

(NOT) READY FOR THEIR CLOSE-UP:  
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AMENDMENT FOCUS IN RESTRICTING CAMPUS  
FILMING

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# (NOT) READY FOR THEIR CLOSE-UP: CAMERA-SHY COLLEGES LOSE FIRST AMENDMENT FOCUS IN RESTRICTING CAMPUS FILMING

Frank D. LoMonte\* & Lila Greenberg†

## I. INTRODUCTION

From gameday to graduation day, college campuses are some of the most photographed spots in the United States. With their iconic architectural landmarks and rolling greenspaces, campuses are a natural setting for those interested in shooting photos or video, amateurs and professionals alike. And for better or worse, colleges are regularly in the news—whether for research breakthroughs or athletic scandals—which naturally attracts journalistic photography and videography as well.

Yet, despite their park-like atmosphere, state colleges and universities frequently enforce restrictions on photography and videography far beyond what would be regarded as standard practice—or as constitutionally permissible—in parks and other public spaces. Journalism students at the University of Minnesota, for instance, ran into an unexpectedly rigid prohibition against shooting photos or video without university approval when working on class assignments; one student reported that he was forced to wait three weeks to obtain permission to—belatedly—

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complete a photojournalism project.<sup>1</sup> During 2017, authorities at two sister community colleges in New York City handcuffed visiting professional journalists and threatened them with criminal charges merely for being on campus property while gathering news.<sup>2</sup> One of the most acclaimed photographs in the history of American journalism—John Filo’s Pulitzer Prize-winning image of Mary Ann Vecchio kneeling horror-struck over the body of a Kent State University student shot to death by the National Guard during an anti-war protest—was taken on a college campus.<sup>3</sup> Yet, on some college campuses today, a contemporary John Filo might be violating an array of dubiously constitutional regulations because he took photos depicting identifiable people without written consent or a permit.

College campuses are regarded as a marketplace for testing novel or edgy ideas, places where wide-open expression furthers the core educational mission.<sup>4</sup> As one federal appeals court recently put it:

Nowhere is free speech more important than in our leading institutions of higher learning. Colleges and universities serve as the founts of—and the testing grounds for—new ideas. Their chief mission is to equip students to examine arguments critically and perhaps even more importantly, to prepare young citizens to participate in the civic and political life of our democratic republic.<sup>5</sup>

Increasingly, the outdoor areas of state college campuses are recognized under state law as “public forums” amenable to expressive use.<sup>6</sup> Yet colleges’ regulations

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<sup>1</sup> Dylan Anderson, *Campus Filming Guidelines Complicate Student Coursework*, MINN. DAILY (Feb. 27, 2019), <https://mndaily.com/227126/news/adfilming/> [https://perma.cc/JJ4T-M2HS].

<sup>2</sup> Max Zahn, *‘This is Unprecedented’: Public Colleges Limiting Journalist Access*, COLUM. JOURNALISM REV. (Dec. 13, 2017), [https://www.cjr.org/united\\_states\\_project/cuny-campus-journalist-crackdown.php](https://www.cjr.org/united_states_project/cuny-campus-journalist-crackdown.php).

<sup>3</sup> Patricia McCormick, *The Girl in the Kent State Photo*, WASH. POST MAG. (Apr. 19, 2021), <https://www.washingtonpost.com/magazine/2021/04/19/girl-kent-state-photo-lifelong-burden-being-national-symbol/> [https://perma.cc/R3KC-5KCD].

<sup>4</sup> *Healy v. James*, 408 U.S. 169, 180 (1972).

<sup>5</sup> *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1128 (11th Cir. 2022).

<sup>6</sup> See Thomas J. Davis, *Assessing Constitutional Challenges to University Free Speech Zones Under Public Forum Doctrine*, 79 IND. L.J. 267, 275 (2004) (“The mere structure of the public university has been accepted as proof of a governmental design to create a designated public forum.”); see also Josh Moody, *Georgia Law Bans ‘Free Speech Zones’ at Public Colleges*, INSIDE HIGHER EDUC. (May 4, 2022), <https://www.insidehighered.com/quicktakes/2022/05/04/georgia-law-bans-%E2%80%98free-speech-zones%E2%80%99-public-colleges> [https://perma.cc/C7GZ-APLB] (reporting that, as of 2022, Georgia

about gathering images in public places are, at times, in tension with prevailing First Amendment standards protecting expressive activity on government property.

