health care. Nor do there currently appear to be any state, local, or federal laws restricting the

68. *See, e.g.*, Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 582 (2006).

69. *See* cases cited *supra* note 56.

70. McCullen v. Coakley, 134 S. Ct. 2518, 2541 (2014).

71. *Id.* at 2536–39.

72. *Id.* at 2530–36.

73. *See, e.g.*, Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 758 (1994) (citing testimony by a clinic doctor who testified that, "as a result of having to run such a gauntlet to enter the clinic, the patients 'manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures'"); Planned Parenthood Ass'n v. Operation Rescue*,* 57 Cal. Rptr. 2d 736, 739 (1996) (noting trial court finding that Operation Rescue had "effectively forced [] patients to walk a gauntlet of intimidation to reach the clinic. It has frightened them, reduced them to tears, and caused them severe emotional upset. Patients' heightened stress levels, in turn, have complicated their medical procedures.").

74. *See* Erin Bernstein, *The Upside of Abortion Disclosure Laws*, 24 STAN. L. & POL'Y REV. 171 (2013).

75. *See, e.g.*, Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

76. *See* Freedom of Access to Clinic Entrances Act (FACE) of 1994, 18 U.S.C. § 248 (2012) (barring various acts, including blocking a person's access to the entrance of a facility).

77. *See, e.g.*, Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 819 (1997) (citing CAL. CONST. art. I, § 1 as an independent source for protection of the abortion right).

78. *See* McCullen v. Coakley, 571 F.3d 167, 180 (1st Cir. 2009), *rev'd and remanded*, 134 S. Ct. 2518 (2014).

videotaping or photographing of patients entering or exiting health care facilities. The ordinances described above limit the active speech activities of demonstrators outside of covered facilities, but remain silent on the more passive acts of recording—even though information gathering and image capture are increasingly being recognized as protected First Amendment activities. And the government interests protected by the "bubble"- and "buffer"-zone laws—preventing demonstration activities from deterring individuals from accessing crucial health care services—are certainly implicated by the recording of patients entering and exiting health care facilities.

D. Mind the Gap: Image Capture of Patients

The image capture of individuals accessing health care through public spaces has not been directly addressed—either by courts or scholars. In the past two decades, the protections for recorders and protections for patients have grown up alongside each other. But the rising availability of technology and increased political polarity surrounding certain kinds of health care access may mean that these two strands of jurisprudence will soon collide. Simply put, there is a gap in the law—current laws protecting patients accessing health care do not prevent bystanders from videotaping or photographing potential patients. This Article is a first attempt to explore the space that exists between the privacy laws that cover patients once they enter a medical clinic and the laws preventing verbal harassment and physical obstruction outside health care facilities.

While the focus of the right-to-record cases has, as noted above, mainly focused on the right of citizens to record government agents, courts have been moving toward a more nuanced exploration of when citizens may have some privacy interests in public interactions.[79] In addition, there has been some movement by scholars to explore the implications of civilian recordings made in public spaces.[80] Likewise, states and localities have begun to realize that patient-protective laws such as "bubble" and "buffer" zones are not adequate to protect patient privacy against protesters wielding

79. For example, the court in *Alvarez* was careful not to invalidate the entire enactment, but instead left room for the state to adopt a less broad recording ban. *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 606 (7th Cir. 2012) ("Of course, the First Amendment does not prevent the Illinois General Assembly from enacting greater protection for conversational privacy than the common-law tort remedy provides. Nor is the legislature limited to using the Fourth Amendment 'reasonable expectation of privacy' doctrine as a benchmark. But by legislating this broadly—by making it a crime to audio record *any* conversation, even those that are *not* in fact private—the State has severed the link between the eavesdropping statute's means and its end. Rather than attempting to tailor the statutory prohibition to the important goal of protecting personal privacy, Illinois has banned nearly all audio recording without consent of the parties—including audio recording that implicates *no* privacy interests at all."). This, of course, begs the question of which actions taken in public *are* in fact private.

80. *See* Kaminski, *supra* note 37, at 62.

video cameras.[81] This Article is a first attempt at exploring the place where these two developing strains of jurisprudence meet.

Image capture of people seeking health care services exists at this intersection. While the "bubble"- and "buffer"-zone laws discussed above would not prevent the open video recording of women seeking reproductive health care (especially if the recording was done outside of the zone), similar public health and privacy interests are implicated. First, the policing of health care facilities with purposefully visible video or still camera equipment serves to signal disapproval to potential patients (and current facility employees) in ways similar to the more traditional protests. On top of this, open recording also signals to patients that their movements are being tracked, and perhaps viewed by any number of strangers to whom the video is shown or published. In addition, with the rise of technology allowing for instant publication and possible biometric identification, it is not far-fetched to assume that protesters could post images of the facility's patients to social media (from which those pictured may have a hard time getting themselves removed[82]) and from there identify the individuals depicted. Likewise, the recording of individuals accessing health care implicates the free-speech rights of those doing the recording, perhaps especially those who are recording as an expression of their political position on the service offered by a particular facility.

Of course, once a patient enters a health care facility, they become anonymous again. As discussed below in Part II, under state and federal law health providers may not divulge health care details about the individual, and in many cases even the fact that the individual has received treatment at all.[83] These medical privacy laws were passed for some of the

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81. *See* Committee Hearing, S.F. Bd. of Supervisors Neighborhood Servs. and Safety Comm. (Apr. 18, 2013), http://sanfrancisco.granicus.com/TranscriptViewer.php?view_id=164&clip_id=17316 (discussing S.F., CAL., POLICE CODE art. 43, § 4303 (2013)). Disclaimer: the author was involved in the drafting of the San Francisco buffer zone law. Nothing contained within this Article should be attributed to the City and County of San Francisco, nor is it based upon any attorney–client privileged information.

82. For example, although individuals may be able to "un-tag" themselves from photos posted on Facebook, individuals appear to have little recourse when others post photos of them. *See Frequently Asked Questions*, FACEBOOK, https://www.facebook.com/help/196434507090362/ (last visited July 29, 2013); *Community Questions*, FACEBOOK https://www.facebook.com/help/community/question/?id=1382770808684465 (last visited July 29, 2012).

83. More specifically, "information about the patient's general condition and location of an inpatient, outpatient or emergency department patient may be released only if the inquiry specifically identifies the patient by name. No information may be given if a request does not include a specific patient's name or if the patient requests that the information not be released." *See HIPAA Updated Guidelines for Releasing Information on the Condition of Patients*, AMERICAN HOSPITAL ASSOC., http://www.aha.org/advocacy-issues/tools-resources/advisory/96-06/030201-media-adv.shtml (last visited July 29, 2013). However, most facilities note that where knowledge of a patient's location could potentially endanger that individual, "no information of any kind should be given, including confirmation of the patient's presence at the facility." *Id.*

same reasons underlying the "buffer"- and "bubble"-zone laws described above. Simply put, medical privacy and patient anonymity are crucial to our health system. But there is a troubling gap in coverage between the privacy laws that cover patients once they enter the doors on one hand and the laws preventing verbal harassment and physical obstruction outside health care facilities on the other. Given the burgeoning case law supporting a First Amendment right to record events in public places, and the longstanding case law that the publication of legally obtained information, including images, is also considered to be protected speech, the question arises whether laws like the "buffer"- or "bubble"-zone laws *should* prohibit such image capture.

II. THE IMPORTANCE OF HEALTH PRIVACY

Before looking at mechanisms that could address the image capture and identification of patients accessing health care services, this Article will take a step back, and will first explore *why* we value health privacy—namely by inquiring into what aspects of health information government has found worthy of privacy protection and what interests it hoped to achieve by enacting medical-privacy protections. This is an important foundational question that must be addressed before exploring whether those protections ought to extend outside medical facilities—and to individuals and entities other than medical providers or entities already covered by federal and state privacy laws.

In passing the HIPAA Privacy Rule[84] and parallel state medical privacy laws,[85] legislatures have sought to protect the medical information of individuals as something confidential—something that should not be disclosed to the public by medical providers, whether public or private.[86] In implementing these laws, the federal government has expended significant resources toward enforcement,[87] and public and private health care

84. 45 C.F.R. §§ 160, 164 (2013). Interestingly, HIPAA itself was not initially conceived of as a privacy statute. As its name (the Health Insurance Portability and Accountability Act) implies, HIPAA was intended to promote health insurance portability for workers when they change or lose employment. HIPAA, in attempting to combat fraud and administrative waste, required the adoption of electronic information transfer. This, in turn, raised privacy concerns. *See, e.g.*, Kendra Gray, *The Privacy Rule: Are We Being Deceived?*, 11 DEPAUL J. HEALTH CARE L. 89, 90–94 (2008).

85. The HIPAA privacy does not preempt all state legislation dealing with medical privacy, but instead allows some state regulation of health privacy. For example, state laws with more stringent privacy protections are usually thought to escape preemption. *See* Barbara J. Evans, *Institutional Competence to Balance Privacy and Competing Values: The Forgotten Third Prong of HIPAA Preemption Analysis*, 46 U.C. DAVIS L. REV. 1175, 1196 (2013).

86. *See* 45 C.F.R. §§ 160, 164 (2013).

