NOTE

Free Speech off my Body: Protecting Abortion Patients and Medical Privacy in Light of the First Amendment

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INTRODUCTION

Abortion clinics and the women who visit them are targets. Clinics nationwide experience daily protests, receive bomb threats, and need to take extensive precautions to protect the lives of their doctors, staff, and patients.[1] Although California is one of the most abortion-friendly states,[2] California's clinics are still subject to significant anti-abortion demonstrations, and have been the victims of substantial safety threats and harassment.[3] California currently has some laws in place that deter harassment.[4] However, these laws fall short of protecting doctors and patients in part because the laws are difficult to enforce, and also because new harassment tactics work around existing laws. Protestors have been known to take pictures or videos of patients and doctors

[1] *See* NAT'L ABORTION FED'N, 2019 VIOLENCE AND DISRUPTION STATISTICS 1 (2019), https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/NAF-2019-Violence-and-Disruption-Stats-Final.pdf [https://perma.cc/KL7D-6T46]; NAT'L ABORTION FED'N, 2018 VIOLENCE AND DISRUPTION STATISTICS 7-10 (2018), https://prochoice.org/wp-content/uploads/2018-anti-abortion-violence-and-disruption.pdf [https://perma.cc/7KED-S34C] [hereinafter *2018 Violence*].

[2] *See* Emily Cadei, *Overturning* Roe v. Wade *Wouldn't Be the Biggest Obstacle for Abortion Access in California*, SACRAMENTO BEE (Aug. 2, 2018, 12:01 AM), https://www.sacbee.com/news/politics-government/capitol-alert/article215841115.html [https://perma.cc/99S9-5T6V] (explaining that California is the only state that recognizes a state Constitutional right to elect an abortion procedure); Ashley Edwards, *I Need an Abortion — Now What? An Indispensable Guide To Laws, Waiting Periods & Restrictions by State*, REFINERY29, https://www.refinery29.com/en-us/2019/01/217375/abortion-clinics-laws-map (last visited Oct. 6, 2020) [https://perma.cc/AW8G-J22A] (illustrating how California has the highest number of abortion clinics in the United States and has one restriction on abortion after twenty-four weeks of gestation); Phil Willon, *Newsom to Women Seeking Abortions: California Welcomes You*, L.A. TIMES (May 31, 2019, 12:44 PM), https://www.latimes.com/politics/la-pol-ca-gavin-newsom-california-abortion-restrictions-20190531-story.html [https://perma.cc/NHB5-DVMQ] (discussing California Governor Gavin Newsom's decision to sign a proclamation affirming a woman's right to elect an abortion procedure in California).

[3] *See* Monica Busch, *That Hoax Bomb at Planned Parenthood Unveils a Terrifying Reality*, BUSTLE (Oct. 22, 2017), https://www.bustle.com/p/that-hoax-bomb-at-planned-parenthood-proves-threats-to-abortion-clinics-are-still-horribly-real-2969572 [https://perma.cc/GC8G-V53P].

[4] *See, e.g.*, California Freedom of Access to Clinic and Church Entrances Act, CAL. PENAL CODE § 423 (2020) (prohibiting threats and obstruction of access outside reproductive health facilities); CAL. GOV. CODE § 6218 (2020) (prohibiting posting "the home address, home telephone number, or image of any provider, employee, volunteer, or patient of a reproductive health services facility" on the internet with the intention of threatening the subject of the posting or inciting a third party to violence); S.F., CAL., POLICE CODE art. 43, § 4303 (2020) (prohibiting following or harassing a person within 25 feet of a reproductive health facility); SANTA BARBARA, CAL., MUNICIPAL CODE tit. 9, ch. 9.99.020 (2020) (prohibiting demonstrations within the driveway area or eight feet of the driveway area of a health care facility).

entering abortion clinics and post them online.[5] Other anti-abortion activists utilize online chat forums to ostracize and threaten women who receive abortions.[6] Many view the potential misuse of patient images coupled with the increased online attention to abortion as a threat to patients' privacy.[7]

Women who seek medical care at an abortion-providing clinic must invariably confront protestors, and currently have no way to control the use of the images protestors might take.[8] Capturing images of patients entering or exiting reproductive health facilities could lead to private, sensitive information about their medical treatment becoming public knowledge.[9] Over one third of abortion procedures are done at

[5] The former Chief Legal Counsel for Planned Parenthood Affiliates of California, Maggy Krell, views photography and recording outside of clinics as one of the most pervasive safety and privacy issues patients face. California's Planned Parenthood clinics report that anti-abortion protestors are almost always recording patients who come into and out of clinics with their cell phones. Mrs. Krell has stated that "there is always a concern that people are posting these images on social media." In 2018 Planned Parenthood Affiliates of California sent a cease and desist letter to a man who was recording interactions with patients outside of Southern California clinics and posting the videos to a YouTube channel. He has not been back since the letter was sent, but Mrs. Krell does not believe this is a long-term solution for this issue. Interview with Maggy Krell, former Chief Legal Counsel, Planned Parenthood Affiliates of California, in Sacramento, Cal. (Dec. 5, 2019) (on file with author); *see also*, Sue Chan, *Abortion WebCam*, CBS NEWS (Aug. 22, 2002, 4:43 PM), https://www.cbsnews.com/news/abortion-webcam/ [https://perma.cc/B9FR-NU5J]; Yochi J. Dreazen, *Abortion Protesters Use Cameras, Raise New Legal Issues, Lawsuits*, WALL ST. J. (May 28, 2002, 12:01 AM), https://www.wsj.com/articles/SB1022539371607091560 [https://perma.cc/SHX3-VR79].

[6] *See* Niraj Chokshi, *Chicago Man Charged in Death Threat Against Abortion Clinic*, N.Y. TIMES (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/us/ifunny-threat-abortion.html [https://perma.cc/TVC7-PTFF].

[7] *See* Erin B. Bernstein, *Health Privacy in Public Spaces*, 66 ALA. L. REV. 989, 1006-07 (2015); *2018 Violence*, *supra* note 1, at 1.

[8] *See* Bernstein, *supra* note 7, at 992 ("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.").

[9] Courts have acknowledged that witnessing people entering a reproductive health facility implicates medical privacy concerns. *See* Madsen v. Women's Health Ctr., 512 U.S. 753, 768-70 (1994) (finding medical privacy was a significant state interest in creating a buffer zone around an abortion clinic); *cf.* Chico Feminist Women's Health Ctr. v. Scully, 208 Cal. App. 3d 230, 241-43 (1989) (noting while courts cannot guarantee residents "the kind of anonymity they might find in a 'large metropolitan community,'" people entering abortion clinics "doubtless have an important interest in protecting the privacy of their medical procedure").

reproductive health clinics.[10] The nature of reproductive health clinics implies that patients are obtaining abortion care or other reproductive health services. Moreover, individuals can be identified from an image alone through social media and facial recognition technology.[11] This increases the risk that an individual's participation in an abortion procedure will be exposed if protestors are allowed to capture and post images or videos online. California currently prohibits posting images of patients online, but only when it is intended to threaten the patient or incite a third party to violence.[12] Because this law only prohibits posting in very narrow circumstances, it does little to protect from these potential privacy violations.

This issue is most significant for urban clinics which abut the public-right-of-way. Clinics in highly urbanized areas — like Los Angeles and San Francisco — seldom have parking lots or other property between the street and entrances, and cannot impose a barrier between patients and protestors.[13] Further, the overwhelming majority of Californians live in highly urbanized spaces.[14] Because a significant portion of Californians must use the public right of way to access abortion services, as the law currently stands, many Californians are at risk for medical privacy violations when they attempt to receive care.[15] This potential exposure of medical care raises significant medical privacy concerns that need to be addressed by restricting recording and photography of patients seeking care at reproductive health facilities.[16]

Photography and video-recording (which I will refer to collectively as "recording"), however, occupy a legal grey area with respect to First

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[10] *See State Facts About Abortion: California*, GUTTMACHER INST. (Sept. 2020), https://www.guttmacher.org/fact-sheet/state-facts-about-abortion-california [https://perma.cc/943Q-T64K].

[11] Cade Metz, *Facial Recognition Tech Is Growing Stronger, Thanks to Your Face*, N.Y. TIMES (July 13, 2019), https://www.nytimes.com/2019/07/13/technology/databases-faces-facial-recognition-technology.html [https://perma.cc/9VYM-9GGC].

[12] CAL. GOV. CODE § 6218 (2020).

[13] Interview with Maggy Krell, *supra* note 5.

[14] Mike Maciag, *Map: California Home to Most Densely Populated Areas*, GOVERNING (Mar. 26, 2012, 5:00 PM), https://www.governing.com/blogs/by-the-numbers/california-cenus-population-density-urbanized-areas-cities.html [https://perma.cc/RNP9-GGF8] (noting that 95% of California citizens live in high-populated urban environments).

[15] *See* Bernstein, *supra* note 7, at 993.

[16] Although this Note focuses on medical privacy concerns, there are other significant issues related to sharing photos or videos of women who receive abortions, including concerns for personal safety. The National Abortion Federation reports high instances of death threats, threats of harm, and stalking that occur over the internet. *2018 Violence supra* note 1, at 4.

Amendment protection,[17] which complicates any regulation of recording outside a clinic.[18] The First Amendment at its core protects oral speech and not conduct.[19] However, First Amendment jurisprudence has extended the reach of the First Amendment to also protect conduct that itself communicates ideas[20] or is necessary to produce and distribute speech.[21] Images themselves enjoy First Amendment protection because they are a medium which can represent or express ideas.[22] The uncertainty in the law arises out of the extremely close relationship between the act of recording, dissemination of images, and the images themselves.[23] A lack of definitive jurisprudence on this topic makes it unclear if the First Amendment protects the act of recording, and if so, to what extent.[24] Courts faced with recording restrictions, though, have assumed that First Amendment interests are implicated.[25]

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[17] Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 366-69 (2011) (discussing the variant ways courts have granted First Amendment protection to image capture).

[18] *See* Margot E. Kaminski, *Privacy and the Right to Record*, 97 B.U. L. REV. 167, 179 (2017).

[19] *See* U.S. CONST. amend. I.

[20] *See* Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968)).

[21] *See* Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1055-56 (2015) (providing examples of the "penumbral protections for conduct related to the production of speech").

[22] The Supreme Court has held that a wide variety of mediums qualify for First Amendment protection, including photographs or images. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 790 (2011) (finding that video games qualify for First Amendment protection because they can convey an idea); Massachusetts v. Oakes, 491 U.S. 576, 591 (1989) ("Photography, painting, and other two-dimensional forms of artistic reproduction . . . are plainly expressive activities that ordinarily qualify for First Amendment protection."); Kaplan v. California, 413 U.S. 115, 119-20 (1973) (stating that pictures, films, and paintings have traditional First Amendment protection); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952) (holding that motion pictures are a protected medium for communication).