Overly restrictive policies can have real consequences on the public's ability to stay informed about what is happening within public higher education—which consumes more than \$300 billion in state and local tax dollars each year.<sup>7</sup> If journalists are intimidated by restrictions that forbid gathering images on campus without a permit, news coverage of an already greatly under-covered sector of government will suffer.<sup>8</sup> Visual images make news accounts trustworthy and impactful.<sup>9</sup> As dramatically demonstrated by the sustained global outrage over the caught-on-video murder of George Floyd by a Minneapolis police officer in 2020, a generation raised on YouTube can be galvanized into action by the power of a compelling image.<sup>10</sup>

This Article looks at the ways in which public universities across the country purport to control photography and videography on their campuses, and how those

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became the twenty-second state to enact a statute designating the outdoor spaces on state college and university campuses as public forum property accessible for expressive use).

<sup>7</sup> *State and Local Backgrounders: Higher Education Expenditures*, URB. INST., <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/higher-education-expenditures#Question1Higher> [<https://perma.cc/BY6T-HG7U>] (last visited Nov. 2, 2022).

<sup>8</sup> See E.J. Dionne, Jr. et al., *Invisible: 1.4 Percent Coverage for Education is Not Enough*, BROOKINGS (Dec. 2, 2009), <https://www.brookings.edu/research/invisible-1-4-percent-coverage-for-education-is-not-enough/> [<https://perma.cc/BY6T-HG7U>] (reporting that, as of 2009, major U.S. news organizations devoted only 1.4% of articles and airtime to coverage of education news, and that only 29.9% of the 1.4% was about higher education—meaning that less than half of the 1% of mainstream media coverage on education was dedicated to college and university news).

<sup>9</sup> See Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 345–47 (2011) (observing that visual image capture serves deterrence and accountability functions: “Image capture can document activities that are proper subjects of public deliberation but which the protagonists would prefer to keep hidden and deniable”).

<sup>10</sup> See Elliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning that Shows No Signs of Slowing Down*, CNN (Aug. 19, 2020), <https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html> [<https://perma.cc/3UFC-UGTM>] (chronicling months of protest that followed Floyd's death by asphyxiation, which a teenage bystander videotaped, and observing that “the graphic nature of the video” was one reason that Floyd's killing became a flashpoint for especially intense public anger); see also Sarah Garvey-Potvin, *The Snapped Shutter: Violations of the First Amendment Rights of Photographers on the Port Authority of New York and New Jersey PATH System*, 63 RUTGERS L. REV. 657, 667 (2011) (“Many crimes are documented by public camera and video devices. This potential for documentation acts as a deterrence, and also as an important method for law enforcement to identify assailant, victims, and elements of an offense.”).

controls align—or do not align—with prevailing statutory and constitutional standards.<sup>11</sup> Section II begins by looking at what courts have said about the First Amendment right to capture images and the growing consensus that the act of creating photos and videos is itself an act of constitutionally protected expression. Section III then examines how First Amendment standards apply when speakers seek to use the premises of a state college or university for expression. The section looks both at the longstanding judicial solicitude for speech on college campuses, as well as a more recent trend to cement the right of free speech on campus property by way of state legislation. Section IV describes instances in which campus authorities have sought to curtail videography and what might motivate them to do so. It then turns to the results of a survey of state university regulations gathered by the Joseph L. Brechner Center for Freedom of Information at the University of Florida, describing the varying ways in which colleges purport to regulate visual image capture on their premises and identifying common themes and patterns across the states.<sup>12</sup> Section V builds on the survey results by assessing whether commonplace campus filming restrictions hold up to prevailing understandings of what the First Amendment does and does not allow university regulators to restrict. Finally, Section VI concludes by recommending that universities reassess their rulebooks and remove heavy-handed controls on visual recording in light of the growing consensus of courts and state legislators that the open areas of state college campuses should be open for expressive use.

## II. PHOTOGRAPHY AS EXPRESSION

The First Amendment forcefully protects the right to distribute information and ideas. Once a journalist has information, almost nothing can be done to halt its dissemination.<sup>13</sup> The right to publish prevails even if the information was leaked by

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<sup>11</sup> For brevity, this Article will use the terms “filming,” “photography,” “videography,” and “image capture” as synonyms for the range of activity that involves using camera equipment to record visual images, whether still or moving. As a matter of First Amendment law, there is no meaningful distinction between shooting a still photo versus shooting a video, so the terms at times will be conflated for simplicity.