87. *See* OFF. FOR CIVIL RIGHTS, U.S. DEP'T OF HEALTH AND HUMAN SERVS., ANNUAL REPORT TO CONGRESS ON HIPAA PRIVACY RULE AND SECURITY RULE COMPLIANCE FOR CALENDAR YEARS 2009 AND 2010 5, *available at* http://www.hhs.gov/ocr/privacy/hipaa/enforcement/compliancerept.pdf

providers expend countless resources toward compliance.[88] Most, if not all, of these privacy protective laws protect personal health information held by "covered entities."[89] This requirement is separate from state law evidentiary provisions, such as the doctor–patient privilege, and from state law medical licensing guidelines.[90]

It may be obvious, then, to say that we have a norm of valuing health privacy.[91] But what is it about health privacy do we value, and why do we protect it at such cost?[92] A look at the articulated goals of the HIPAA Privacy Rule may shed some light on this. In rolling out the privacy rule, then-Secretary of Health and Human Services Donna Shalala noted five guiding principles of the Rule.[93] As summarized by one scholar, these principles are:

> 1) consumer control—consumers should not have to trade their health privacy in order to obtain health care; 2) boundaries—disclosure of health information should be for health care reasons only; 3) security—consumers should have faith that their health

(noting that "[f]rom April 14, 2003, the compliance date of the Privacy Rule, to December 31, 2010, OCR received 57,375 complaints alleging violations of the Privacy Rule. OCR resolved 52,339, or ninety-one percent, of the complaints received.")

88. Jack Brill, Note, *Giving HIPAA Enforcement Room to Grow: Why There Should Not (Yet) Be a Private Cause of Action*, 83 NOTRE DAME L. REV. 2105, 2132 (2008) (noting the "very high costs of HIPAA privacy compliance").

89. *See* 42 U.S.C. §1320d(2), (3), (5) (2012) (listing and defining the entities regulated by the Privacy Rule); *see also* Beverly Cohen, *Reconciling the HIPAA Privacy Rule with State Laws Regulating Ex Parte Interviews of Plaintiffs' Treating Physicians: A Guide to Performing HIPAA Preemption Analysis*, 43 HOUS. L. REV. 1091, 1098 (2006).

90. *See* Jennifer Clark, *HIPAA As an Evidentiary Rule? An Analysis of* Miguel M. *and Its Impact*, 26 J.L. & HEALTH 1, 9 (2013) (discussing relationship between the HIPAA Privacy Rule and state-law evidentiary rules such as the physician–patient privilege).

91. *See, e.g.*, Elizabeth D. De Armond, *A Dearth of Remedies*, 113 PENN ST. L. REV. 1, 46–49 (2008) (noting societal norms preferring health privacy, though those norms are not always enforceable through federal statutes such as HIPAA due to lack of private rights of action).

92. In at least some contexts, there is a very real tension between health privacy and dissemination of important information. As Professor Victoria Schwartz has noted, at least in the corporate context, the serious illness of a notable corporate individual such as Steve Jobs highlights the tension between privacy and disclosure. Victoria Schwartz, *Disclosing Corporate Disclosure Policies*, 40 FLA. ST. U. L. REV. 487, 488 (2013).

93. *See* Donna Shalala, Sec'y of Health and Human Servs. et al., White House Press Briefing, (Dec. 20, 2000), 2000 WL 1868717, at *3–4; *see also* Marie C. Pollio, *The Inadequacy of HIPAA's Privacy Rule: The Plain Language Notice of Privacy Practices and Patient Understanding*, 60 N.Y.U. ANN. SURV. AM. L. 579, 589 (2004). Similar concerns appear to underlie state law evidentiary provisions like the physician–patient privilege. *See* Clark, *supra* note 90, at 9 (noting that the New York Court of Appeals "found that the physician-patient privilege serves three core policy objectives: (1) to maximize unfettered patient communication with medical professionals, so that any potential embarrassment arising from public disclosure will not deter people from seeking medical help and securing adequate diagnosis and treatment, (2) to encourage medical professionals to be candid in recording confidential information in patient medical records, and (3) to protect patients' reasonable privacy expectations against disclosure of sensitive personal information") (internal quotations omitted).

> information will be protected; 4) accountability—punishment for misuse of information; and 5) public responsibility—privacy should be balanced with the need to support medical research and law enforcement.[94]

Like many privacy related laws, the HIPAA Privacy Rule attempts to balance individual privacy and interests promoted by information sharing, including law enforcement and research.[95]

Each of the above-mentioned principles seems to be aimed at furthering public health goals. Indeed, as one official noted, the whole underlying purpose of the Privacy Rule "is to make sure that people get the health care that they need."[96] If consumers need to trade their privacy right in order to obtain health care, they may be less likely to seek care or may be less honest with their health care practitioners.[97] This expressed purpose of the Privacy Rule appears to be reflected in the public health literature as well. We hear quite a bit about the effects of privacy (and the stigma attendant to breaches of privacy) in the context of women's reproductive health care and abortion. But the belief that treatment will be private is significant in treating male patients as well, especially in providing important services such as HIV and STI prevention to underserved, urban, and LGBT populations.[98] Indeed, the confidentiality of medical treatment holds value in numerous arenas outside of reproductive health in which the mere fact of treatment could stigmatize a patient—mental health services, substance abuse treatment, and LBGT-focused counseling, to name just a few.

The fear of being "outed" as having a particular health condition[99] or even of feeling the need to be tested for a particular condition (such as HIV[100]), underlies much of the concern for health privacy. State, local, and

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94. Pollio, *supra* note 93, at 589.

95. *See* Press Briefing, *supra* note 93, at *3.

96. *Id.* at *6 (remarks of Sally Katzen, Deputy Director for Management at the Office of Management and Budget).

97. Gray, *supra* note 84, at 94.

98. *See, e.g.*, Brian Dodge et al., *The Significance of Privacy and Trust in Providing Health-Related Services to Behaviorally Bisexual Men in the United States*, 24 AIDS EDUC. & PREVENTION 242, 247 (2012); Claire Lindberg et al., *Barriers to Sexual and Reproductive Health Care: Urban Male Adolescents Speak Out*, 29 ISSUES IN COMPREHENSIVE PEDIATRIC NURSING 73, 80–84 (2006).

99. *See, e.g.*, Mary D. Fan, *Constitutionalizing Informational Privacy by Assumption*, 14 U. PA. J. CONST. L. 953, 986 (2012) (noting harms of outing HIV and transgender identity); *see also* Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 438 (2000) (noting that "even if an individual can 'cure' a stigmatized trait, she may still not be accepted in the community of 'normals'"); Scott Burris, *Fear Itself: AIDS, Herpes and Public Health Decisions*, 3 YALE L. & POL'Y REV. 479, 503 (1985) (noting the "potentially stigmatizing, costly, and educationally damaging" effects of publicity for juvenile herpes patients).

100. Elizabeth Cooper, *Social Risk and the Transformation of Public Health Law: Lessons from the Plague Years*, 86 IOWA L. REV. 869, 932–33 n.287 (2001); *see also* Gregory M. Herek, *Illness,*

federal governments legislate on issues related to medical privacy because these fears can seriously harm the public health by discouraging proactive and preventative care and stigmatizing treatment.[101] Indeed, the spread of disease may even be facilitated when individuals avoid medical care for fear of being stigmatized. For this reason, even the *fact* of treatment—the information that an individual is a patient of a particular doctor has accessed care at a facility, or has been hospitalized—is covered within the ambit of the HIPAA Privacy Rule.[102]

Similar concerns underlie other health-privacy standards. Although the physician–patient privilege is an evidentiary standard allowing for exclusion of evidence at trial, and not an affirmative statutory obligation like the HIPAA Privacy Rule, commentators have similarly noted that the privilege promotes both individual and public health goals.[103] The physician–patient privilege promotes candor and allows patients to be full participants in their health care.[104] When patients fear disclosure of their health information, they may withhold information crucial to their own care.[105] Further, patients fearful of their medical information being disclosed may forgo treatment altogether.[106] These two behaviors may harm not only those individual patients but also public health more broadly.[107]

Commentators have noted that when individual patients avoid treatment or are less than fully candid with their medical providers, there are three potential harms to public health.[108] First, patients unaware that they have transmissible infections or unwilling to get treatment for those

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Stigma, and AIDS, *in* PSYCHOLOGICAL ASPECTS OF SERIOUS ILLNESS: CHRONIC CONDITIONS, FATAL DISEASES, AND CLINICAL CARE 107, 134 (Paul T. Costa, Jr. & Gary R. VandenBos eds., 1990).

101. *See Cooper*, *supra* note 100, at 905–08.

102. *See* 45 C.F.R. 164.510(b)(ii) (2013).

103. Ralph Ruebner & Leslie Ann Reis, *Hippocrates to HIPAA: A Foundation for a Federal Physician-Patient Privilege*, 77 TEMP. L. REV. 505, 548–53 (2004) (noting the individual and public health benefits to be gained from recognition of a federal physician-patient privilege); *see* Wendy E. Parmet, Comment, *Public Health Protection and the Privacy of Medical Records*, 16 HARV. C.R.-C.L. L. REV. 265, 272 (1981) (noting that the patient–physician privilege was initially justified based on a public health rationale).

104. Ruebner & Reis, *supra* note 103, at 556.

105. *Id.* at 548–49; *see* Lawrence O. Gostin, *Health Information Privacy*, 80 CORNELL L. REV. 451, 490 (1995) ("Maintaining reasonable levels of privacy is essential to the effective functioning of the health and public health systems."); Gray, *supra* note 84, at 94 (noting that patients may withhold information or avoid care if concerned about the security of their health information).

106. *See* Ruebner & Reis, *supra* note 103, at 548 ("[P]atients have a direct disincentive to seek a constitutionally protected abortion or treatment for a communicable sexually transmitted disease if there was even a mere possibility that personally identifiable information regarding such conditions, procedures, or treatments would find its way into the public domain."); *see also* Gray, *supra* note 84, at 94.

107. Gostin, *supra* note 105, at 491; *see* Ruebner & Reis, *supra* note 103, at 553–56; Parmet, *supra* note 103, at 266.