[23] Kreimer, *supra* note 17, at 376-77; *see also* Kaminski, *supra* note 18, at 170.

[24] Bhagwat, *supra* note 21, at 1034; Kaminski, *supra* note 18, at 177.

[25] *See, e.g.*, ACLU of Ill. v. Alvarez, 679 F.3d 583, 595 (7th Cir. 2012) (finding that recording is a corollary right protected by the first amendment); Glik v. Cunniffe, 655 F.3d 78, 83-84 (1st Cir. 2011) (asserting that "videotaping of public officials is an exercise of First Amendment liberties"); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (asserting that the First Amendment protects a right to record police officers); Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (finding a First Amendment violation for prohibiting recording of a public meeting involving the Alabama Supreme Court); Poniktera v. Seiler, 181 Cal. App. 4th 121, 131-32 (2010)

This Note argues that a restriction on non-consensual photography or recording of patients outside reproductive health clinics properly balances the First Amendment and medical privacy interests at stake by protecting patient medical privacy without unduly burdening speech.[26] Part I will discuss the background of balancing the First Amendment with patient interests in the abortion context, as well as other instances where restrictions on recording properly balanced competing First Amendment interests.[27] Part II will discuss the scope of First Amendment protections for recording.[28] Part II will then discuss the countervailing interests in medical privacy before concluding that, in light of these interests, a restriction on non-consensual recording of patients outside reproductive health facilities would be constitutional.[29] Part III will propose statutory language, which properly balances these competing interests, and which California should adopt to provide greater protection for abortion patients.[30]

I. BACKGROUND

Abortion is one of the most hotly contested issues of our time. Recently, a number of states have taken steps toward curbing or altogether restricting abortion services,[31] the federal government has taken steps to withhold funding from abortion providers,[32] and anti-abortion sentiment has been more pronounced.[33] Despite this national

(assuming that recording at and around polling places is protected under the First Amendment).

[26] *See infra* Part II.B.3.

[27] *See infra* Part I.

[28] *See infra* Part II.

[29] *See infra* Part II.B.

[30] *See infra* Part III.

[31] *See, e.g.*, H.R. 314 (Al. 2019) (criminalizing all abortions in Alabama); Living Infants Fairness and Equality (LIFE) Act, H.R. 481 (Ga. 2019) (banning abortions at six weeks of gestation in Georgia); S. 126, 100th Gen. Assemb., § 188.056 (Mo. 2019) (banning abortion at eight weeks of gestation in Missouri); Preterm-Cleveland v. Yost, 394 F. Supp. 796, 798 (S.D. Oh. 2019) (challenging Ohio law which bans abortions at six weeks of gestation); EMW Women's Surgical Ctr. v. Beshear, No. 3:19-cv-178, 2019 U.S. Dist. LEXIS 4525, at *1-2 (W.D. Ky. Mar. 15, 2019) (challenging Kentucky law which bans abortions at six weeks of gestation).

[32] *See* State of California v. Alex Azar, II, No. 19-15974 (9th Cir. filed May 7, 2019); State of Oregon v. Alex Azar, II, No. 19-35386 (9th Cir. filed May 6, 2019); State of Washington v. Alex Azar, II, No. 19-35394 (9th Cir. filed May 6, 2019).

[33] Kate Smith, *Violence Against Abortion Clinics Hit a Record High Last Year. Doctors Say It's Getting Worse*, CBS NEWS (Sept. 17, 2019, 9:19 AM), https://www.cbsnews.com/news/violence-against-abortion-clinics-like-planned-parenthood-hit-a-record-high-last-year-doctors-say-its-getting-worse/ [https://perma.cc/7K7F-Y2J9].

debate, however, abortion remains a legal medical option in the United States.[34] Reconciling this increased attention on abortion providers with meaningful access to medical care is no easy feat, especially in the face of the First Amendment. The exercise of First Amendment rights through protests outside of abortion clinics can deter patients and obstruct access to care.[35] Both state and federal legislatures have implemented restrictions on protests in order to protect patients and ensure access to care.[36] These measures have categorically been challenged as unduly burdening the First Amendment right to debate a matter of public concern.[37] Anti-abortion speech is generally recognized as core political speech on issues of public concern, which is protected by the First Amendment.[38] Despite this protection, the Supreme Court has found that state and patient interests, in some instances, are significant enough to allow for restrictions on protestor activity.[39] As the cases below highlight, the right to free speech is not absolute and can justifiably be curtailed.

A. Balancing Free Speech and Abortion Access

The Freedom of Access to Clinic Entrances Act ("FACE Act") was enacted by Congress in 1994 in response to harassment and violence outside of abortion clinics.[40] Abortion protestors and state governments

[34] Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming the right to choose to have an abortion free from government interference until fetal viability); Roe v. Wade, 410 U.S. 113 (1973) (recognizing constitutional right to choose to have an abortion free from government interference).

[35] *See* Davis Crary, *U.S. Abortion Clinics Face Surge of Trespassing and Blockades*, DENVER POST (May 7, 2018, 4:10 PM), https://www.denverpost.com/2018/05/07/abortion-clinics-trespassing-obstruction-blockades/ [https://perma.cc/VWP3-WNM2] (describing instances of protestors obstructing access of patients to reproductive health clinics).

[36] *See infra* Part I.A.

[37] *See infra* Part I.A.; *cf.* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stating that "debate on public issues should be uninhibited, robust, and wide-open").

[38] *See* McCullen v. Coakley, 573 U.S. 464, 487 (2014); Hill v. Colorado, 530 U.S. 703, 707 (2000); Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 377 (1997); Madsen v. Women's Health Ctr., 512 U.S. 753, 768-70 (1994).

[39] *See, e.g.*, *Hill*, 530 U.S. at 717-18 (finding a restriction on protestor activity to be valid); *Schenck*, 519 U.S. at 376 (finding a preliminary injunction was not unlawful prior restraint on free speech); *Madsen*, 512 U.S. at 768-70 (finding the buffer zone at issue was not a significant burden on speech).

[40] Freedom of Access to Clinic Entrances, 18 U.S.C. § 248 (2018) (prohibiting the use of force, threat of force, or physical obstruction to "intimidate or interfere with any person because that person is or has been, or in order to intimidate such person . . .

have challenged this act numerous times on First Amendment grounds.[41] However, courts have repeatedly found that it does not violate the First Amendment because it restricts speech outside of First Amendment protection, including true threats, assaults, trespass, and vandalism.[42] Notably, the FACE Act constitutionally prohibits speech made online which constitutes a threat to abortion providers.[43] In *Planned Parenthood v. ACLA*, the Ninth Circuit concluded that images of abortion providers with wanted signs and crosshairs posted online to a website called "Nuremberg Files" constituted a true threat outside of First Amendment protection.[44] The Ninth Circuit found this speech was unprotected despite the asserted political message, because taken as a whole, the speech constituted a threat to the providers.[45]

from, obtaining or providing reproductive health services"). California has similar legislation to the FACE act. California Freedom of Access to Clinic and Church Entrances Act, CAL. PENAL CODE § 423 (2020).

[41] *See, e.g.*, United States v. Bird, 401 F.3d 633, 634 (5th Cir. 2005) (challenging original holding in light of new Supreme Court decision); Norton v. Ashcroft, 298 F.3d 547, 550 (6th Cir. 2002) (illustrating anti-abortion activists challenging constitutionality of Freedom of Access to Clinic Entrances Act); U.S. v. Hart, 212 F.3d 1067, 1069 (8th Cir. 2000) (finding against anti-abortion activist under the FACE act); United States v. Gregg, 226 F.3d 253, 256 (3d Cir. 2000) (arguing "FACE is a violation of Congress's authority"); United States v. Wilson, 154 F.3d 658, 660 (7th Cir. 1998) (arguing "FACE violates their First Amendment right of freedom of speech by deterring the expression of a particular point of view and their right of freedom of association"); United States v. Weslin, 156 F.3d 292, 294 (2d Cir. 1998) (claiming FACE is unconstitutional); Hoffman v. Hunt, 126 F.3d 575, 579 (4th Cir. 1997) (illustrating anti-abortion activists arguing prohibition of health care facilities violated their First Amendment rights); Terry v. Reno, 101 F.3d 1412, 1413 (D.C. Cir. 1996) (challenging constitutionality of FACE Act); Cheffer v. Reno, 55 F.3d 1517, 1519 (11th Cir. 1995) (same).

[42] *See, e.g.*, *Bird*, 401 F.3d at 634 (asserting FACE is still constitutionally valid even in light of the new Supreme Court decision); *Norton*, 298 F.3d at 550 (holding "Freedom of Access to Clinic Entrances Act does not, on its face, violate plaintiffs' First Amendment rights of free speech"); *Hart*, 212 F.3d at 1073 (finding "[t]he FACE Act is narrowly tailored because it imposes criminal liability for only three types of activities: uses of force, threats of force, and physical obstructions"); *Gregg*, 226 F.3d at 256 (finding FACE constitutional); *Wilson*, 154 F.3d at 660; *Weslin*, 156 F.3d at 294 (dismissing appeal and holding FACE constitutional); *Hunt*, 126 F.3d at 579 (reversing lower court decision that FACE is unconstitutional); *Terry*, 101 F.3d at 1414 (finding "[t]he Access Act also does not violate the First Amendment"); *Cheffer*, 55 F.3d at 1521-22 (finding FACE "does not violate appellants' First Amendment rights").

[43] Planned Parenthood of the Columbia/Willamette, Inc. v. Am. Coal. of Life Activists, 290 F.3d 1058, 1077 (9th Cir. 2002).

[44] *Id.* at 1077-80.

[45] *Id.* at 1079-80.

1. Buffer Zone Restrictions

Numerous states have also enacted "buffer zones" limiting protest within a designated amount of space outside of abortion clinic entrances or within a certain number of feet from patients.[46] The Supreme Court upheld buffer zone restrictions in *Hill v. Colorado*[47] and *Madsen v. Women's Health Center*,[48] despite holding that the protests were "core political speech," because the laws were tailored to meet a state interest and allowed for effective alternative channels of communication.[49] *Madsen* is particularly relevant because the Court identified medical privacy as a compelling state interest.[50] The interest in maintaining medical privacy, among other state interests, was sufficient to justify an injunction that was appropriately tailored to maintain privacy.[51]

More recently, in *McCullen v. Coakley*, the Supreme Court struck down a buffer zone law in Massachusetts because it was not tailored to the state's interests and burdened more speech than necessary.[52] The law prohibited anyone from remaining within thirty-five feet of a reproductive health clinic.[53] The law was challenged by anti-abortion "counselors" who would approach women on the sidewalk in an attempt to persuade them against receiving an abortion.[54] Notably, the court did find that the law was content neutral despite its limited scope of restricting speech outside abortion clinics.[55] The Court held the law did not discriminate against speech for *what* was said, only *where* it was

[46] *See, e.g.*, McCullen v. Coakley, 573 U.S. 464, 487 (2014) ("At the same time, the buffer zones impose serious burdens on petitioners' speech."); Hill v. Colorado, 530 U.S. 703, 717-18 (2000) (describing the buffer zone created by the contested statute); Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 377 (1997) (describing a floating buffer zone which was eventually struck down by the Supreme Court); Madsen v. Women's Health Ctr., 512 U.S. 753, 768 (1994) (describing the thirty-six-foot buffer zone implemented by the state).