<sup>12</sup> The authors, in association with the Joseph L. Brechner Center for Freedom of Information at the University of Florida (Brechner Center), conducted a research study surveying the regulations on various types of visual image capture on college campuses; this Article offers a summary of the research. The comprehensive data is on file with the Brechner Center.

<sup>13</sup> See *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249 (1936) (The First Amendment “was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation.”).

someone who obtained it illegally and even if the information concerns closely guarded national security matters.<sup>14</sup>

On the other hand, the First Amendment is not understood as an unlimited license to enter into controlled-access spaces to gather news.<sup>15</sup> For instance, the Supreme Court has rejected the idea that representatives of the news media can demand to be admitted to a prison or jail to interview incarcerated people.<sup>16</sup> The Court has recognized a right to be present where news is happening only in limited circumstances—primarily, during the critical stages of judicial proceedings held in open court.<sup>17</sup> Even when a government proceeding is held open for public attendance, the right to watch does not always necessarily imply a right to record.<sup>18</sup> And courts have declined to recognize a constitutional right to demand production of government documents, or to insist on being able to speak with government

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<sup>14</sup> See *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (interpreting the First Amendment to protect journalists' right to disseminate newsworthy information they have obtained lawfully, even if their source broke the law); see also *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (refusing to enjoin newspapers' publication of "Pentagon Papers" chronicling the secret history of U.S. involvement in Vietnam, even though papers were leaked by a Pentagon insider and concerned matters of national security).

<sup>15</sup> See Eric Easton, *Two Wrongs Mock a Right: Overcoming the Cohen Maledicta that Bar First Amendment Protection for Newsgathering*, 58 OHIO ST. L.J. 1135, 1140 (1997) ("[T]he degree of constitutional protection accorded to newsgathering is held to be distinct from and lower than that given to dissemination, even though today we conceive of the former as a prerequisite to the latter.").

<sup>16</sup> See *Pell v. Procunier*, 417 U.S. 817, 833–34 (1974) (finding no First Amendment right for journalists to insist on interviewing particular inmates in state prisons or obtaining access to secured areas of prisons not normally made accessible to the general public); see also *Houchins v. KQED, Inc.*, 438 U.S. 1, 15–16 (1978) (extending the reasoning of *Pell* to local jails).

<sup>17</sup> See *Press-Enter. Co. v. Superior Court of Cal.*, 464 U.S. 501, 509–11 (1984).

<sup>18</sup> See *Rice v. Kemper*, 374 F.3d 675, 678 (8th Cir. 2004) (In rejecting a religious organization's claim of a First Amendment right to videotape an execution that public witnesses were allowed to watch, the court held "that neither the public nor the media has a First Amendment right to videotape, photograph, or make audio recordings of government proceedings that are by law open to the public."). The court in *Rice* acknowledged the well-recognized constitutional right to watch criminal trials but explained that "no court has ruled that videotaping or cameras are required to satisfy this right of access." *Id.* at 679. See also *Whiteland Woods, L.P. v. Twp. of West Whiteland*, 193 F.3d 177, 183–84 (3d Cir. 1999) (finding that a developer who was prohibited from videotaping a municipal committee meeting could not mount a First Amendment claim because the right to attend and take notes at meetings did not imply an entitlement to videotape: "The First Amendment does not require states to accommodate every potential method of recording its proceedings, particularly where the public is granted alternative means of compiling a comprehensive record.").

officials who refuse to make themselves accessible.<sup>19</sup> In other words, the act of news *gathering* is less categorically protected than the act of news *publishing*, in keeping with the notion that the First Amendment operates primarily as a “negative” right (a constraint on government overreaching) than a “positive” right (an entitlement to compel the government to do something).<sup>20</sup>

The act of taking a photo or recording a video falls into something of a gray area of constitutional doctrine. “Expressive conduct” is understood to be protected by the First Amendment; however, when only the “conduct” part of the expressive conduct is targeted for regulation, the constitutional protections diminish.<sup>21</sup> For instance, in the oft-cited case of *United States v. O’Brien*, the Supreme Court applied a somewhat relaxed level of First Amendment scrutiny to a federal prohibition against burning draft cards, reasoning that the prohibition targeted the act of burning rather than the reason for the burning, which might or might not be expressive.<sup>22</sup>

A prohibition against shooting photos or videos might be rationalized as a mere restriction on conduct and not expression since the act of activating the camera does not—without more—convey a message to anyone. From time to time, courts have

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<sup>19</sup> See *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 40 (1999) (finding no First Amendment issue with California’s statutory limits on access to records containing addresses of arrestees, because there was no constitutional entitlement to the records in the first place); see also *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410, 418 (4th Cir. 2006) (finding that Maryland’s governor did not violate a news organizations’ First Amendment rights by selectively freezing out certain distrusted newspaper reporters from access to interviews).