108. Ruebner & Reis, *supra* note 103, at 553–56.

infections may contribute to the spread of disease.[109] Second, medical research that could further public health efforts may suffer if health privacy is insufficiently protected.[110] Third, if patients refuse medical testing for fear of disclosure, public health agencies will be less able to track and respond to epidemiological trends.[111] A possible fourth harm to public health may occur where a reluctance to get diagnosis or treatment may lead to a worse condition later; such a delay in treatment may require more expensive care that could either raise the cost of insurance to others or could draw upon the finite pool of public health resources able to provide care.

Thus, though much of the discussion surrounding the right to privacy in the context of constitutional protection (perhaps with the exception of the debate surrounding the exercise of reproductive rights) focuses on a somewhat vague dignitary value,[112] more concrete concerns for public health underlie medical privacy legislation.[113] As currently formulated, medical privacy statutes do not prohibit the recording and publication of individuals seeking treatment, so long as those images capture patients passing through public spaces. However, the important concerns underlying those laws—concerns about the very real public health consequences of stigmatizing those who seek health care services—should inform the conversation about whether and how we extend those protections beyond the front door of the medical clinic.

Beyond the specific statutory support for privacy in health care, the broader value of preventing threats to community health also carries significant weight, even against incursions on other heavily protected constitutional or quasi-constitutional rights. Historically, state and local public health initiatives have been accorded a good deal of discretion, even

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109. *Id.*; *see* Gostin, *supra* note 105, at 491 ("[F]ailure to divulge communicable conditions such as HIV infection may pose a risk to the health of sexual or needle-sharing partners.").

110. Gostin, *supra* note 105, at 491. Interestingly, even with current privacy laws, researchers have been able to de-anonymize DNA samples using publicly available information. *See* Melissa Gymreck et al., *Identifying Personal Genomes by Surname Inference*, 339 SCI. 321, 321–24 (2013) (demonstrating that the identities of volunteers who donate personal genome sequence data can be revealed using only publicly available information); *see also* Robert T. Gonzalez, *Your Biggest Genetic Secrets Can Now Be Hacked, Stolen, and Used for Target Marketing*, IO9.COM (Jan. 17, 2013, 12:38 PM), http://io9.com/5976845/your-biggest-genetic-secrets-can-now-be-hacked-stolen-and-used-for-target-marketing (explaining how researchers took gene sequencing and cross-referenced with publicly available genealogy data to identify ostensibly anonymous donors).

111. Ruebner & Reis, *supra* note 103, at 553–56.

112. *See, e.g.*, Parmet, *supra* note 103, at 268.

113. Lawrence O. Gostin et al., *Informational Privacy and the Public's Health: The Model State Public Health Privacy Act*, 91 AM. J. PUB. HEALTH 1388 (2001), *available at* http://ajph.aphapublications.org/doi/pdf/10.2105 /AJPH.91.9.1388 ("If public health authorities disclose intimate information, individuals may suffer embarrassment, stigma, and discrimination in employment, insurance, and government programs. Persons who fear invasions of privacy may avoid clinical tests and treatments, withdraw from research, or provide inaccurate or incomplete health information.").

where personal liberty and even bodily integrity are implicated. From vaccine requirements[114] to quarantines designed to contain infectious disease[115] to the controversial closures of gay bathhouses in the 1980s,[116] the public health values of preventing and containing health threats to the community health often outweigh countervailing concerns of individual liberty and expression. Interestingly, community health interests are sometimes valued above even individual health privacy—in the context of notifying partners of those newly diagnosed with STDs or disclosing such information as a sanction against those who repeat STD transmission.[117]

Significant public health concerns are certainly implicated in the recording of patients accessing health care. The narrower concern related to health privacy has been reflected as one deeply valued by both states and the federal government, not only as protecting dignitary interests,[118] but also individual health outcomes. And the broader concern of safeguarding community health by promoting testing and treatment of potentially stigmatizing conditions also has deep roots in our understanding of public

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114. *See* Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 396 & n.166 (2000) (noting that "the state may require individuals to undergo relatively minor intrusions into their bodies for the sake of the general public welfare" and citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), which upheld a statute requiring smallpox vaccination to preserve the public health).

115. *See, e.g.*, Lawrence O. Gostin et al., *The Law and the Public's Health: A Study of Infectious Disease Law in the United States*, 99 COLUM. L. REV. 59, 77–79 (1999); *see also* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2284 (2003) (discussing broad local quarantine powers); Mary D. Fan, *Sex, Privacy, and Public Health in a Casual Encounters Culture*, 45 U.C. DAVIS L. REV. 531, 567 (2011) (noting quarantine as an available statutory option where treatment is refused for quarantine or venereal disease); Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 584 (2009).

116. *See, e.g.*, Scott Burris, *Rationality Review and the Politics of Public Health*, 34 VILL. L. REV. 933, 968–69 (1989); Erin McCormick, Note, *Strengthening the Effectiveness of California's HIV Transmission Statute*, 24 HASTINGS WOMEN'S L.J. 407, 418–422 (2013). Many have noted that, in the high-profile instance of the San Francisco bathhouse closures, the court only closed the bathhouses conditionally, and temporarily. *See* John G. Culhane, *Sex, Fear, and Public Health Policy*, 5 YALE J. HEALTH POL'Y L. & ETHICS 327, 334 (2005).

117. Fan, *supra* note 115, at 584–85; *see* Mary D. Fan, *Decentralizing STD Surveillance: Toward Better Informed Sexual Consent*, 12 YALE J. HEALTH POL'Y L. & ETHICS 1, 6 (2012) [hereinafter Fan, *Decentralizing*]. Professor Fan, noting the resource-intensive nature of a state-driven public health network tracking STD diagnosis and treatment, examines potential consumer and technology driven alternatives "that put power and information in the hands of the people in order to facilitate truly informed decisionmaking and consent, rather than concentrating it away in the state." *Id*. Interestingly, some of the very tools that threaten health care privacy in the image capture setting—namely the rise of online-social networks—may provide a tool for use by those same health care consumers to obtain better control and verification of their own and their partners' health status.

118. The Supreme Court has noted the dignitary interests at stake in maintaining the privacy of health records, while noting that governments may not limit dissemination of such records in a content-based manner. *Sorrell v. IMS Health Inc*., 131 S. Ct. 2653, 2672 (2011) ("The capacity of technology to find and publish personal information, including records required by the government, presents serious and unresolved issues with respect to personal privacy and the dignity it seeks to secure. In considering how to protect those interests, however, the State cannot engage in content-based discrimination to advance its own side of a debate.").

health powers—even where those powers require very real limitations on physical liberty and bodily integrity.

These two values are each threatened by image capture of patients, especially those seeking reproductive care, STD testing, LGBT-specific services, mental health care, substance abuse counseling, and other medical services.[119] Such image capture and potential subsequent patient identifications could have three effects: (1) those identified as seeking services may be deterred from seeking further services and may suffer adverse health effects related to their "outing"; (2) potential patients of that particular health center may be deterred from entering that particular facility, either delaying or avoiding health care until finding an alternate facility; and (3) potential patients of other health care facilities may fear approaching any facility where they fear surreptitious recording and thus be deterred entirely from seeking sensitive health care services. A potential state or local government limitation on such recording would be in line with the values of individual health privacy and of community health protection.

III. PUSHING PEOPLE INTO THE PUBLIC EYE

When we examine possible legislative action related to the recording of individuals accessing health care services, we must also examine the policy interests particular to the level of government most likely to enact such legislation: local government. In most states, it is not the state government that is ultimately vested with day-to-day control over zoning, land use, public safety, and public health. Local governments—cities, counties, and other municipal or regional entities—often have the sovereign power and responsibility for these core functions.[120]

The local is where the constitutional rubber meets the road.[121] Local governments are, for federal constitutional purposes, state actors; this means that many seemingly mundane municipal actions may implicate a federal constitutional right.[122] And, because of the vast swath of police

119. The definition of "health services" in any statute protective of health privacy is, of course, key both to protecting individual and public health interests as well as to maintaining an administrable law that is not overbroad in restricting recording. For purposes of this Article, "health clinics" and "health services" would include medical treatment facilities licensed under the state law of their particular jurisdiction but would not broadly extend to pharmacies, chiropractors, or other quasi-medical treatment facilities.

120. *See, e.g.*, Barron, *supra* note 115, at 2261, 2357.

121. I credit Professor Kathleen Morris for this evocative phrase. For a fuller description of localities' activities as constitutional actors, see Kathleen S. Morris, *The Case for Local Constitutional Enforcement*, 47 HARV. C.R.-C.L. L. REV. 1, 42 (2012) (citing ALEC C. EWALD, THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE 3 (2009)).

122. *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) (holding municipalities, like other state actors, subject to liability under 42 U.S.C. § 1983).

powers delegated to local governments by the states (whether through state constitution or by statute), the core rights of individuals are often those being implicated by local actions: police surveillance, search and seizure, and use of force; zoning, inverse condemnation, and eminent domain; public nuisance enforcement, mandatory vaccination, and health care for the indigent—all of these are central local functions. And, as a political matter, problems experienced particularly acutely by localities are more likely to be addressed by local ordinance than by statewide enactment.[123]

Some might wonder why, in a discussion of balancing the First Amendment rights of those who wish to record in public places against the privacy rights of those being recorded, we should stop to consider the role of local governments. There are two reasons we might do so. First, and most simply, local governments are often the body responsible for public health.[124] Second, municipalities have the most agency over the spatial element implicated in speech protests. By enacting zoning laws, encouraging density, and focusing on public transit, local governments encourage individuals to place themselves in public in order to engage in even the most private transactions.

An understanding of the stake of local governments in public health and land-use functions is not only key to the "government interest" prong of a First Amendment challenge to any potential legislation limiting recording in public places. It is also crucial to understanding why the health-privacy problem has arisen in the first place—that it is not a creation of individuals *wanting* to handle their business in public, but of local policies that make it nearly impossible not to. Given that these individual behaviors may be driven not by personal desire or even ambivalence but by government action, we ought to consider how such land-use policies ought to impact our usual assumption that actions taken in public spaces are voluntary and therefore not to be accorded privacy protections.