[47] *Hill*, 530 U.S. at 718. The law in *Hill* provides for a buffer zone that is significantly smaller than the one in *McCullen* (eight feet compared to thirty-five feet), so it is arguable that the *Hill* law is not burdensome on speech to the same extent and is constitutional. *Compare Hill*, 530 U.S. at 718 (upholding eight-foot "buffer zone"), *with McCullen*, 573 U.S. at 487-90 (striking down a law similar to the law in *Hill*, but not formally overturning *Hill*).

[48] *Madsen*, 512 U.S. at 768.

[49] *Hill*, 530 U.S. at 717-18; *Madsen*, 512 U.S. at 768.

[50] *Madsen*, 512 U.S. at 768.

[51] *Id.*

[52] *McCullen*, 573 U.S. at 496-97.

[53] *Id.* at 469.

[54] *Id.* at 473-74.

[55] *Id.* at 479-80.

said.[56] It further held that the law was content neutral because the justifications for the law (public safety, patient access to healthcare, and unobstructed use of public sidewalks) did not reference the content of the regulated speech, and was therefore subject to intermediate scrutiny.[57]

Ultimately, the Court struck down the law for being too burdensome on speech.[58] The Court based this finding on the fact that the plaintiffs were "counselors" who had a particular style of communication that was burdened.[59] The Court found the plaintiffs could not effectively communicate their messages without the ability to approach patients and provide counseling through personal conversations.[60] Though this case favored the First Amendment interests, it illustrates that laws can target patient protection without favoring one side of the abortion debate.[61]

B. California's Restrictions on Recording

Recording and image capture itself occupies a legal grey area with respect to the First Amendment. Regardless of the most appropriate theory for protecting recording under the First Amendment, restrictions on recording do raise First Amendment issues, particularly when the recording is adjacent to topics of public concern.[62] Despite this, there are constitutional restrictions on recording and image capture in public spaces when there is a sufficient countervailing interest.[63] California already has constitutional restrictions on recording in public spaces,

[56] *Id.*

[57] *Id.*

[58] *Id.* at 496-97.

[59] *Id.* at 487-88.

[60] *Id.*

[61] *See id.* at 479-80.

[62] Most cases which raise First Amendment issues on recording restrictions involve recording the conduct of public officials (police officers). Speech addressing government and public official conduct is traditionally viewed as a matter of public concern and is protected by the First Amendment. *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 597 (7th Cir. 2012); Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011); 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).

[63] *See, e.g.*, CAL. ELEC. CODE § 18541(a)(3) (2020) (restricting recording at polling places); CAL. PENAL CODE § 632 (2020) (restricting electronic recording and dissemination of conversations when not all parties consent to the recording or dissemination).

which supports the constitutionality of a restriction on recording outside reproductive health facilities.[64]

California restricts photography and video recording within 100 feet of a polling location, in order to protect voters' privacy and their ability to cast a secret ballot.[65] The California Fourth District Court of Appeal found that this restriction was constitutional as to the polling place itself, but did not resolve the issue restricting recording surrounding the polling place.[66] It first found that polling places are not traditional public fora, meaning the restriction is subject to a lower level of scrutiny.[67] The court held that the recording restrictions were reasonable limitations because they furthered the purpose that the forum serves, and that it was necessary to restrict recording to meet the state interest.[68] The restrictions furthered the purpose of the forum — to facilitate voting — by alleviating the potentially deterrent effects of recording. While the scrutiny applied to non-traditional fora is lower than what is applied to traditional public fora,[69] this law recognizes a privacy interest which justifies a restriction on recording.[70]

California also restricts electronic recording and dissemination of conversations when not all parties consent to the recording or dissemination, and the parties participating in the conversation have a reasonable expectation of privacy.[71] The fact that something is recorded in a public location is not dispositive of a breach of privacy.[72] Even in public locations parties can assert a reasonable expectation of privacy and bring an action under this law for breaches of privacy by recording.[73] Both of these examples show that California recognizes that privacy interests, even in public spaces, can justify restrictions on recording.

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[64] *See* ELEC. § 18541(a)(3); PENAL § 632.

[65] *See* ELEC. § 18541(a)(3).

[66] *See* Poniktera v. Seiler, 181 Cal. App. 4th 121, 133-38 (2010).

[67] *See id.* at 133-36.

[68] *See id.* at 136-38.

[69] *See* Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678-79 (1992).

[70] *Poniktera*, 181 Cal. App. 4th at 138.

[71] *See* CAL. PENAL CODE § 632 (2020).

[72] *See* Safari Club Int'l v. Rudolph, 862 F.3d 1113, 1124-26 (9th Cir. 2017) (finding that Plaintiffs might have an objectively reasonable expectation of privacy surrounding the recorded conversation despite the conversation occurring in a public restaurant).

[73] *See id.*

II. THE CONSTITUTIONALITY OF A RESTRICTION ON RECORDING

A. Is Recording Protected Speech?

The First Amendment protects a right to free speech which cannot be abridged by the government.[74] Recording is not "speech" in the traditional sense, but rather conduct which is not generally protected under the First Amendment.[75] However, recording is inextricably linked to communication both because it is a means of creating communication and because the communication can be simultaneous with the recording.[76] This connection is especially apparent with the rise of smartphone and social media usage.[77] Individuals regularly use images on social media as a medium to communicate ideas, and often record and post images instantaneously.[78] Recording is invariably tied up with the First Amendment, but this begs the question: on what grounds, and to what extent, should recording be granted First Amendment protection?[79]

This Part will first analyze theories for the grounds for protecting recording under the First Amendment both generally and as applied to the proposed restriction.[80] It will then determine what scrutiny should

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[74] U.S. CONST. amend. I.

[75] *See* Texas v. Johnson, 491 U.S. 397, 404 (1989) ("The First Amendment literally forbids the abridgment only of 'speech' . . . ."). Court decisions have distinguished between conduct and "expressive conduct," granting only the latter First Amendment protection. *Id.* at 404 (finding that conduct which is "sufficiently imbued with elements of communication" is entitled to first amendment protection (quoting Spence v. Washington, 418 U.S. 405, 409 (1974))); United States v. O'Brien, 391 U.S. 367, 375-76 (1968) (finding that conduct which expresses an idea may be subject to First Amendment protection).

[76] *See* Kreimer, *supra* note 17, at 376-77.

[77] *See* Nelson Granados, *What is Media in the Digital Age?*, FORBES (Oct. 3, 2016, 12:06 PM), https://www.forbes.com/sites/nelsongranados/2016/10/03/what-is-media-in-the-digital-age/#4802343851 [https://perma.cc/Z9AP-5PP5].

[78] *See, e.g.*, Elise Moreau, *What is Instagram and Why Should You Be Using It?*, LIFEWIRE, https://www.lifewire.com/what-is-instagram-3486316 (last updated Sept. 2, 2020) [https://perma.cc/ED2E-BS6D]; *Facebook Live*, FACEBOOK, https://www.facebook.com/facebookmedia/solutions/facebook-live (last visited Sept. 24, 2020) [https://perma.cc/32JN-Q5XU]; SNAPCHAT, https://www.snapchat.com/ (last visited Sept. 24, 2020) [https://perma.cc/9TWS-RB5A].

[79] *See* Bhagwat, *supra* note 21, at 1034; Kaminski, *supra* note 18, at 177.

[80] The restriction proposed in this Note would prohibit recording patients outside of reproductive health facilities when the person recording acts intentionally and with reason to believe that the person being recorded is a patient. The proposed restriction includes an exception for recordings taken with consent of the patient. The analysis, then, applies to a restriction on the non-consensual recording of private individuals, engaging in private conduct, on a public street. *See infra* Part III.

be applied to the proposed restriction based on the most appropriate theory. Finally, this Part will analyze the proposed restriction under that level of scrutiny.[81]

1. Recording as Expressive Conduct

One way to conceptualize First Amendment protections for recording is to regard recording as expressive speech. Regardless of the close relationship it has to expression, however, the act of recording is conduct, and the two should not be conflated.[82] Conduct alone is not generally protected by the First Amendment, and courts are wary to extend protection to conduct.[83] When the underlying conduct is not generally associated with speech,[84] the government has significant freedom to regulate the non-speech elements of the conduct. [85] In some instances, conduct is afforded First Amendment protection because it is in-and-of-itself expressive in a way that constitutes speech.[86] In order for conduct to be classified as "expressive conduct," there must be a clear intent to convey a message, and a likelihood that the message will be understood by viewers.[87]

The act of recording alone does not appear to be expressive conduct under this test. One could argue that under some circumstances the act

[81] Kaminski, *supra* note 18, at 175-76 (providing the framework for evaluating First Amendment protections).

[82] *See* Larsen v. Fort Wayne Police Dep't, 825 F. Supp. 2d 965, 979 (N.D. Ind. 2010); Bhagwat, *supra* note 21, at 1042.

[83] *See* Texas v. Johnson, 491 U.S. 397, 404 (1989); United States v. O'Brien, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea.").

[84] Conduct which is considered closely associated to speech involves acts such as leafletting or circulating books, whereas expressive conduct is conduct associated with speech only in the particular instance. *Compare* Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (finding protection for distribution of pamphlets and leaflets), *with O'Brien*, 391 U.S. at 376-77 (finding that burning of Selective Services certificates is expressive conduct as applied, and holding that the government interest satisfies the restriction on conduct). The act of recording is not closely associated with speech in the same way. *See supra* Part II.A.1 ¶ 1.

[85] *See Johnson*, 491 U.S. at 406 ("The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word.").

[86] *See, e.g.*, *id.* at 404-05 (finding that burning a flag is expressive conduct which constitutes speech); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969) (finding that wearing an armband to protest military involvement in Vietnam is speech).

[87] *Johnson*, 491 U.S. at 404 (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974)).

of recording a patient entering a clinic would convey a message of disagreement, particularly if the recorder were in crowd of anti-abortion protestors. However, the mere act of recording fails to clearly communicate a particular message in the same way that burning a flag on courthouse steps does because an audience would not inherently understand the message.[88] An expressive conduct theory for First Amendment recording protections is tenuous because it would need to be assessed based on the particular circumstances of each act of recording.