As discussed above, where local government interests in public health are implicated, courts have historically tolerated serious incursions into the physical liberty of their citizens. Thus, it may be the case that the serious public health consequences implicated in the recording of individuals seeking health care may also justify local government regulation of those actions—even though such regulation would implicate the free-speech rights of those making the recordings.

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123. *Cf.* Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL'Y REV. 165, 212, 213–14 (2010); *see also* Kaitlin Ainsworth Caruso, *Associational Standing for Cities*, 47 CONN. L. REV. 59, 92–93 (2014).

124. *See, e.g.*, Richard Briffault, *Home Rule for the Twenty-First Century*, 36 URB. LAW. 253, 257 (2004); Diane E. Hoffmann & Virginia Rowthorn, *Building Public Health Law Capacity at the Local Level*, 36 J.L. MED. & ETHICS 6, 8 (2008).

A. Local-Government Zoning for Public Health

In addition to being a major caretaker of the public health, local governments are also responsible for a good deal of land-use planning.[125] Local zoning ordinances separating the uses for which particular parcels of land may be used are a core expression of the local police power.[126] Localities have the power to zone not only for permissible use, but also to regulate such development characteristics as building height, minimum lot size, and density.[127]

The origins of local government zoning powers are thought to lie in the municipal power to enact public health regulations. The United States Supreme Court itself has recognized that zoning ordinances are a proper exercise of police power because regulation of building uses to separate business and residential districts improved "public health, safety, morals, [and] general welfare."[128] Originally, these (mainly urban) zoning regulations sought to decrease density for public health purposes—both to prevent the spread of communicable diseases[129] and to ameliorate the health effects of industrial development upon municipal residents.[130]

In the past decade, however, local government land-use regulation has been trending toward policies that increase population density and reduce urban sprawl.[131] Public health advocates and scholars alike have proposed policies that combat sprawl for a variety of reasons, including habitat

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125. *See* Brittan J. Bush, *A New Regionalist Perspective on Land Use and the Environment*, 56 HOW. L.J. 207, 231 (2012); *see also* John R. Nolon, *Comprehensive Land Use Planning: Learning How and Where to Grow*, 13 PACE L. REV. 351, 351 (1993).

126. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 387, 397 (1926).

127. Vanessa Russell-Evans & Carl S. Hacker, *Expanding Waistlines and Expanding Cities: Urban Sprawl and Its Impact on Obesity, How the Adoption of Smart Growth Statutes Can Build Healthier and More Active Communities*, 29 VA. ENVTL. L.J. 63, 72 (2011); *see generally* Wendy Collins Perdue, Lesley A. Stone & Lawrence O. Gostin, *The Built Environment and Its Relationship to the Public's Health: The Legal Framework*, 93 AM. J. PUB. HEALTH 1390 (2003).

128. *Euclid*, 272 U.S. at 395.

129. Perdue, Stone & Gostin, *supra* note 127, at 1390; *see also* Russell-Evans & Hacker, *supra* note 127, at 70–72 (noting that zoning and other regulation of the built environment arose, in part, due to outbreaks of yellow fever, tuberculosis, and cholera within urban neighborhoods with dense migrant populations).

130. Perdue, Stone & Gostin, *supra* note 127, at 1390.

131. "Sprawl" is a somewhat abstract concept, and can be difficult to define separately from normal suburban growth. *See* Jeremy R. Meredith, Note, *Sprawl and the New Urbanist Solution*, 89 VA. L. REV. 447, 449 (2003). But six characteristics are commonly included in a working definition of sprawl: (1) low relative density; (2) noncontiguous/"leapfrog" development; (3) segregation of different land use types; (4) consumption of exurban agricultural lands by development; (5) reliance on cars to access individual land uses; and (6) lack of integrated land use planning. *See* Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 137, 140–42 (1999); Meredith, *supra*, at 449–450.

This is by no means meant to suggest that all cities and regions have moved towards anti-sprawl zoning, but rather to note the trend in some areas toward density, walkability, and other anti-sprawl measures.

preservation,[132] greenhouse gas reduction,[133] and urban social and economic disenfranchisement.[134] More recently, scholars have proposed sprawl-reducing land-use initiatives to further public health goals.[135]

According to public health scholars, the same zoning measures enacted to protect public health interests in the early twentieth century are now contributing to chronic health problems.[136] The sprawl-caused reliance on automobiles is thought to be one factor in the obesity epidemic,[137] as well as in increasing the air pollution that may cause asthma and other respiratory conditions.[138] And urban sprawl has been noted as a contributor to climate change, which implicates an even broader concept of public health.[139] In response, public health scholars have suggested increased involvement of public health officials in land-use and zoning decision making.[140]

Scholars have suggested several local government policies[141] to counteract the negative health effects caused—whether directly or indirectly—by urban sprawl. Chief among these proposals is to increase urban density through zoning policies that encourage mixed-use development and neighborhood walkability.[142] Denser urban neighborhoods take care of two problems at once. First, policies leading to higher density encourage city dwellers to walk. This leads to an increase in daily non-recreational physical activity by those who walk, rather than drive, to their destinations.[143] Second, the reduction of automobile use may

132. Meredith, *supra* note 131, at 463; *see also* Michael M. Maya, *Transportation Planning and the Prevention of Urban Sprawl*, 83 N.Y.U. L. REV. 879, 884 (2008).

133. *See, e.g.*, Bush, *supra* note 125, at 239; *see also* Alice Kaswan, *Climate Change, Consumption, and Cities*, 36 FORDHAM URB. L.J. 253, 254–58 (2009).

134. Meredith, *supra* note 131, at 448; *see* Bush, *supra* note 125, at 242–43.

135. *See* Russell-Evans & Hacker, *supra* note 127, at 79–80; *see also* Perdue, Stone & Gostin, *supra* note 127, at 1393.

136. *See* Perdue, Stone & Gostin, *supra* note 127 at 1390 ("Indeed, deconcentration of populations and the separation between residential and business areas, measures urged a hundred years ago to improve [public] health, may contribute to chronic health problems.")

137. *See* Russell-Evans & Hacker, *supra* note 127, at 75–80; *see also* Perdue, Stone & Gostin, *supra* note 127, at 1391.

138. Perdue, Stone & Gostin, *supra* note 127, at 1391.

139. Kaswan, *supra* note 133 at 258–265.

140. Russell-Evans & Hacker, *supra* note 127, at 75.

141. There has, of course, been a lively debate over whether anti-sprawl policies inherently contradict an expansive view of local power. *See* Barron, *supra* note 115, at 2335. This Article does not seek to weigh in on that debate but simply notes that at least some local governments have attempted to combat sprawl by enacting policies applicable within their own borders. It is the effect of these pro-density policies that the Article seeks to focus upon.

142. *See, e.g.*, Michael Lewyn, *New Urbanist Zoning for Dummies*, 58 ALA. L. REV. 257, 297 (2006); Russell-Evans & Hacker, *supra* note 127, at 88.

143. *See, e.g.*, Kevin C. Foy, *Home Is Where the Health Is: The Convergence of Environmental Justice, Affordable Housing, and Green Building*, 30 PACE ENVTL. L. REV. 1, 50 (2012); Wendy Collins Perdue et al., *Assessing Competencies for Obesity Prevention and Control*, 37 J.L. MED. & ETHICS 37, 37–38 (2009).

lower emissions in the urban area, decreasing air pollutant-caused asthma and respiratory problems.[144] In addition to projects that increase density, local and regional governments seeking to fight the effects of urban sprawl also promote "transit first" policies that prioritize mass-transit options over the use of private vehicles.[145] One type of such a policy is to reduce urban parking spaces (or make the existing ones more expensive) to incentivize the use of transit for daily errands.[146] Finally, the emphasis by some public health systems on community-based care facilities such as free clinics and community health centers[147] has played a part in moving patients through public spaces in order to seek care, as has an increased reliance on specialized clinics to provide services like abortion care.[148]

Each of these policies, while enacted to further public health goals, has an effect of encouraging individuals to take the business of their daily lives into the public sphere. Local government policies increase mixed-use development, encourage city-dwellers to walk to their appointments rather than drive, and make scarce the availability or affordability of parking spaces, all in order to benefit the health and welfare of their citizens. But such policies are not cost-free; indeed, by altering the use of public spaces such as sidewalks, these policies also should affect the way in which we conceive of privacy in public places. When we discuss the privacy norm applicable to actions taken in public spaces, we must acknowledge that one consequence of density policies is the undermining of the urban anonymity that reasonable people once expected to have.

This Article focuses upon the effects of urban land-use policies in encouraging density zoning and decreasing urban sprawl. Some might rightfully wonder why a loss of health care anonymity in urban spaces is

144. *See, e.g.*, Foy, *supra* note 143, at 50; Edward H. Ziegler, *The Case for Megapolitan Growth Management in the 21st Century: Regional Urban Planning and Sustainable Development in the United States*, 41 URB. LAW. 147, 156 (2009).

145. *See* Herman Huang, *The Land-Use Impacts of Urban Rail Transit Systems*, 11 J. PLAN. LITERATURE 17, 21–22 (1996).

146. Michael Lewyn, *Sprawl in Canada and the United States*, 44 URB. LAW. 85, 133 (2012).

147. *Cf.* Lewis D. Solomon & Tricia Asaro, *Community-Based Health Care: A Legal and Policy Analysis*, 24 FORDHAM URB. L.J. 235, 275 (1997); *see also* Adam Millard-Ball, *Putting on Their Parking Caps*, PLANNING, Apr. 2002, at 16, 16, *available at* http://people.ucsc.edu/~adammb/publications/Millard-Ball_2002_Putting_on_Their_Parking_Caps.pdf; *Case Study: San Francisco, CA Parking Requirements*, Puget Sound Regional Council, http://www.psrc.org/growth/housing/hip/case-studies/sf (last visited Mar. 24, 2015).