2. Recording as a Corollary Right

The most accurate way to conceptualize recording as protected by the First Amendment is as a corollary to free speech.[89] That is, recording is necessary to effectuate the right of expression. Courts have recognized that even though something might not itself be protected, it may be entitled to protection because it is necessary to "secure" the core right.[90] With respect to the First Amendment, courts have found that ancillary acts necessary to distribute speech are protected under the First Amendment.[91] Similarly, recording can be viewed as a corollary to speech because it is so closely tied to speech.

The Seventh Circuit in *American Civil Liberties Union v. Alvarez* came to this conclusion, stating that "[t]he act of *making* [a] . . . recording is necessarily included within the First Amendment . . . as a corollary of the right to disseminate the resulting recording."[92] Recording is used as a means to produce speech that is then disseminated and conveys a message.[93] Without the ability to record, the right to convey that

[88] *See* Larsen v. Fort Wayne Police Dep't, 825 F. Supp. 2d 965, 979 (N.D. Ind. 2010) (holding that taking photographs or video recordings alone does not constitute protected speech under the First Amendment); Bhagwat, *supra* note 21, at 1042.

[89] The leading case on this issue, *ACLU v. Alvarez*, conceptualizes the right to record under this theory. While the case applies to audio and audiovisual recording, the court in dicta asserts the same is true for photography. ACLU of Ill. v. Alvarez, 679 F.3d 583, 595-97 (7th Cir. 2012); *see also* Bhagwat, *supra* note 21, at 1056-58; Kaminski, *supra* note 18, at 188-90.

[90] *See* Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965).

[91] *See, e.g.*, Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 761-62 (1988) (protecting news racks under the First Amendment as necessary to distribution); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64 n.6 (1963) (finding protection for the circulation of books); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938) (finding protection for distribution of pamphlets and leaflets).

[92] *Alvarez*, 679 F.3d at 595.

[93] *See* Bhagwat, *supra* note 21, at 1042.

message would be significantly limited or ineffective.[94] Particularly in an era which relies heavily on images to convey information, not being able to produce those images through recording would leave freedom of expression without meaningful effect.[95] Thus, recording is a corollary right because it secures the core right of conveying the images produced by the recording.

3. Recording as Newsgathering

Another way to conceptualize recording is as a newsgathering mechanism. Abortion protestors may assert that they are recording in an effort to gather information about something that is a topic of public concern.[96] The right to gather news is a subset of the corollary rights argument,[97] but is based on the Press Clause of the Constitution specifically.[98] The argument is that the ability to gather news is essential to a free press.[99] This could apply to recording because recording can be a newsgathering mechanism.[100] The weakness with this theory, however, is that it is twice removed from the First Amendment.[101] In addition, the right to gather news is typically invoked to justify access to places, which is not an issue here.[102] The right to gather information grants access rights, but does not necessarily mean there is a right to gather information in the manner one chooses.[103] For example, one might have a right to be present at a criminal trial, but not a right to record it.[104] Because of the pervasive use of photographs and videos in

94 *See Alvarez*, 679 F.3d at 595; *see also* Kaminski, *supra* note 18, at 190.

95 *See Alvarez*, 679 F.3d at 595.

96 *See supra* Part I.A.

97 Kaminski, *supra* note 18, at 190.

98 *See* Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011) ("An important corollary to this interest in protecting the stock of public information is that '[t]here is an undoubted right to gather news "from any source by means within the law."'" (quoting Houchins v. KQED, Inc., 438 U.S. 1, 11 (1978))).

99 *See id.*

100 *See* Bhagwat, *supra* note 21, at 1078.

101 *See id.* ("[T]he causal and temporal connection between gathering information and speech is more distant than the connection between producing speech and actual speech.").

102 *See* Kaminski, *supra* note 18, at 192.

103 *See* Estes v. Texas, 381 U.S. 532, 539-40 (1965) (plurality opinion) (holding that the right to gather news merely means the same access as the public, not the right to televise or otherwise gather news by the means of choice).

104 *See id.*; *see also* Kaminski, *supra* note 18, at 193-94; Nancy S. Marder, *The Conundrum of Cameras in the Courtroom*, 44 ARIZ. ST. L. J. 1489, 1492-93 (2012) (discussing the competing interests of privacy and public concern where cameras are

modern news reporting,[105] there is a stronger argument that the ability to record *is* necessary to newsgathering and therefore integral to freedom of the press. The Ninth Circuit has suggested that recording-as-newsgathering could be a basis for affording First Amendment protection to recording, even for amateur journalists.[106]

However, relying on the Press Clause for protecting recording may be problematic, as the Press Clause seems to occupy a subordinate role in First Amendment jurisprudence,[107] especially with the rise of amateur journalists. Aside from the fact that the internet has shattered the concept of a traditional media due to an increase in amateur reporting,[108] courts have regularly asserted that the "press" has the same rights as the general population.[109] As one scholar has noted, "[b]ecause the freedoms to publish and to disseminate speech are also protected by the Speech Clause, the Press Clause has been left with nothing to do."[110] Premising First Amendment protections for recording on the Press Clause removes recording further from speech. It also does nothing to bolster protection beyond a pure corollary rights argument in an already public space.[111]

In light of these various theories, the simple corollary rights argument seems to be the most accurate way to conceptualize recording under the First Amendment. It is also the most supported by case law and legal scholarship.[112] Recording is not the same as expressive conduct because

barred from the courtroom to avoid curb media exposure). California limits the use of cameras in courtrooms subject to the Judge's discretion, although the hearings are generally open to the public and involve topics of public concern. *Cameras in the Courtroom*, CAL. CTS., https://www.courts.ca.gov/10018.htm (last visited Sept. 24, 2020) [https://perma.cc/88AD-HD45].

105 *Why Journalists Use Social Media*, NEWS LAB, newslab.org/journalists-use-social-media/ (last visited Sept. 28, 2020) [https://perma.cc/9S9F-KN2F].

106 *See* Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (finding a genuine issue of material fact as to whether officers interfered with amateur journalist's First Amendment right to film a protest on a public street).

107 *See* Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027-28 (2011).

108 *See* Bhagwat, *supra* note 21, at 1053; Granados, *supra* note 77 ("People often use 'the media' to refer to those who write or publish news or other non-fiction . . . . But does 'the media' also refer to news in social networks not written by a professional journalist? Does any comment on social media classify as media?").

109 *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 704 (1972) (quoting Lovell v. City of Griffin, 303 U.S. 444, 450, 452 (1938)) (finding that freedom of the press extends to everyone, not just the traditional media).

110 West, *supra* note 107, at 1028.

111 *See supra* Part II.A.2.

112 *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 595-97 (7th Cir. 2012); Bhagwat, *supra* note 21, at 1056-58; Kaminski, *supra* note 18, at 188-90.

it does not in itself communicate a message.[113] Instead, recording is often necessary to create speech which is then later communicated.[114] While not a perfect fit, this close relationship of recording to speech makes it more akin to a corollary right.

4. The Right to Record Private Individuals

There is no case law which definitively recognizes or protects a general right to record private persons under the First Amendment.[115] Every case which explicitly recognizes First Amendment protections for recording involves recording police or other public persons acting within the scope of their public office.[116] First Amendment doctrine recognizes that speech about public persons or government entities should be "uninhibited, robust, and wide-open."[117] There is a presumed right to speak about government entities or public persons because there is a significant public interest in matters concerning them.[118] However, there is less reason to afford an uninhibited right to record and produce speech about private individuals engaging in private conduct, because the speech produced is not of the same public or democratic importance.[119] Private individuals engaging in an abortion

[113] *Supra* Part II.A.1.

[114] *See supra* Part II.A.2; *see also* Bhagwat, *supra* note 21, at 1042.

[115] *See Alvarez*, 679 F.3d at 595 (finding that recording police officers in the course of their duty is a corollary right protected by the first amendment); *see, e.g.*, Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011) (asserting that "videotaping of public officials is an exercise of First Amendment liberties"); Smith v. City of Cumming, 212 F.3d 1332, 1333 (2000) (asserting that the First Amendment protects a right to record police officers); Fordyce v. City of Seattle, 55 F.3d 436, 439 (9th Cir. 1995) (finding an issue of material fact as to whether an officer infringed on journalists First Amendment right to record the officer's conduct); Blackston v. Alabama, 30 F.3d 117, 120 (11th Cir. 1994) (finding plaintiffs validly stated a claim for a First Amendment violation for prohibiting recording of a public meeting involving the Alabama Supreme Court).

[116] *See, e.g.*, *Alvarez*, 679 F.3d at 595 (finding that recording police officers in the course of their duty is a corollary right protected by the first amendment).

[117] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270-71 (1964).

[118] *See id.* at 270-71, 279-80 (holding that public persons have the burden of proving actual malice in defamation claims because the interest in open public debate is so strong).

[119] Underlying First Amendment law is the need to debate about public issues to maintain a functional democracy. *See, e.g.*, Bartnicki v. Vopper, 532 U.S. 514, 535 (2001) (finding First Amendment protection for the speech at issue because it contributed to public debate); *Sullivan*, 376 U.S. at 270-71 (affording heightened First Amendment protections to speech that concerned public officials because of the interest in public debate). Open public conversation about private individuals does not contribute to democracy in the same way.

or other reproductive health procedure is arguably not an issue of public concern. The Supreme Court has stated that "where matters of purely private significance are at issue, First Amendment protections are often less rigorous."[120] As such, the recording of patients should not receive the same robust protection as the recording of public officials.[121]

In cases which involve the publication of information about private individuals, courts must determine whether the speech is sufficiently an issue of public concern and weigh the other interests accordingly.[122] The First Amendment acts as a shield to liability if the matters discussed are on a topic of public concern.[123] Speech that is not about an issue of public concern generally cannot claim First Amendment protection and is subject to liability under other applicable laws.[124]

What constitutes an issue of public concern is not well defined,[125] but notable cases provide some guidance. These cases seem to state that in order to claim First Amendment protection from liability, the speech must be primarily about broad issues of public concern, and that incidental speech about private individuals does not make the speech as a whole private.[126] In contrast, issues that are primarily about private matters should not be considered topics of public concern. In *Cox Broadcasting Corp. v. Cohn* the Supreme Court found that the name of a rape victim was a matter of public concern because judicial proceedings are of concern to the public.[127] The Court held that the need for free speech concerning government operations was paramount to the privacy interest at issue.[128] Conversely, information about patients electing to have an abortion procedure is not closely tied to speaking about government conduct in the same way that information about parties in a judicial proceeding is.

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120 Snyder v. Phelps, 562 U.S. 443, 452 (2011).

121 *See id.*

122 *See id.* at 452-53; City of San Diego v. Roe, 543 U.S. 77, 83-84 (2004); *Bartnicki*, 532 U.S. at 534-35; Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491-92 (1975).

123 *See Snyder*, 562 U.S. at 474 (Alito, J., dissenting); *Bartnicki*, 532 U.S. at 535 (describing the First Amendment as a "shield" for speech on matters of public concern); *Sullivan*, 376 U.S. at 270-71.

124 *See, e.g.*, *Snyder*, 562 U.S. at 474 (Alito, J., dissenting) (discussing non-public speech as subject to tort liability); *Sullivan*, 376 U.S. at 270-71 (explaining public speech concerns in the context of advertising and defamation).

125 *Roe*, 543 U.S. at 83-84 (defining an issue of public concern as "a subject of general interest and of value and concern to the public").

126 *See id.*; *Cox Broad. Corp.*, 420 U.S. at 491-92.

127 *See Cox Broad. Corp.*, 420 U.S. at 491-92.

128 *See id.* at 492.

The Court in *Snyder v. Phelps* defined an issue of public concern more broadly. The Court found that the protest of a private individual's funeral involved speech on a topic of public concern because the dominant themes of the protest were broad public issues.[129] The "context" of a private funeral for a private person did not remove the speech from the realm of public concern.[130] In other words, the speech about a private person was incidental to the broader issue, which was of public concern.

The *Snyder* court stressed that the holding was narrow and based on the particular context of the case,[131] leaving ambiguous when speech crosses the line of public concern. The majority and the dissent disagreed about the dominant theme of the protest in the case.[132] Justice Alito, writing for the dissent, viewed the private individual as the central theme of the protest, not incidental to it.[133] Both Justice Alito and Justice Breyer, who wrote in concurrence, also emphasized that an individual's private information was not a *per se* public concern merely because it was publicized.[134]

Each of the opinions in *Snyder* are compatible with the argument that speech which is predominantly focused on private individuals engaging in private conduct (rather than predominantly focused on broad issues) is not about a topic of public concern.[135] Under this argument, the affairs of a private individuals electing to receive a routine medical procedure, such as abortion,[136] is not of public concern, even if abortion more broadly is a topic of public concern.[137] If the patient's affairs are not considered a matter of public concern, then protestors do not have a right to record patients under the First Amendment.[138] The First Amendment would not act as a countervailing interest or a shield from

[129] *Snyder*, 562 U.S. at 444.

[130] *Id.*

[131] *Id.* at 460.

[132] *Id.* at 471 (Alito, J., dissenting).

[133] *Id.*

[134] *Id.*

[135] *See id.* at 453-55 (majority opinion); *id.* at 461 (Breyer, J., concurring); *id.* at 471 (Alito, J., dissenting).

[136] *Abortion is a Common Experience for U.S. Women, Despite Dramatic Declines in Rates*, GUTTMACHER INST. (Oct. 19, 2017), https://www.guttmacher.org/news-release/2017/abortion-common-experience-us-women-despite-dramatic-declines-rates [https://perma.cc/CD56-3KF5] (stating that nearly one in four U.S. women have an abortion in her lifetime).

[137] *See supra* Part I.A.

[138] *Cf. Snyder*, 562 U.S. at 474 (Alito, J., dissenting) (explaining that the First Amendment did not protect speech not related to a matter of public concern).

liability.[139] Instead, protestors could be subject to liability for violating the privacy interests, such as those protected by the California Constitution.[140] The California Constitution, as described later in this Note, prohibits the dissemination or misuse of information regarding an individual's participation in a medical procedure.[141]

However, the ongoing public debate about abortion rights may be enough to afford First Amendment protections to recording, even as applied to recording private individuals.[142] Anti-abortion protestors or activists are likely to claim that the dominant theme of their recording and subsequent speech is the broad topic of abortion.[143] People frequently express views on abortion outside clinics, and individual women are often the incidental targets of this speech.[144] The proposed restriction will likely face a challenge for impacting First Amendment rights because the restriction arguably impedes public debate about abortion.[145] Even so, the proposed restriction could withstand a First Amendment challenge.

B. Balancing Medical Privacy with the First Amendment

If the proposed restriction were subject to a First Amendment challenge, the First Amendment interests would need to be assessed against the asserted medical privacy interests to determine whether the restriction is justified. Courts recognize that there is a need for governments to regulate speech in some instances, but the courts review the regulation's impact on speech based on what is being regulated and

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139 *Cf. id.* (stating that speech not related to public concern is not protected by the First Amendment).

140 *See infra* Part II.B.2.a.

141 *See infra* Part II.B.2.a.

142 *Cf. Snyder*, 562 U.S. at 444 (finding that even though a private individual was targeted by protestors, debate about LGBTQ+ military members was a matter of public concern which entitled protestors to First Amendment protections); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open."); Gawker Media, LLC v. Bollea, 129 So. 3d 1196, 1202 (Fl. Dist. Ct. App. 2014) (finding that a sex tape made by a professional wrestler was a matter of public concern entitled to First Amendment protection, despite the contention that the tape was private in nature, because of the public controversy over the tape which was exacerbated by the wrestler himself).

143 *Cf. Snyder*, 562 U.S. at 444 (arguing that the dominant theme of the speech was designed to have broad public reach).

144 *See supra* Part I.A; *cf. Snyder*, 562 U.S. at 443-44 (describing the Westboro picketing outside Matthew Snyder's funeral).

145 *See supra* Part I.A.

why.[146] The overwhelming concern is that the government should not unduly burden or directly target speech.[147] The way that recording is conceptualized is important because it affects the level of scrutiny that will be applied to the proposed restriction.[148]

When the government regulates speech which occurs on traditional public fora (such as a sidewalk outside a reproductive health facility),[149] levels of scrutiny vary in the context of content-neutral and content-based restrictions.[150] If a restriction is content-based — meaning it either facially discriminates based on subject matter, or is motivated by hostility toward a viewpoint — then it is subject to strict scrutiny.[151] Alternatively, intermediate scrutiny is applied to content-neutral restrictions.[152] Content-neutral regulations generally regulate the time, place, or manner of speech (i.e., the way speech is communicated), and not the speech itself.[153] The reason lower scrutiny is applied to these content-neutral regulations is because there is less concern that the government is favoring speech or skewing public debate on the topic.[154]

A restriction on recording outside reproductive health facilities should be subject to a lower standard of scrutiny because it targets conduct and not speech directly. Even if recording is integral to speech, it is not as closely related to speech as leafletting or other conduct which implicates corollary rights.[155] With the exception of live videos, recording does not disseminate a message immediately in the same way

[146] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 626 (1994).

[147] *See id.*

[148] *See* Bhagwat, *supra* note 21, at 1059; Kaminski, *supra* note 18, at 200-01.

[149] This restriction would restrict recording on sidewalks outside reproductive health facilities. Streets and sidewalks are classified as traditional public fora. *See* McCullen v. Coakley, 573 U.S. 464, 479-81 (2014); Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 678 (1992).

[150] *See* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 99 (1972).

[151] Reed v. Town of Gilbert, 576 U.S. 155, 163-64 (2015); *see Mosley*, 408 U.S. at 99 (finding that a law which discriminates based on the person who is picketing is a content-based regulation subject to strict scrutiny).

[152] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (finding that content-neutral laws are subject to intermediate scrutiny).

[153] *See Ward*, 491 U.S. at 791.

[154] *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 652 (1994) (applying lower scrutiny to content-neutral regulations because there is not concern the government was trying to favor or disadvantage speech).

[155] *See Ward*, 491 U.S. at 791; Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (finding that canvassing is conduct, but that its close relationship to speech makes any regulation a direct regulation of speech); Lovell v. City of Griffin, 303 U.S. 444, 452 (1938).

that most protected speech immediately disseminates a message.[156] Thus, a restriction on recording has a lesser impact on free expression than a restriction on speech itself. This leaves recording somewhere between pure conduct, which is subject to rational basis scrutiny,[157] and other corollary conduct which is subject to either strict or intermediate scrutiny.[158]

The level of scrutiny should be something akin to the intermediate scrutiny applied to time, place, and manner restrictions.[159] A restriction on recording — like a time, place, or manner restriction — would not prohibit speech, but rather regulate the way in which speech is produced. Indeed, in *Alvarez v. ACLU*, the most recent Circuit Court opinion concerning recording, the court applied a less rigorous version of intermediate scrutiny.[160] Intermediate scrutiny necessitates that a regulation be (1) content neutral, (2) pursuant to an important government interest, and (3) reasonably tailored to meet that interest.[161]

1. The Recording Restriction Is Content Neutral

The restriction proposed in this Note is content-neutral. To determine whether a restriction is content-based or content-neutral, courts first examine whether a law is content-based on its face, asking whether it discriminates against a viewpoint or subject matter.[162] The Court in *Reed v. Town of Gilbert* described facially discriminatory laws as ones that "draw[] distinctions based on the message a speaker conveys."[163] Here, the proposed restriction does not facially discriminate against any particular viewpoint.[164] Instead, it generally prohibits the act of recording patients, regardless of the message the recorder intends to convey.[165] For example, it would equally prohibit

156 *See* Bhagwat, *supra* note 21, at 1033-34.

157 *See* United States v. O'Brien, 391 U.S. 367, 382 (1968).

158 *See Ward*, 491 U.S. at 791; *Lovell*, 303 U.S. at 452; Bhagwat, *supra* note 21, at 1060-64 (discussing the various applications of scrutiny to laws restricting speech production).

159 ACLU of Ill. v. Alvarez, 679 F.3d 583, 604-05 (7th Cir. 2012). *See generally* Bhagwat, *supra* note 21, at 1060-64 (discussing the various applications of scrutiny to laws restricting speech production).

160 The Court does not definitively state what level of scrutiny should be applied to restrictions on recording but does apply an intermediate scrutiny based on the scrutiny applied to time, place, and manner restrictions. *Alvarez*, 679 F.3d at 604-05.

161 *Id.* at 605.

162 Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015).

163 *Id.*

164 *See infra* Part III.

165 *See infra* Part III.

recording for a message that is supportive of abortion as well as a message that is critical of it. Another test for content-neutrality is whether the law can be "justified without reference to the content of the regulated speech."[166] A law is justified without reference to the content of the speech if the intent of the law is not to prohibit speech.[167] The restriction proposed here is justified without reference to the content of the speech because it is intended to protect medical privacy.[168] The proposed restriction, therefore, should be considered content-neutral.