148. *See, e.g.*, Yvonne Lindgren, *The Rhetoric of Choice: Restoring Healthcare to the Abortion Right*, 64 HASTINGS L.J. 385, 419 (2013) ("In 1973, hospitals made up 80% of the United States' abortion facilities, but by 1996, clinics performed 90% of abortions in the country. As a result, the majority of abortions are performed in stand-alone clinics such as Planned Parenthood rather than by a woman's regular physician as an integrated part of her healthcare.").

more worthy of discussion than the same problem in rural spaces.[149] Clearly, the individual and public health care consequences of privacy loss are present in rural and even suburban locations.[150] But as some courts have noted in the health care privacy context, those living in rural areas or small towns have less of an expectation of anonymity for a very practical reason: the high possibility of being observed by someone who can actually identify the patient.[151] In the urban context, however, individuals expect privacy precisely because they are unlikely to be directly observed by someone able to identify them. The central problem upon which this Article is focused is that the rise in image-capture technology enables observers to record and identify nearly anyone entering a medical clinic. In some ways, our urban cores metamorphose into small towns where most patients can be identified—not by nosy neighbors, but by technology—despite the urban clinic-goer's higher expectations of anonymity.

B. The Spatial Effects of Local Government Policies

As discussed above, local government land-use policies, as part of the municipal responsibility for public health, also create the spatial backdrop against which the loss of privacy for those accessing health care through public spaces has developed. Put simply, local government policies have, for better or worse, pushed individuals into public spaces to transact their daily business. The narrowing of the private space and purposeful pushing of individuals onto public sidewalks and public transit cannot be said to be wholly voluntary but instead is a product of willful (if beneficial) government action.

Local governments, in addition to protecting public health and safety, are also the guardians of common spaces entrusted to the public's use[152] and therefore mediate between dual roles regarding the public spaces within their bounds. They are at once the trustee of the public sphere—including sidewalks—and the sovereign responsible for maintaining public

149. Of course, not all urban environments are alike; Los Angeles, for instance, may offer more anonymity by virtue of its lack of density and emphasis on car culture, while Manhattan's density may offer more anonymity to those moving through its sidewalks.

150. Jeffrey C. Bauer, *Rural America and the Digital Transformation of Health Care*, 23 J. LEGAL MED. 73, 81 (2002).

151. *See* Chico Feminist Women's Health Ctr. v. Scully, 256 Cal. Rptr. 194, 200 (Cal. Ct. App.) (1989) ("The very 'small-town' characteristics that prompted the Center to request its injunctive relief are the very characteristics that make the relief inappropriate. Because Chico is a small city, the clients are more likely to be recognized. But that increased chance of recognition on a public street is a 'common habit' of Chico. We have no doubt that Chico's smaller size makes it a most attractive place to live in many respects. But the clients who are residents of Chico must accept the limitations of small-city life along with its amenities.").

152. Zick, *supra* note 68, at 608–09.

health and safety.[153] These two roles sometimes pull local government interests in the use of public spaces in two opposite directions. Putting aside for now the somewhat clumsy forum analysis used for First Amendment purposes,[154] the *type* of space within a municipality is worthy of consideration. As some scholars have noted, it is folly to treat all public spaces interchangeably, especially when examining a government's restriction of speech within its bounds. Not all sidewalks are alike. Rather, there is a wide variability of spatial types that comprise our expressive topography.[155]

The role of local government policies in pushing individuals to transact their business—including accessing health care—through public places is especially important to consider in an evaluation of whether privacy ought to be protected in some public spaces. Many scholars have noted the decline of privacy torts in the modern era, especially in relation to behavior arguably protected by free-speech concerns.[156] But even putting aside the weighty First Amendment concerns to be balanced against privacy assurances, privacy torts have usually not been understood to encompass the recording or reporting of things that occur in public spaces.[157]

Part of this limitation of privacy torts is based upon the idea of consent—the idea that by engaging in actions in public spaces, individuals acknowledge that their actions are subject to viewing, recording, and reporting.[158] We could also think of this concept as a kind of assumption of the risk; by acting on the public stage, people assume the risk that those actions might be recorded.[159] In some ways, this makes sense. When people leave their private homes and voluntarily enter public spaces like parks,

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153. *Id.*

154. *Id.* at 613–14; *see* Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984).

155. Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 441–42, 485 (2006). Zick's scholarship suggests that clinic protesters, which presumably would include those using image capture to identify or intimidate patients, as occupying embodied space. Although Zick cautions that "conditions of modernity, including mass urbanization, mobility, and technological advancement, ought to, if anything, heighten our resolve to maintain meaningful connections to places," perhaps we ought to consider whether and when the regulation of certain types of embodied spaces ought to consider actual bodies—that is, the individual and public health effects of recording on the individuals being recorded.

156. *See, e.g.*, Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65 (2012).

157. For instance, the privacy tort of intrusion on seclusion provided relief "only against images involuntarily captured within the target's own home or in facilities remote from the public; publication of private facts is generally held to be inapplicable to images voluntarily exposed to the public gaze." Kreimer, *supra* note 3, at 352; *see* McClurg, *supra* note 22, at 1008 (noting the limited applicability of privacy torts to protect against recording of actions in public places); Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 496 (2006) ("The law often recognizes surveillance as a harm in private places but rarely in public places.").

158. *See, e.g.*, McClurg, *supra* note 22, at 1039.

159. Blackman, *supra* note 3, at 386–87.

civic plazas, and sidewalks, they simply cannot expect the same amount of privacy as they may have in their homes.

But where people have been driven into the public sphere to transact even their most sensitive and personal business—including the access of health care services—ought we to count this as consent to the publication of these affairs? Where municipal policies have removed the option of driving to a doctor's office and parking in a private lot, should we count the use of a public sidewalk to enter that facility as a waiver of privacy? And, while putting certain types of public spaces outside of the growing rise in image capture would acknowledge the variability of the use of public space, it should not result in the wholesale removal of public space from image capture—most cities do not have a single "medical district," but rather, care facilities are sprinkled throughout the urban landscape.

Some might note the ability of individuals seeking communities that have higher privacy norms to sort themselves into municipalities that value sprawl and the attendant privacy afforded by private parking lots.[160] Such preference-sorting might, at least indirectly, cut against the idea that local land-use initiatives diminish the consent or waiver of individual privacy in public spaces. However, as other scholars have noted, the wealthy are often loath to give up the "agglomeration" gains of a dense, urban environment despite numerous downsides of city living,[161] and the poor are less likely to have the means to relocate elsewhere.[162] Finally, however one feels about the Tiebaut model, it should be noted that in a marketplace view of localities, municipalities courting those citizens valuing privacy more highly than the ability to surveil their neighbors should be able to enact privacy protective legislation.[163]

The aim of this Article is not to answer these questions, but merely to point out that our perspective on individual expectations of privacy in public places may be overly simplistic if we imagine that people enter those spaces entirely of their own volition. And, in types of public spaces where the recording or publication of images results in particularly problematic consequences for public health and safety, perhaps the combination of land use policies pushing people into those spaces and the public health effects of recording ought to be balanced more heavily against the rights of individuals to capture such images.

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160. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 418 (1956); *see generally* David Schleicher, *The City As a Law and Economic Subject*, 2010 U. ILL. L. REV. 1507.

161. Schleicher, *supra* note 160, at 1510.

162. Aaron J. Saiger, *Local Government Without Tiebout*, 41 URB. LAW. 93, 98 (2009).

163. *Cf.* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1494 (1987) (reviewing RAOUL BERGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)); *see* Saiger, *supra* note 162, at 99.

IV. THE CREATION OF CAMERA-FREE ZONES

In recent years, while pervasive image capture has made the loss of anonymity in public spaces more technologically feasible, the jurisprudential landscape has not distinguished between types of public spaces where this loss of privacy might be balanced against competing individual rights or broader public health concerns. In at least those cities where lawmakers have enacted policies encouraging walkability, mixed-use, and other pro-density policies, some limitation on image capture in certain public spaces may be warranted.

Courts already recognize that in certain instances, speech activities that deter health care access may be limited. As discussed above, "bubble"-zone laws (and perhaps more narrowly-drawn "buffer" zone laws) can restrict even core political speech within close proximity to health care facilities.[164] Recognizing the importance of health care access and the consequences of individuals being deterred from such access, some state and local governments have already enacted such limitations.[165] Although no "buffer"- or "bubble"-zone law has (to date) restricted individuals from image-capture activities near health care facilities, the balancing between health care privacy and free speech in cases upholding such laws would surely be relevant to any analysis of an image-capture restriction.

Nor are "camera-free" zones without precedent. Simply put, the right to access a public space, to observe what happens in that space, and to report on those occurrences does not necessarily include the right to record within that space. Putting aside the plethora of instances where photography is forbidden due to security concerns (justified or not[166]), at least two examples come to mind where individuals are restricted from recording in public spaces. In many state and federal courts, image capture is prohibited within the courtroom.[167] These prohibitions are common despite a constitutional right for the public to access not only the building, but also the proceedings within.[168] Additionally, many states prohibit not only

164. *See supra* Part C.

165. *See supra* note 58.

166. *See, e.g.*, Sarah Garvey-Potvin, Note, *The Snapped Shutter: Violations of the First Amendment Rights of Photographers on the Port Authority of New York and New Jersey PATH System*, 63 RUTGERS L. REV. 657, 677–83 (2011).