There is an argument that this would be a content-based restriction because it is restricting recording only outside reproductive health facilities, and as such, impacts only a particular viewpoint.[169] Anti-abortion activists may argue that the only people constrained by the law are those asserting a negative view toward abortion. However, this argument mirrors the argument the Court rejected in *McCullen v. Coakley*.[170] In *McCullen*, the Supreme Court found that a restriction on protests outside of an abortion clinic was a content-neutral ban.[171] The law prevented any person from speaking to a patient or protesting within a fixed zone, not just those with a particular viewpoint.[172] The restriction was justified by concerns such as public safety, access to healthcare, and unobstructed sidewalk use, which were all justified state interests unrelated to speech content.[173] Although most people who were banned from speaking in that zone shared a particular viewpoint, the ban only incidentally effected that viewpoint in a disparate way.[174] The Court held that incidental burdens on speech are not enough to make a law content-based.

Similar to *McCullen*, here, a restriction on recording outside reproductive health facilities is content-neutral. It is not facially discriminatory against a particular viewpoint, and it is justified without reference to the content of the speech. The restriction would restrict

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166 McCullen v. Coakley, 573 U.S. 464, 477 (2014) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

167 *See, e.g.*, *Ward*, 491 U.S. at 791-92 (finding that noise regulations implemented to maintain the character of the sheep meadow were justified without reference to the content of the speech).

168 *See infra* Part II.B.2.

169 *Cf. McCullen*, 573 U.S. at 479-81 (finding that a particular restriction was not content-specific and affected the general public).

170 *See id.*

171 *See id.*

172 *See id.*

173 *See id.* at 480-81.

174 *See id.* at 479-81.

everyone from recording individuals outside a clinic.[175] It would only be incidental that the majority of those restricted share a particular viewpoint. A restriction on recording outside of clinics, then, is a content neutral regulation which meets the first prong of the intermediate scrutiny test.

2. Medical Privacy Is an Important Government Interest Furthered by Restricting Recording Outside Reproductive Health Facilities

To satisfy intermediate scrutiny, a restriction on recording outside reproductive health facilities must satisfy an important government interest.[176] Protecting medical privacy is an important government interest which will be furthered by this proposed law.[177] Medical privacy receives strong protections at both the federal and state levels.[178] The federal Health Insurance Portability and Accountability Act ("HIPAA"),[179] which has allowed for comprehensive regulation of medical information was driven by five principles:

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 information will be protected;
4) accountability — punishment for misuse of information; and

175 *See infra* Part III.

176 *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 605 (7th Cir. 2012).

177 *See infra* Part III.

178 *See, e.g.*, California Medical Information Act, CAL. CIV. CODE §§ 56-56.37 (1981) (outlining standards for disclosure); CAL. HEALTH & SAFETY CODE § 1280.15 (1973) (prohibiting unauthorized disclosure of patient medical information); 45 C.F.R. §§ 160, 162,164 (2020) (outlining federal privacy regulations). *See generally Your Patient Privacy Rights: A Consumer Guide to Health Information Privacy in California*, CAL. DEP'T OF JUSTICE, https://oag.ca.gov/privacy/facts/medical-privacy/patient-rights (last visited Nov. 22, 2019) [https://perma.cc/L3Q4-CDES] (describing the vast options consumers have at their disposal to limit disclosure of their health information).

179 Health Insurance Portability and Accountability Act of 1996, 104 Pub. L. No. 104-19, 110 Stat. 1936.

5) public responsibility — privacy should be balanced with the need to support medical research and law enforcement.[180]

While these protections are meant to safeguard medical data from disclosure by medical professionals,[181] the breadth of medical privacy protections demonstrates a strong governmental interest in preventing disclosure of personal medical information in general. The protection of medical data is necessary to ensure individuals are accessing and fully utilizing health care services, thereby preventing social stigma or discrimination.[182] Although current laws only regulate certain entities which typically store medical data, the disclosure of data by any entity may cause harm by deterring individuals from seeking care.[183] This interest is especially important to states because they are charged with maintaining the health and safety of their citizens.[184] California in particular recognizes that misuse or disclosure of medical information, including by private individuals, causes significant harm.[185]

a. California Constitutional Right to Medical Privacy

The governmental interest in medical privacy is heightened in California, which has enacted a constitutional right to medical privacy.[186] The California Constitution affords all persons an unalienable right to privacy that is broader than the federal

[180] 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) (citing Press Briefing, Donna Shalala, Secretary of Health and Human Services, The White House, 2000 WL 1868717 (Dec. 20, 2000), https://www.c-span.org/video/?155229-1/health-human-services-budget-briefing [https://perma.cc/Y4PP-2NCB]).

[181] *See generally* 45 C.F.R. § 164.502 (2020) (noting that Health and Human Services' regulations prevent disclosure of medical information except in limited circumstances).

[182] Lawrence O. Gostin, James G. Hodge Jr. & Mira S. Burghardt, *Balancing Communal Goods and Personal Privacy Under a National Health Informational Privacy Rule*, 46 ST. LOUIS U. L.J. 5, 10 (2002).

[183] *Id.* The Chief Legal Counsel of Planned Parenthood Affiliates of California believes that the presence of people recording deters patients from seeking medical care. Interview with Maggy Krell, *supra* note 5.

[184] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613, 1613 (2020) (Thomas, J., concurring) (noting that the Constitution entrusts "the safety and health of the people" to States and state officials (quoting Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905))).

[185] *See* Planned Parenthood v. Aakhus, 14 Cal. App. 4th 162, 172 (1993).

[186] *See id.*

constitution.[187] Neither governmental nor private parties can intrude on another's privacy where there is (1) a legally protected privacy interest, (2) a reasonable expectation of privacy, and (3) the intrusion is serious enough with respect to the nature, scope, and actual or potential impact to constitute an egregious breach of social norms.[188] California has a significant interest in protecting the privacy of patients receiving an abortion or reproductive healthcare.[189] The right to privacy with respect to participating in an abortion or other sexual health treatment is a legally protected privacy interest under the California Constitution.[190] The Second District Court of Appeals in California has found that videotaping and photographing patients entering an abortion clinic when the patients were on private property denied the patients their right to privacy under the California Constitution.[191] This right to privacy should be extended to patients entering abortion clinics on public sidewalks.

Given that public sidewalks are traditional public forum, this proposal is seemingly at odds with the holding in *Snyder v. Phelps*.[192] In *Snyder*, the plaintiff asserted a privacy claim for intrusion upon seclusion against the Westboro Baptist Church for protesting the plaintiff's son's funeral.[193] The defendants claimed they had a First Amendment right to protest the funeral.[194] The First Amendment interest in *Snyder* was heightened by the fact that defendants were protesting about an issue of public concern on a traditional public forum.[195] The Court ruled for the defendants, stating that the plaintiff's privacy was not invaded to an intolerable extent so as to justify curtailing the protected speech.[196]

The holding in *Snyder* should not apply in this instance because the privacy interests are different and should be weighed differently.[197] The privacy interest asserted in *Snyder*, based on the Maryland Intrusion

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187 CAL. CONST. art. I, § 1; *Aakhus*, 14 Cal. App. 4th at 172.

188 Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 287 (2009) (citing Hill v. Nat'l Collegiate Athletic Ass'n, 7 Cal. 4th 1, 35-37 (1994)).

189 *See Aakhus*, 14 Cal. App. 4th at 172; Chico Feminist Women's Health Ctr. v. Scully, 208 Cal. App. 3d 230, 241 (1989).

190 *See Aakhus*, 14 Cal. App. 4th at 170.

191 *Id.* at 172.

192 *See* Snyder v. Phelps, 562 U.S. 443, 456-60 (2011).

193 *Id.* at 459.

194 *See id.* at 456-57.

195 *See id.* at 458.

196 *See id.* at 459-61.

197 *See* Daniel J. Solove, *Conceptualizing Privacy*, 90 CALIF. L. REV. 1087, 1092 (2002) (identifying different concepts of privacy).

upon Seclusion tort, was an interest in being left alone.[198] The Court interpreted the tort as requiring an invasion into private life which would make the plaintiff a "captive audience" to the speech.[199] This is different than the privacy interest asserted by this Note, which is an interest in protecting against the dissemination or misuse of private medical information.[200] While the government does not have a strong interest in shielding people from speech they may find offensive, especially when the speech occurs on a traditional public forum,[201] there is a strong interest in controlling the dissemination of medical information,[202] in spite of the speech originating at, or occurring on, a public forum.

(1) The California Constitution Recognizes an Interest in Ensuring Information About a Medical Procedure Is Not Disseminated or Misused

The California Constitution recognizes a right against the dissemination or disclosure of private information.[203] The California Constitutional right to privacy is extended only where there is a legally protected interest.[204] Legally protected privacy interests are either "autonomy interests" in making personal and intimate decisions without observation or intrusion, or "informational interests" in protecting misuse of sensitive and confidential information.[205] The right to privately decide to have an abortion and other sexual or reproductive health decisions are recognized as fundamental protected autonomy

198 *See Snyder*, 562 U.S. at 459-60. *See generally id.*; Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (introducing the concept of a right to be let alone).

199 *See Snyder*, 562 U.S. at 459-60; *see also* Cohen v. California, 403 U.S. 15, 21 (1971).

200 *See infra* Part II.B.2.a.1; *see* Solove, *supra* note 197, at 1109-10 (noting that control over personal information is a prevailing theory of privacy).

201 *See Snyder*, 562 U.S. at 459-60; *see also* McCullen v. Coakley, 573 U.S. 464, 481 (2014) (finding that an interest in preventing offense is not content neutral); Erznoznik v. Jacksonville, 422 U.S. 205, 210-11 (1975) (noting "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer"); *Cohen*, 403 U.S. at 21 (holding that it is not the Government's role to proscribe speech when the person subject to the speech may "avert[] their eyes").

202 *See supra* Part II.B.2.

203 *See* Hill v. Nat'l Collegiate Athletic Ass'n, 7 Cal. 4th 1, 35 (1994).

204 Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 287 (2009) (citing *Hill*, 7 Cal. 4th at 35).

205 *Hill*, 7 Cal. 4th at 35.

interests by the California Supreme Court.[206] The right to protect against disclosure about a citizen's participation in a medical procedure, including abortion, is characterized as a protected informational interest by the California Courts of Appeal.[207] Informational interests involve a right to control information about oneself.[208] The interest here is better characterized as an informational interest in protecting against the disclosure or misuse of information about the patients' participation in an abortion or other reproductive health procedure.[209]

If a protestor were to record and share a photograph or video of a patient entering a reproductive health facility, they are potentially disclosing private information. Entering a reproductive health clinic implies participation in an abortion or other reproductive health procedure.[210] Patients have an interest in controlling videos or recordings which contain information about their participation in such a procedure.[211] An interest in controlling recordings outside reproductive health clinics, then, is a legally protected privacy interest under the California Constitution.