167. While most state courts allow cameras in at least some courtrooms, most have some restrictions upon cameras in the trial courts, and many leave the decision to individual judges' discretion. *See* Audrey Maness, Comment, *Does the First Amendment's 'Right of Access' Require Court Proceedings To Be Televised?: A Constitutional and Practical Discussion*, 34 PEPP. L. REV. 123, 144–49 (2006); *see also* Matthew E. Feinberg, *The Prop 8 Decision and Courtroom Drama in the YouTube Age: Why Camera Use Should Be Permitted in Courtrooms During High Profile Civil Cases*, 17 CARDOZO J.L. & GENDER 33, 34 (2010).

168. The courts have recognized a constitutional right to access court proceedings, with some limited exceptions. *See, e.g.*, Press-Enter. Co. v. Superior Court, 464 U.S. 501, 509 (1984). Although

"electioneering" within a certain distance of polling places, but also photographing people entering or exiting. Some states also prevent recording of the ballot (even one's own).

While these "camera-free" zones may differ in some important particulars from such a zone on a sidewalk outside a health care facility, there are certainly some aspects in which they are comparable. By exploring these two types of spaces in which image capture is limited and inquiring into the balances struck (for good or ill) between the right to record and other competing rights, the advisability of a similar carve-out near health care facilities should become apparent.

A. Camera-Free Courtrooms

One fairly high profile space in which government actors have limited the public's right to image capture has been in courtrooms. While state courts have gradually become more hospitable toward recording, the federal courts remain hostile toward cameras in the courtroom.[169] And, even in the states with liberal standards for allowing trials and other proceedings to be recorded, fairly substantial restrictions still exist. Judicial discretion over which proceedings may be recorded, and how, is often present.[170]

The right of the public to access court proceedings has been fairly well established by both the United States Supreme Court in criminal cases and by numerous federal courts in civil cases.[171] Yet courts have persisted in limiting the right of the same public to record those proceedings to which they are constitutionally guaranteed access.[172] Because the analysis of *why* such limitations upon image capture are permitted—where such recordings are protected in other public spaces—hinges upon the identification of courtrooms as a nonpublic forum,[173] courtroom recording limitations may seem to be inapposite to limitations on image capture on portions of public sidewalks, the quintessential public forum. However, as courts examining

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the access right arose in respect to criminal proceedings, it has since been extended to civil trials. *See* Feinberg, *supra* note 167, at 40 ("[V]arious courts [] extend the constitutional rights of the press and public to access civil judicial proceedings, although that issue has never reached the Supreme Court.").

169. *See, e.g.*, Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L.J. 1489, 1492 (2012).

170. Maness, *supra* note 167, at 144–77.

171. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988); Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 22–23 (2d Cir. 1984); Newman v. Graddick, 696 F.2d 796, 801–02 (11th Cir. 1983).

172. Maness, *supra* note 167, at 136–38.

173. *See, e.g.*, U.S. v. Grace, 461 U.S. 171, 178 (1983) (inside of Supreme Court building is nonpublic forum); *see also* Huminski v. Corsones, 396 F.3d 53, 91 (2d Cir. 2004); Sammartano v. First Judicial Dist. Court, 303 F.3d 959, 966 (9th Cir. 2002); Comfort v. MacLaughlin, 473 F. Supp. 2d 1026, 1028 (C.D. Cal. 2006); Schmidter v. State, 103 So. 3d 263, 270 (Fla. Dist. Ct. App. 2012).

challenges to courtroom camera policies engage in a balancing of individual rights (including privacy rights) against the right to record, an examination of the courtroom camera-free zones is at least marginally relevant.

Both courts and scholars have engaged in an analysis of the core rights on each side of the dispute over the right-to-record judicial proceedings. On one side of the balance, of course, is the free-speech right. Media organizations in particular have stressed the newsworthiness of many court proceedings.[174] But while the recent cases on the right to record have suggested that, where one can access information in a public space, one can usually record it, the federal courts assessing a right to record judicial proceedings have come to the opposite conclusion.[175]

Several factors weigh against the educational and accountability values[176] of making such recordings available, and most of those factors at least purportedly relate to individual concerns. Key among these countervailing concerns are the effects of image capture on witnesses and jurors; both courts and commentators have worried that being recorded may lead to intimidation and even unwillingness to participate in the process.[177] Though in the criminal context these concerns are related to a defendant's right to a fair trial,[178] some scholars have ultimately articulated the concern for both witnesses and jurors as one of privacy.[179] As one scholar has noted, "[a]lthough trial participants are involved in a public proceeding, they do not relinquish all privacy interests when they enter the

174. Marder, *supra* note 169, at 1531–33.

175. *Id.* at 1492. The federal courts have, however, begun a pilot program to evaluate the possibility of allowing cameras in the courtroom. *Id.* at 1494 n.10 (citing *Courts Selected for Federal Cameras in Court Pilot Study*, U.S. COURTS (June 8, 2011), http://www.uscourts.gov/News/NewsView/11-06-08/Courts_Selected_for_Federal _Cameras_in_Court_Pilot_Study.aspx ("Fourteen federal trial courts have been selected to take part in the federal Judiciary's digital video pilot, which will begin July 18, 2011, and will evaluate the effect of cameras in courtrooms.")). *See Judiciary Approves Pilot Project for Cameras in District Courts*, U.S. COURTS (Sept. 14, 2010), http://www.uscourts.gov/News/NewsView/10-09-14/Judiciary_Approves_Pilot_Project_for_Cameras_in_District _Courts.aspx ("The Judicial Conference of the United States today approved a pilot project to evaluate the effect of cameras in federal district courtrooms and the public release of digital video recordings of some civil proceedings.").

176. Marder, *supra* note 169, at 1501–05.

177. The Supreme Court alluded to concerns over witness intimidation in reversing the District Court's decision to amend the local rules to allow the bench trial in the *Perry v. Schwarzenegger* challenge to Proposition 8 to be broadcast. *See* Hollingsworth v. Perry, 558 U.S. 183 (2010). Note: the author worked on the trial phase of *Perry v. Schwarzenegger* for a Plaintiff-Intervenor, the City and County of San Francisco. *See also* Marder, *supra* note 169, at 1541.

178. Marder, *supra* note 169, at 1539–41.

179. *Id.* at 1541 ("Cameras in the courtroom make it harder for all judges—federal and state—to protect the privacy interests of participants. Although trial participants are involved in a public proceeding, they do not relinquish all privacy interests when they enter the courtroom.").

courtroom."[180] During voir dire, for example, attorneys may ask jurors questions about personal issues—including about health conditions—that might be embarrassing if publicized.[181] Likewise, witnesses may be asked questions at trial that would make them similarly uncomfortable, or subject them to social scrutiny.[182]

Just as in the loss of health care privacy, however, the feelings of intimidation are thought to lead to a more systemic problem. In the case of courtroom image capture, there are several such concerns. Witnesses that feel intimidated may be less likely to testify truthfully.[183] If jurors are publicly identified by photograph, rather than name, they may be more recognizable and therefore more subject to external pressure or may be less likely to be a holdout.[184] In the long run, these concerns may lead individuals to be less likely to cooperate as witnesses or to be willing to serve on a jury.[185] I do not take a position on whether any of these concerns has been empirically confirmed, or whether even if confirmed, they ought to outweigh the important countervailing concerns in favor of a broader policy allowing cameras in the courtrooms.[186] However, it is important to note that, in engaging with the issue of whether to permit cameras in the courtroom, both scholars and courts seek to balance the privacy concerns of witness and jurors, as well as the potential for intimidation, against the right to record the proceedings for the benefit of the public or for another political purpose.

The exclusion of cameras from some courtrooms, like any exclusion of image capture of health facilities, also leaves some alternatives for public

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180. *Id.*

181. Melanie D. Wilson, *Juror Privacy in the Sixth Amendment Balance*, 2012 UTAH L. REV. 2023, 2057 (citing Sara Zweig, *Medical Privacy and Voir Dire: Going Beyond Doctor and Patient*, DCBA BRIEF (Apr. 2010), http://www.dcbabrief.org/vol220410art1.html).

182. Randolph N. Jonakait, *Secret Testimony and Public Trials in New York*, 42 N.Y.L. SCH. L. REV. 407, 426–27 (1998).

183. Hollingsworth v. Perry, 558 U.S. 183, 193 (2010) (citing REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 47 (Sept. 20, 1994)) ("[T]he intimidating effect of cameras on some witnesses and jurors [is] cause for concern.")).

184. *See* Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191, 2217 (1996); Kenneth B. Nunn, *When Juries Meet the Press: Rethinking the Jury's Representative Function in Highly Publicized Cases*, 22 HASTINGS CONST. L.Q. 405, 429–30 (1995).

185. Christopher Keleher, *The Repercussions of Anonymous Juries*, 44 U.S.F. L. REV. 531, 542 (2010) (citing J. Clark Kelso, *Final Report of the Blue Ribbon Commission on Jury System Improvement*, 47 HASTINGS L.J. 1433, 1463 (1996) (noting that de-identifying jurors is thought to incentivize jury service)).