(2) Patients Have a Reasonable, Limited Expectation of Privacy on Public Streets Outside of Clinics

Although a privacy interest may be protected, there must also be a reasonable expectation of privacy given the circumstances.[212] The reasonableness of privacy expectations is largely dependent on widely accepted social norms and practices surrounding the interest, the need to maximize individual control over information, and the opportunity to consent.[213] Courts historically have not recognized a reasonable

206 *See* Am. Acad. of Pediatrics v. Lungren, 16 Cal. 4th 307, 332 (1997) (quoting Comm. to Defend Reprod. Rights v. Myers, 29 Cal. 3d 252, 275 (1981)).

207 Planned Parenthood v. Aakhus, 14 Cal. App. 4th 162, 172 (1993); Chico Feminist Women's Health Ctr. v. Scully, 208 Cal. App. 3d 230, 241 (1989).

208 *See Hill*, 7 Cal. 4th at 35.

209 Filming patients entering and exiting a health care clinic does not implicate their autonomy interests because the protestors are not interfering with the ability of a woman to make a private decision about whether or not to have an abortion or receive other health care.

210 *See supra* Introduction ¶ 2.

211 *See* Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 291 (2009) (emphasizing that video recording or photography "denies . . . a key feature of privacy — the right to control the dissemination of . . . image and actions").

212 *Id.* at 287.

213 *See, e.g.*, *Hill*, 7 Cal. 4th at 36-42 (finding that although there is a reasonable expectation of privacy in medical information, this expectation is diminished for college athletes because of the norms of college sports and the voluntariness of participation).

expectation of privacy in public spaces because there is a notion that people consent to being in the public eye.[214] This construction of privacy, however, fails to take into account shifting public norms and the way technology exacerbates breaches of privacy.[215] Most privacy case law is based on outdated understandings about how information is shared[216] and how people move through public spaces.[217] Breaches of privacy are more likely, more impactful, and more permanent with the rise of social media and facial recognition technology.[218] Further, the overwhelming majority of Californians live in highly urbanized spaces where there is both a need to use public transportation and public streets, and greater sense of anonymity.[219] Because of the way these new factors affect breaches of privacy, the legal approach to privacy expectations needs to be reassessed. Specifically, although it is unreasonable to expect complete privacy in public spaces with respect to the other people present in those spaces, there might be a limited expectation of privacy with respect to the public at large.[220]

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[214] *See* 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, 990-92, 994 (1995).

[215] *See* Bernstein, *supra* note 7, at 992-93; *see also* McClurg, *supra* note 214, at 994-95.

[216] *See* Marc Groman, *As Technology Advances, What Will Happen with Online Privacy?*, FORBES (Jan. 15, 2019, 12:07 PM), https://www.forbes.com/sites/quora/2019/01/15/as-technology-advances-what-will-happen-with-online-privacy/#6440ffd1c451 [https://perma.cc/3BUG-CL2L]; *see also McClurg*, *supra* note 214, at 1009-14 (comparing the scope of privacy violations when the concept of privacy law was established to the expansive violations of privacy carried out by the media in modern times).

[217] *See* Bernstein, *supra* note 7, at 1020-21 (discussing how privacy law fails to consider the way zoning impacts the ability to consent to being in the public eye because of a shift toward walking and public transportation).

[218] *See* AlterEgo, *What Happens with Your Personal Data Once Its Online*, MEDIUM (June 7, 2017), https://medium.com/@cyberalterego/what-happens-with-your-personal-data-once-its-online-e17121724ac3 [https://perma.cc/6JF2-YLD6] (discussing the difficulty of removing information from the internet); *see also* Groman, *supra* note 216.

[219] *See* Bernstein, *supra* note 7, at 992-93.

[220] As technological innovation continues to push people into the public sphere, new concerns about privacy in public spaces are challenging outdated concepts of privacy. *See* Lee Rainie & Janna Anderson, *The Future of Privacy*, PEW RESEARCH CTR. (Dec. 18, 2014), https://www.pewresearch.org/internet/2014/12/18/future-of-privacy/ [https://perma.cc/MH3V-GSQY]. There is a growing recognition of privacy interests in location. Although people are travelling in public spaces, many people consider it a breach of privacy if the locations they visit are to be exposed. *See* Stuart A. Thompson & Charlie Warzel, *Twelve Million Phones, One Dataset, Zero Privacy*, N.Y. TIMES (Dec. 19, 2019), https://www.nytimes.com/interactive/2019/12/19/opinion/location-tracking-cell-phone.html [https://perma.cc/5PWM-PQBD].

The traditional approach in the abortion clinic context is found in *Chico Feminist Women's Health Center v. Scully*.[221] In this case, a protestor had recognized a patient entering the clinic, and relayed this information to the patient's family member.[222] The clinic asked the California Court of Appeal for the Third Appellate District for an injunction to keep protestors away from entry vantage points so that patients would not be recognized when entering.[223] The court found that although patients had an interest in protecting against disclosure of their participation in an abortion procedure, there was no reasonable expectation of anonymity when entering an abortion clinic.[224] Because Chico is a small community, as opposed to a larger metropolitan area, the court determined it was common for members of the community to be recognized on public streets.[225] The court also found that by choosing to live in this community, community members had consented to diminished privacy.[226] The court therefore concluded that while patients had a right to privacy about their participation in an abortion procedure, they did not have a reasonable expectation to complete anonymity on the public streets outside the clinic.[227]

The circumstances of *Scully*, however, are much different than the typical experience of a Californian seeking an abortion procedure in the modern day. First, because most people in California live in urban communities,[228] they are not consenting to a diminished expectation of privacy in the same way that someone living in a small community does.[229] They also would not expect that, in general, people who pass them on the street would be directly able to recognize them or would be connected to someone they know.[230] The addition of technology creates an even starker contrast from *Scully*. There is a noted difference between expecting to be seen by a limited number of observers on the

[221] Chico Feminist Women's Health Ctr. v. Scully, 208 Cal. App. 3d 230, 242 (1989).

[222] *See id.* at 238.

[223] *Id.* at 235.

[224] *See id.* at 242.

[225] *Id.*

[226] *See id.*

[227] *Id.*

[228] *See* Maciag, *supra* note 14.

[229] Bernstein, *supra* note 7, at 1015, 1019. Bernstein argues that people living in urban spaces do not consent to being recording merely by being in public. Instead, they are forced into the public eye by zoning, land-use policies, and public transportation: "[W]e 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." *Id.*

[230] *Id.* at 1019.

street, and having this information recorded with the potential to be disseminated to the public at large via social media and the internet.[231] *Scully* does not map on to the modern experience of most Californians, and should not preclude an argument for a reasonable expectation of privacy on public streets outside abortion clinics. The *Scully* case was correct to note that "complete privacy" is not feasible with respect to people in the immediate vicinity of a clinic,[232] but at least a degree of privacy should be maintained with respect to the general public.[233]

Despite the *Scully* court's finding that there was no reasonable expectation of absolute privacy in a public location, California common law has in some circumstances recognized a limited expectation of privacy.[234] The fact that something is recorded in a public location is not dispositive of a breach of privacy.[235] Even in public locations parties can assert a reasonable expectation of privacy and bring an action for breaches of privacy by recording.[236] The California Supreme Court in *Sanders v. American Broadcasting Companies* stated, "[t]here are degrees and nuances to societal recognition of our expectations of privacy: the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law."[237] Even where there is not an expectation of absolute privacy because of nearby observers, there can still be a reasonable expectation that information will not be widely disseminated through electronic recording and media.[238]

For example, in *In re M.H.*, although there was not an expectation of complete privacy when making loud sounds in a public bathroom stall while wearing recognizable socks, there was an expectation of not being recorded and having that recording distributed through social media.[239]

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231 *See id.*

232 *See Scully*, 208 Cal. App. 3d at 242.

233 "The mere fact that a person can be seen by someone does not automatically mean that he or she can legally be forced to be subject to being seen by everyone." Sanders v. Am. Broad. Cos., 20 Cal. 4th 907, 916 (1999) (quoting 1 J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY § 5.10[A][2] (1998)).

234 *See* Safari Club Int'l v. Rudolph, 862 F.3d 1113, 1124 (9th Cir. 2017); *Sanders*, 20 Cal. 4th at 915-16.

235 *See Safari Club Int'l*, 862 F.3d at 1124 (finding that Plaintiffs might have an objectively reasonable expectation of privacy surrounding the recorded conversation despite the conversation occurring in a public restaurant).

236 *See id.*

237 *Sanders*, 20 Cal. 4th at 916.

238 *In re* M.H., 1 Cal. App. 5th 699, 709 (2016); *see also Sanders*, 20 Cal. 4th at 915-17; Shulman v. Grp. W Prods., Inc., 18 Cal. 4th 200, 234-35 (1998).

239 *In re M.H.*, 1 Cal. App. 5th at 711.

Similarly here, there should be a reasonable expectation of privacy against being recorded when entering a reproductive health clinic because of the potential for that recording to be distributed to the general public via social media.

(3) The Intrusion of Privacy Is Egregious with Respect to the Nature, Scope, and Potential Impact

The California Constitution only protects privacy interests if a breach of those interests would be serious enough with respect to the nature, scope, and actual or potential impact "to constitute an egregious breach of social norms."[240] The seriousness of the intrusion is closely related to the reasonableness of the expectation of privacy, and the extent to which those expectations were violated.[241] The need to maximize control over the private information at issue is central to determining the seriousness of a breach.[242] The California Supreme Court has noted that "a key feature of privacy" is "the right to control the dissemination of . . . image[s] and actions."[243]

Social norms dictate a general zone of privacy surrounding sexuality and family planning decisions.[244] Patients can generally expect that information about their participation in an abortion or other reproductive health procedure will not be disclosed to the public.[245] Patients have a strong interest in maximizing control over information about something as personal as having an abortion.[246] When a photograph or video is taken of a patient entering a clinic, there is

[240] Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 287 (2009) (citing Hill v. Nat'l Collegiate Athletic Ass'n, 7 Cal. 4th 1, 37 (1994)).

[241] *See id.* at 287.

[242] *See id.* at 291.

[243] *Id.*

[244] *See* Am. Acad. of Pediatrics v. Lungren, 16 Cal. 4th 307, 332-33 (1997); People v. Belous, 71 Cal. 2d 954, 963 (1969). *See generally* Roe v. Wade, 410 U.S. 113 (1973) (finding a constitutional right to abortion grounded in a right to privacy); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing married couples' right to use birth control based on a right to privacy).