186. One interesting perspective on the use of cameras in the courtroom has been to note the growing use of video as a news medium, and the shrinking financial viability of print media. *See* Elizabeth A. Stawicki, *The Future of Cameras in the Courts: Florida Sunshine or Judge Judy*, 8 PITT. J. TECH. L. POL'Y 4, 28–30 (2008) (noting that declining newspaper readership may leave courts effectively closed to the public). However, this perspective may perhaps be countered by the rise in non-traditional language-based (as opposed to video-dependent) media such as blogs and more established online outlets.

explication of the proceedings. Courtrooms that eliminate cameras do not leave the media, or other interested parties, unable to report on the details of what goes on within courtrooms. Indeed, in the case of the *Perry v. Schwarzenegger* trial challenging Proposition 8, the bench trial was live-blogged[187] and tweeted,[188] and the trial transcripts dramatized—first online,[189] then in stage performances by stars like Brad Pitt and George Clooney.[190]

The availability of these alternative methods of communicating courtroom content may raise the question of whether the image-capture ban actually furthers the policies intended. That is, if the witness testimony can simply be replayed by reading or reenacting transcripts, what benefit could there be in forbidding cameras?[191] The difference in the ways individuals experience reenactment on one hand and image capture on the other is somewhat reflected by the language used to describe the two acts. Where reporting and reenactment both reflect a relatively neutral duplication of events, the language most often used to describe photography is more intrusive, acquisitive, and even violent in nature.[192]

This visceral difference between image capture and reporting through alternative means is perhaps even more starkly presented in the case of image capture related to health care access. Witnesses and jurors are participating in a government function, and even acting as quasi-state actors in some ways.[193] And, in the same ways in which the new right-to-record cases suggest that the right is grounded in the ability of citizens to monitor the government, there is perhaps a case to be made for the same for

187. *See, e.g.*, *Firedoglake Covers the Prop 8 Trial*, FIREDOGLAKE, http://firedoglake.com/prop8trial/ (last visited Mar. 27, 2015).

188. *See, e.g.*, Jon Brooks, *Judges Hear Arguments on Prop 8 Trial Video, Judge Vaughn Walker's Same-Sex Relationship*, KQED (Dec. 8, 2011), http://blogs.kqed.org/newsfix/2011/12/08/prop-8-hearing-on-trial-video-vaughn-walkers-same-sex-relationship/ (containing link to live Twitter feed of reporter during trial).

189. *See MarriageTrial.com: A Re-enactment of the Federal Proposition 8 Trial* Perry v. Schwarzenegger, MARRIAGETRIAL.COM, http://www.marriagetrial.com (last visited Mar. 27, 2015).

190. *See, e.g.*, Adam B. Vary, *On the Scene: Prop 8 Play Reading in L.A. Featuring Brad Pitt and George Clooney*, ENTERTAINMENT WEEKLY (Mar. 4, 2012, 2:10 PM), http://popwatch.ew.com/2012/03/04/prop-8-play-brad-pitt-george-clooney/.

191. At least one scholar, however, has questioned the ability of press and less formal reporting to act as a proxy for the public, noting that "[t]elevision news is demonstrably *worse* than public attendance or camera-free media at transmitting objective information." Cristina Carmody Tilley, *I Am a Camera: Scrutinizing the Assumption That Cameras in the Courtroom Furnish Public Value by Operating As a Proxy for the Public*, 16 U. PA. J. CONST. L. 697, 727 (2014).

192. Thus, when we speak about "shooting" with our cameras, "taking" photos, and "capturing" images, we reflect the very real way in which subjects may experience being photographed (and identified) differently from being reported on through non-visual media. This insight came out of a conversation with Prof. Justin Levitt, for which the author is grateful.

193. *See* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 254 (1995).

recording courtroom actions.[194] In contrast, private individuals accessing health care through public spaces cannot be said to be acting on behalf of the government in any meaningful way, except insofar as their continued health serves the greater public health interests.

B. Camera-Free Polling Places

Another "camera-free" zone existing much closer to our public rights of way than the courtroom is the area surrounding polling places. Some states, including California, have limited the use of photography or other modes of image capture near the entrances and exits of polling places where recording intimidates potential voters.[195] These camera-free zones are perhaps more squarely related to the possibility of limiting image capture near the entrances of health care clinics, as they facially encompass public rights of way adjacent to the polling place. That is, statutory limitations of image capture near polling places usually state a distance at which no recording shall be made, and do not distinguish between public and private property. A small caveat, however, is that these statutory limitations do not impose categorical bans on recording, but rather focus either on intent to intimidate or an effect of intimidation.

In this Part, I do not address restrictions on image capture *within* the polling place itself.[196] Although there is a rich body of case law and scholarship on such restrictions, the comparison between image capture of a facility's entrance in the health care context and the polling place context is much more apt, in part because the intra-polling place restrictions have often relied upon a forum analysis generally inapplicable to public

194. This case may be strongest in actions where the state itself is a party, e.g., criminal actions or civil actions such as consumer protection or antitrust suits where the government is the prosecuting entity.

195. CAL. ELEC. CODE § 18541 (West 2003 & Supp. 2015) ("(a) No person shall, with the intent of dissuading another person from voting, within 100 feet of a polling place, do any of the following: (1) Solicit a vote or speak to a voter on the subject of marking his or her ballot. (2) Place a sign relating to voters' qualifications or speak to a voter on the subject of his or her qualifications except as provided in Section 14240. (3) Photograph, video record, or otherwise record a voter entering or exiting a polling place."; *see also* S.D. CODIFIED LAWS § 12-18-3 (1995) ("Except for sample ballots and materials and supplies necessary for the conduct of the election, no person may, in any polling place or within or on any building in which a polling place is located or within one hundred feet from any entrance leading into a polling place . . . use any communication or photographic device in a manner which repeatedly distracts, interrupts, or intimidates any voter or election worker.").

196. Image capture within the polling place is often restricted, often within the context of photographing one's own ballot; although the ability to "Instagram" the vote might seem desirable, such photos are often discouraged in an attempt to ensure that attempts to purchase votes could not be verified. James J. Woodruff II, *Where the Wild Things Are: The Polling Place, Voter Intimidation, and the First Amendment*, 50 U. LOUISVILLE L. REV. 253, 277 (2011); *see* Harry Sawyers, *Is It Illegal To Instagram Your Vote?*, GIZMODO (Nov. 6, 2012, 11:49 AM), http://gizmodo.com/5958065/is-it-illegal-to-instagram-your-vote.

sidewalks.[197] Nor does this Part address potential similarities to the ubiquitous anti-electioneering laws which limit campaign activity within a particular distance of a polling place.[198] These zones, which limit political speech within a certain radius of a polling place (often including public rights of way), bear some similarities to the "buffer zones" discussed above, which limit speech outside some health clinics.[199] The anti-electioneering zones, like the buffer zones, do not appear to prevent or even address recording.

While some scholars have described the balancing done by courts in upholding anti-electioneering laws as between expressive autonomy and electoral integrity,[200] prohibitions on image capture appear to be aimed more directly at preventing intimidation of individual voters. The California statute has an intent requirement—prohibiting image capture done "with the intent of dissuading" an individual from voting.[201] Putting

197. Of course, the case law supporting the electioneering restrictions similarly relied upon a forum analysis doctrine. There has been a great deal of criticism of Justice Scalia's reliance in *Burson v. Freeman*, on the premise that areas adjacent to polling places were not traditional public fora. *See* 504 U.S. 191, 215–17 (1992) (Scalia, J., concurring); Blake D. Morant, *The Jurisprudence of the Media's Access to Voting Polls*, 4 FIRST AMEND. L. REV. 107, 117 (2005). However, it is interesting to note that Justice Scalia advocated for a nuanced view of *when* and *why* particular sidewalks need not be deemed traditional public fora. *Burson*, 504 U.S. at 216 (Scalia, J., concurring) ("'Streets and sidewalks' are not public forums *in all places*, see *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976) (streets and sidewalks on military base are not a public forum), and the long usage of our people demonstrates that the portions of streets and sidewalks adjacent to polling places are not public forums *at all times* either."). Although it is perhaps doubtful that Justice Scalia would similarly apply such a nuanced standard to potentially carve out sidewalks adjacent to health clinics from public forum status, his reluctance to treat all sidewalks as public forums is at least notable.

198. *See, e.g.*, VA. CODE ANN. § 24.2-604 (2011 & Supp. 2013); N.H. REV. STAT. ANN. § 659:43 (2013); TENN. CODE ANN. § 2-7-111 (2013).

199. Scholars have noted that both buffer laws and electioneering restrictions are meant to protect individuals against the intimidation of compelled listening. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 950, 964 (2009). Similarly, Professor Carol Sanger has likened the electioneering restrictions to the protections on abortion decision-making autonomy threatened by mandatory ultrasound laws. Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 389 (2008).

200. Morant, *supra* note 197, at 111.

201. CAL. ELEC. CODE § 18541 (West 2003 & Supp. 2015). The California recording ban, when initially added to the general electioneering statute in 2003, was explicitly envisioned to prevent voters from being intimidated or dissuaded from voting. *See California Bill Analysis, Senate Floor: Assembly Bill 915*, 2003–2004 Reg. Sess. (Cal. 2003) ("According to the author, getting first time and newly registered voters, [particularly] immigrants and minority voters, to the polls is a tremendous task; however, this task becomes even more daunting when voter intimidation is involved. Voter intimidation programs are designed either to provide a basis for challenging the right of people to vote just before election day or when they show up at the polls, and/or creating doubt, confusion and fear among voters, usually minorities, about their right to vote or the location at which they can vote. One of the tactics used, and for no apparent reason, is videotaping or photographing. This tactic is used to dissuade certain voters from entering their designated polling place upon arrival. Some of these voters, who many have recently come from another culture or country, may not understand why their activities are being [monitored] and become even more intimidated when one of the individuals taking the pictures or video approaches them, doesn't say a word and then snaps a shot."). This description of the tactic of using

aside the fact that such an intent requirement might render the law somewhat toothless, it is notable that California's legislature has weighed the seriousness of voter intimidation against the potential First Amendment rights implicated by forbidding recording in the public right of way—and has come down on the side of limiting image capture.[202]

The intimidation of voters by being recorded entering or exiting a polling place is neither imaginary nor new. Minority voters can still recall a time where being recorded accessing a polling place had the potential of real consequences—retaliation by employers or others.[203] More recently, there have been some reports of recording outside of polling places. In 2000, a Republican website in Georgia "reportedly instructed poll watchers to carry video cameras."[204] And during the 2008 presidential election, the recording of license plates outside several polling places in Ohio drew concern.[205]

As with health privacy, the right to vote is often thought of as one emanating from, but not enumerated directly by, the federal Constitution.[206] When balancing the speech rights of those who would record those accessing the polls against the individual's access to the polls—and the broader societal consequences if individuals are intimidated away from exercising that right[207]—state legislatures, and eventually courts, have come out on the side of limiting recording. And, as a plurality of the Supreme Court noted in *Burson v. Freeman*, speech rights may be counterbalanced by the states' "compelling interests in preventing voter intimidation and election fraud."[208] By establishing limitations on

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recording to intimidate voters eerily mirrors some of the same tactics used by those protesting reproductive health care clinics.

202. At least one California court has noted that, while the intent requirement limits criminal enforcement, such a limitation should not be read to include a right to record where an individual lacks an intent to dissuade. Poniktera v. Seiler, 104 Cal. Rptr. 3d 291, 304 n.9 (2010) (noting that the "statute does not necessarily mean photography is permitted, but only that the Legislature has elected to limit criminal penalties to those photographers who possess the requisite evil intent").

203. *See* Sherry A. Swirsky, *Minority Voter Intimidation: The Problem That Won't Go Away*, 11 TEMP. POL. & CIV. RTS. L. REV. 359, 363 (2002) (citing Jim Abrams, *Minority Voter Intimidation Becomes Election Eve Issue*, ASSOCIATED PRESS, Nov. 3, 1998).

204. *Id.* (citing Dave Williams, *Democrats Accuse GOP of Intimidation; Party Alleges that Instructions on Using Cameras at Election Are Attempt to Discourage Blacks from Voting*, AUGUSTA CHRON., Oct. 31, 2001, at C08).

205. *See* Evie Stone, *License Plates Monitored at OH Early Voting Site*, NAT'L PUB. RADIO (Sept. 30, 2008, 4:54 PM), http://www.npr.org/blogs/politics/2008/09/license_plates_monitored_at_oh.html.

206. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 n.78 (1973); *see also* Janai S. Nelson, *The First Amendment, Equal Protection, and Felon Disenfranchisement: A New Viewpoint*, 65 FLA. L. REV. 111, 160 (2013).

207. *See, e.g.*, Morant, *supra* note 197, at 133; *see also* Gilda R. Daniels, *Voter Deception*, 43 IND. L. REV. 343, 357–58 (2010).

208. Burson v. Freeman, 504 U.S. 191, 206 (1992) (Scalia, J., concurring) (addressing constitutionality of anti-electioneering law).

recording, states like California are engaging in the same balance, finding that voter intimidation by camera is equally as compelling a problem. And, while the *McCullen* Court discounted the similarity between anti-electioneering laws and buffer zones in striking down Massachusetts' law, it did so on the basis that "voter intimidation and election fraud . . . are difficult to detect."[209] It is exactly this difficulty in detecting the effects and publication of recordings outing health care access that makes a recording ban necessary.

C. Camera-Free Clinic Zones

The limitations on recording in courtrooms and around polling places may offer a potential solution to the rising problem of individuals being recorded as they attempt to access sensitive health care services. In both of the preceding situations, it is not individual plaintiffs seeking to have image capture stopped using tort or other theories, but rather government entities preemptively restricting image capture via statute or court rules. These restrictions on image capture may provide a template not only for how such a codified restriction might operate, but also how a potential First Amendment challenge might fare.

As in both the courtroom and polling place restrictions, the act of being recorded may intimidate or deter individual access. At stake in the ability to access health care, especially in the reproductive health care context, is a strong government interest in ensuring health privacy.[210] This somewhat parallels the individual rights at stake in the context of both courtroom and polling place image capture restrictions. In the case of health care image capture, the act of being recorded may intimidate, and therefore deter patients from accessing necessary and often constitutionally protected health care.

And, as in the context of courtroom and polling place image capture, the potential deprivation through intimidation of individuals' health access rights may lead to broader consequences for important civic institutions. Courts excluding cameras have articulated concern for the broader judicial

209. McCullen v. Coakley, 134 S. Ct. 2518, 2540 (2014) (citing *Burson*, 405 U.S. at 208).

210. The Supreme Court has clearly articulated reproductive health access in terms of a constitutional right. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). But the "right to health" has not necessarily borne out in constitutional terms. Professor Abigail Moncrieff has articulated the distinction between a "right to health" and constitutional "freedom of health," noting that "individual freedom of health has lurked in Supreme Court precedent for several decades, but it has not emerged with a life of its own. Its spectral existence may be due in part to our recognition of many legitimate regulatory interests in health care and public health." Abigail R. Moncrieff, *The Freedom of Health*, 159 U. PA. L. REV. 2209, 2251 (2011). However, as Moncrieff notes, "the freedom to obtain care does not yet have a life of its own in Supreme Court jurisprudence," but is instead "implicit in and therefore tethered to the Court's reproductive rights jurisprudence." *Id.* at 2223.

institution, including encouraging truthful testimony and encouraging citizens to participate as jurors. Likewise, image capture at polling places implicates not only individuals, but the integrity of the democratic process as a whole. In the health care context, broader issues are at stake than individual access—as discussed above, the perceived loss of anonymity and fear of "outing" for those using sensitive health care services may not only harm the individual, but the collective public health. Despite these similarities, however, it may be that there is an even stronger case to be made for barring cameras outside of clinics than there is for image capture bans near polling places. Much as the case has been made that monitoring courtroom proceedings by video is a way to monitor and educate the public on government actions, commentators have also noted (at the least in the direct democracy context) that voters are also state actors.[211] Given the focus of the right-to-record cases upon the citizen right to monitor government activity, it would seem that the health care context would present an even more defensible limitation upon image capture than the courtroom or polling place contexts.

It is uncertain, however, how potential challenges to a state or local law restricting image capture around health care facilities would fare. The growing jurisprudence recognizing a First Amendment right to record, though mainly arising out of situations where citizens seek to record government agents, poses an interesting test for the image capture restriction discussed in this Article. Is the right to record limited to those situations where individuals seek to document police or other state actions? Or is it an expansive right, as suggested in various dicta, because of the assumption that people accessing public spaces have waived their privacy rights and/or consent to being photographed? Also unclear is whether courts will group the individual and public health concerns implicated by image capture with the interests that have, to date, allowed courts to uphold speech limitations in other contexts.

Given these uncertainties, local entities are perhaps best suited to attempt legislation. Localities will be best able to articulate the potential public health harms of image capture related to health care, and in their capacity as public health providers can muster a robust legislative record. Additionally, as guardians of public spaces, for both speakers and those who must pass through public spaces, localities have a responsibility to balance the use of such spaces.[212] Localities are often responsible, at least

211. *See* Michael Serota & Ethan J. Leib, *The Political Morality of Voting in Direct Democracy*, 97 MINN. L. REV. 1596, 1609–10 (2013); *see also* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 430–35 (2012).

212. *Cf.* Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 733–34 (1998).

to some extent, for encouraging the use of their public spaces—and for zoning where health care may be had. As such, action by local public entities may also be best able to counter the assertion that individuals have consented to be recorded, simply by choosing to walk on a sidewalk. Of course, none of these factors may save a restriction on image capture from First Amendment challenge. Yet, at the very least, such a challenge may allow both courts and scholars to assess where the proper balance lies between the right to record and the right to access health care services privately.

Most importantly, local government action to create camera-free zones outside of health clinics would have an important signaling function. The other constitutional safe spaces discussed above—namely, the protected zones surrounding polling places and courtrooms—stand out because of the important constitutional interests protected by the camera ban. The right to health care access, like the rights protected by the polling place and courtroom camera restrictions, is a vulnerable one. By protecting individuals accessing sensitive health care services from identification and intimidation, local governments would express not only the importance of individual health care access, but would also reaffirm their commitment to a robust role in the shaping of health care policy.

CONCLUSION

This Article suggests that localities should move to protect health care access against the rising tide of image capture in urban areas, and also seeks to examine some of the under-theorized areas of privacy law. While the debate over the propriety of privacy protections for actions taken in public spaces is certainly rich, much of the literature has not disaggregated the types of public spaces at issue, nor taken into account either the type of party making the recording or the type of party being recorded. In highlighting the importance of health privacy in particular—as opposed to a more nebulous privacy right—this Article has attempted to take a specific type of privacy invasion and place it within a broader debate.

Health privacy is important—not only to the individuals for whom such privacy may be decisional in seeking health care, but to the public health system as a whole. Local governments, in looking at the potential effects of image capture on the public health system, should not only consider potential negative health outcomes but also how their own land-use policies may also lead to a loss of privacy for many of their denizens. While a one-size-fits-all approach to health privacy in public spaces may not make sense either practically or doctrinally, a greater examination by both scholars and municipal governments of the intersectionality of land-use policies, technological development, and health privacy would surely benefit both

academics and individuals. And a move toward a more local examination of the intersection of privacy, and use, and public health, could result in innovations that serve community health in a way more tailored to local needs than any state or federal solution could attempt.

Beyond the specific problem at the center of this Article is also a more central question—which public health issues should be addressed structurally by local governments, and which vindicated by individual suits in tort? Where the health harms of a particular practice are felt not only individually but also collectively, affirmative steps by state and local governments to prevent the impairment of public health are appropriate. Governments, in taking steps to guard the public health, will on occasion create unintended consequences—anti-sprawl measures may push people into public spaces. And while financial incentives for individuals to vindicate their rights in court may generally exist, in the case of health or privacy related harms, individuals may nonetheless not wish to expose themselves to further public scrutiny. In these instances, local governments may be ideally placed to act in a way that both ameliorates the consequences of their own actions and guards the public health. The creation of constitutional safe spaces—where governments themselves act to buffer the exercise of important rights—should be considered among the core roles of local governments.