[245] Medical information receives numerous privacy protections, which would lead patients to believe that information about their participation in a medical procedure is also private. *See* Confidentiality of Medical Information Act, CAL. CIV. CODE §§ 56-56.37 (2020); CAL HEALTH & SAFETY CODE § 1280.15 (2020) (prohibiting unauthorized disclosure of patient medical information); 45 C.F.R. §§ 160, 162, 164 (2020) (outlining federal privacy regulations).

[246] *See* Planned Parenthood v. Aakhus, 14 Cal. App. 4th 162, 172 (1993) (finding that the California Constitution protects private information about a person's participation in a medical procedure).

potential that the image or video could be shared publicly.[247] In this instance the patient would have no way of controlling the dissemination of the information implied in that image or video.[248] Public sharing of private information in a way that denies the patients control over disclosure of medical information is a serious invasion of privacy.[249]

California has an important interest in protecting the medical privacy of patients receiving reproductive health care because it is protected by the California Constitution. The right to privacy with respect to participating in an abortion or other sexual health treatment is a legally protected privacy interest under the California Constitution. The restriction would satisfy the second prong of the intermediate scrutiny test.

3. The Restriction on Recording Outside Reproductive Health Facilities Is Reasonably Tailored to the State Interest in Medical Privacy

Finally, to survive intermediate scrutiny, a recording restriction must be reasonably tailored to furthering California's interest in protecting medical privacy.[250] The reasonable tailoring requirement of intermediate scrutiny requires a close fit between the law's means and its ends.[251] This requirement is satisfied if the regulation furthers an important government interest that would be achieved less effectively without the regulation.[252] The regulation may not be substantially more

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[247] The Chief Legal Counsel of Planned Parenthood Affiliates of California has stated that "[t]here is always a concern" that people are posting images of patients taken outside of clinics on social media. Interview with Maggy Krell, *supra* note 5. In 2018 Planned Parenthood Affiliates of California sent a cease and desist letter to a man who was recording interactions with patients outside of Southern California clinics and posting the videos to a YouTube channel. *Id.* People upload images and videos to social media at an incredible rate. In 2019, Facebook alone reported 300 million image uploads per day and eight billion video views per day. Dustin W. Stout, *Social Media Statistics 2020: Top Networks by the Numbers*, DUSTIN STOUT, dustinstout.com/social-media-statistics/ (last visited Jan. 22, 2020) [https://perma.cc/UAB3-W592].

[248] Considering the vast amount of information uploaded on social media daily, a patient might find it near impossible to track and control potential images or videos of themselves being shared on social media. *See* Stout, *supra* note 247.

[249] *See Aakhus*, 14 Cal. App. 4th at 172.

[250] *See* ACLU of Ill. v. Alvarez, 679 F.3d 583, 604-05 (7th Cir. 2012); *see also supra* Part II.B.

[251] *Alvarez*, 679 F.3d at 604-05.

[252] Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989); *see* City of Erie v. Pap's A.M., 529 U.S. 277, 298-99 (2000).

broad than necessary to achieve these ends. This does not require that the law is the least restrictive means of achieving that interest.[253]

The interest in protecting medical privacy of patients would not be achieved as effectively without a restriction on recording outside reproductive health facilities. The restriction curbs the potential dissemination of images or videos which would disclose the patient's participation in a reproductive health procedure. The nature of reproductive health clinics implies that patients are obtaining abortion care or other reproductive health services.[254] Individuals can be identified from an image alone through social media and facial recognition technology.[255] If protestors capture images, there is a risk that they will post them online and that an individual's participation in an abortion procedure will be exposed.[256] Restricting recordings in the first place forestalls the issue of potential disclosure.

A law which only prohibited sharing the videos or images would not be as effective in protecting medical privacy.[257] A restriction on sharing would only be violated and actionable once a disclosure is made and the privacy is breached. Other laws that protect medical privacy (such as HIPPA) aim to prevent the initial disclosure of information through significant regulation and overview.[258] Because individuals are not regulated entities, there is less ability to prevent disclosure once individuals possess the information. In addition, the privacy interest is not only regarding the disclosure of the information, but also the ability of the patient to control that information.[259] A patient can hardly exert control over a video or photograph that someone else already

[253] *Ward*, 491 U.S. at 798; *see also* Bd. of Trs. v. Fox, 492 U.S. 469, 476-77 (1989).

[254] *See generally* Bernstein, *supra* note 7 (arguing that image capture outside abortion clinics implicates medical privacy).

[255] *See* Metz, *supra* note **Error! Bookmark not defined.**.

[256] *See* Stout, *supra* note 247.

[257] In fact, California does have a law in place which prohibits sharing information in limited circumstances. CAL. GOV. CODE § 6218 (2020). However, this law is only applicable in limited circumstances when it is posted to threaten the patient or incite violence by a third party. It does nothing to stop the intimidation harassment that occurs by merely taking a photo, nor does it prevent a breach of medical privacy.

[258] *See e.g.*, Pollio, *supra* note 180, at 589 (discussing the principles behind federal privacy regulations).

[259] *See supra* Part II.B.2.a.1.

possesses.[260] Because of these concerns, the state would not be able to protect medical privacy as effectively absent this law.[261]

The proposed regulation is not more broad than necessary to achieve its ends. The law only prohibits recording outside of reproductive health facilities because these are the spaces which implicate participation in a reproductive health procedure.[262] These spaces are, then, the spaces which carry the highest risk for this type of medical privacy violation.[263] The law does not extend outside of spaces which carry this risk. A recording outside a general hospital would not carry this same implication[264] and so is not proscribed. Additionally, this law only applies when the person recording acts intentionally and with reason to believe that the person being recorded is a patient. There is also an exception for recordings taken with consent of the patient. The law, then, would not target recordings which unintentionally capture a patient, or prohibit recordings where the patient has waived their privacy interest.

The proposed law is also not overly burdensome on speech because the law allows for ample channels of alternative communication both with patients and with the public. Protestors may still record themselves or other protestors outside of clinics. They may also use other means of communication at their disposal so long as images and videos of patients are not involved. Protestors may potentially argue their ability to communicate in a particular way is burdened. Cases have been inconsistent in protecting a right to speak in a particular manner.[265] In

[260] Given the amount of posts made to social media daily, it may be very difficult for patients to even know that someone is posting a video or photograph of them. Stout, *supra* note 247. Facebook, for example, allows users to report posts that go against their community guidelines and ask for removal of the posts. Posts must be reported on a post-by-post basis, and there is no guarantee that a person will not re-post the same video or photograph after the reported post is removed. *See Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards/ (last visited Oct. 2, 2020) [https://perma.cc/7VH9-HK7E]. Instagram has a similar policy where photos must be reported on a post-by-post basis. *What Should I Do if Someone Shares an Intimate Photo of Me on Instagram Without My Permission?*, INSTAGRAM, https://help.instagram.com/1769410010008691 (last visited Oct. 2, 2020) [https://perma.cc/2LLN-ZJKJ].

[261] *Cf.* McCullen v. Coakley, 573 U.S. 464, 482 (2014) (finding that it was reasonable to limit the solution only to places where the problem existed).

[262] *See* Bernstein, *supra* note 7, at 993-94.

[263] Interview with Maggy Krell, *supra* note 5.

[264] Although a general hospital may perform abortion procedures, people enter general hospitals for a variety of procedures or other reasons.

[265] *E.g.*, Frisby v. Schultz, 487 U.S. 474, 488 (1988) (finding that protestors don't have a right to target a particular home); Members of City Council v. Taxpayers for Vincent, 466 U.S. 789, 812 (1984) (finding that distributing literature is an adequate

finding the law overly burdensome, the *McCullen* Court recognized that an impact on one-on-one communication is particularly burdensome to the First Amendment.[266] The recording restriction at issue here, however, impacts media-based communication not one-on-one communication. For this reason, the argument that the law is overly burdensome on this particular manner of communication does not outweigh the medical privacy interest.

III. PROPOSED RESTRICTION ON RECORDING OUTSIDE REPRODUCTIVE HEALTH CLINICS

To protect the medical privacy interests of people seeking reproductive health care while still upholding the First Amendment rights at stake, California should enact the following law. This proposed statute addresses the interests in both medical privacy and the First Amendment.[267] It adequately balances these interests in a way that would survive intermediate scrutiny.[268]

a) The following definitions shall apply to this section:

   1) "Reproductive health services facility" includes a specialized hospital, clinic, physician's office, or other facility that provides or seeks to provide reproductive health services and includes the building or structure in which the facility is located.

   2) "Patient" means any person who is or was involved in obtaining or seeking to obtain any services in a reproductive health services facility.

substitute for posting signs on public property); Kovacs v. Cooper, 336 U.S. 77, 87 (1949) (finding that while Defendant did have a right to free expression, he did not have a right to disseminate speech by means of a sound truck); *cf.* Estes v. Texas, 381 U.S. 532, 539-40 (1965) (plurality opinion) (holding that the right to gather news merely means the same access as the public, not the right to televise or otherwise gather news by the means of choice). *But see* City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994) (finding that there are no adequate substitutes for displaying signs on one's own property); Martin v. Struthers, 319 U.S. 141, 146-49 (1943) (finding that the First Amendment protects a right to door-to-door distribution of literature).

[266] *See McCullen*, 573 U.S. at 488.

[267] The language of this proposed statute is partially derived from the California Freedom of Access to Clinic and Church Entrances Act. CAL. PENAL CODE § 423 (2020).

[268] *See supra* Part II.B.

b) It shall be unlawful for any person, within 100 feet of the entrance to a reproductive health services facility, to intentionally:

1) Photograph, video record, or otherwise record a patient entering or exiting a reproductive health services facility, such that the identity of the patient can be determined, if there is reason to believe that such a person is a patient.

c) This section shall not apply where the person being photographed or video recorded has expressly consented to being photographed, video recorded, or otherwise recorded by the person conducting the photography, video recording, or other recording.

CONCLUSION

Recording patients that are seeking medical care at reproductive health facilities is a significant issue that needs to be addressed in California. The increasingly urban nature of California means that a significant portion of Californians must use the public right of way when attempting to access reproductive health services, which exposes them to potential medical privacy breaches. [269] This potential exposure of medical care raises significant medical privacy concerns that need to be addressed by restricting recording and photography of patients seeking care at reproductive health facilities.[270] A recording restriction would raise First Amendment issues because of the close relationship it has to speech.[271] Arguably, the First Amendment interest in recording a private individual is very low. However, because the broader topic of abortion is of public concern,[272] anti-abortion activists are likely to assert that their speech is protected. The solution to protecting patient privacy is a restriction on non-consensual photography or recording of patients outside reproductive health clinics. A law similar to the one proposed properly balances the medical privacy interests at stake in light of the First Amendment.

[269] *See* Bernstein, *supra* note 7, at 993.

[270] *See id.*

[271] *See supra* Part II.A.

[272] *See supra* Part I.