<sup>20</sup> See Lillian R. BeVier, *Campaign Finance Reform: Specious Arguments, Intractable Dilemmas*, 94 COLUM. L. REV. 1258, 1277 (1994) (asserting that the First Amendment “is a source of negative rights against the government, not a repository of positive entitlement to government favors”); see also Anna M. Taruschio, *The First Amendment, the Right Not to Speak and the Problem of Government Access Statutes*, 27 FORDHAM URB. L.J. 1001, 1031–32 (2000) (acknowledging that the Constitution generally is understood as “a source of negative and not positive liberties,” but noting that some scholars believe that the First Amendment imposes positive obligations on government, in furtherance of a well-functioning marketplace of ideas, to furnish forums for speech).

<sup>21</sup> See *Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1305 (11th Cir. 2003) (explaining that an ordinance of general application prohibiting public nudity is reviewed under intermediate scrutiny rather than strict scrutiny, because its impact on the expressive act of nude dancing is only incidental to its content-neutral restriction on conduct); see also Abner S. Green, *Barnette and Masterpiece Cakeshop: Some Unanswered Questions*, 13 FIU L. REV. 667, 680 (2019) (explaining the distinction between regulation that is content-based versus regulation on conduct that only incidentally restricts speech: “A law banning a certain type of chemical because of danger to health, as applied to a certain kind of paint a painter uses, will get much more relaxed scrutiny than a law banning a certain type of painting.”).

<sup>22</sup> 391 U.S. 367, 375–77 (1968).

found themselves tempted by that rationale.<sup>23</sup> For instance, in a 2016 case, a federal district court in Pennsylvania declined to recognize the act of filming police as “expressive,” absent evidence that the videographer uttered words in the course of filming.<sup>24</sup> The court held that the plaintiffs—who sought damages for police interference with their filming—could not show either that their passive act of recording was intended to convey a particularized message, nor that the officers understood any such message.<sup>25</sup>

That ruling, however, was ultimately reversed by the Third Circuit, which joined a growing consensus arguing that because capturing images is a necessary predicate to publishing them, the process of capture must necessarily be constitutionally protected.<sup>26</sup> As the court wrote:

The First Amendment protects actual photos, videos, and recordings . . . and for this protection to have meaning the Amendment must also protect the act of creating that material. There is no practical difference between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them.<sup>27</sup>

There is now overwhelming agreement that the First Amendment right to freedom of speech protects the creation of images as well as the distribution of images.<sup>28</sup> Indeed, constitutional protection of photography is so powerful that it is

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<sup>23</sup> See, e.g., *State v. Chepilko*, 965 A.2d 190, 192, 200 (N.J. Super. 2009) (ruling that a photographer who snapped photos of tourists for sale was not engaging in constitutionally protected expression, because his primary motive was to make money rather than convey a message); see also Garvey-Potvin, *supra* note 10, at 663 (Although it is widely agreed that photography is an expressive medium, “[c]ourts are in disagreement about the scope and application of First Amendment protection for photographers.”).

<sup>24</sup> *Fields v. City of Philadelphia*, 166 F. Supp. 3d 528, 539 (E.D. Pa. 2016).

<sup>25</sup> *Id.* at 535.

<sup>26</sup> *Fields v. City of Philadelphia*, 862 F.3d 358 (3d Cir. 2017).

<sup>27</sup> *Id.* (citation omitted).

<sup>28</sup> See, e.g., *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (“[T]he act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech . . . as a corollary of the right to disseminate the resulting recording.”); see also Kreimer, *supra* note 9, at 367 (“[A] solid line of courts has recognized that image capture can claim protection under the First Amendment.”). As Kreimer adeptly points out, the advent of livestreaming technology—which enables anyone with an internet-enabled smartphone to transmit video in real time over social sharing platforms—renders obsolete any argument that videography is not speech. *Id.* at 408–09. Since livestreaming closes the gap between recording a video and broadcasting it and everyone agrees that broadcasting a video is



not even clear whether the government can criminalize entirely ill-motivated acts of image capture, such as nonconsensual “upskirt” photos of women’s genital areas.<sup>29</sup>

In particular, an overwhelming body of case law now recognizes that the First Amendment guarantees the right to film police performing official duties in a publicly viewable place, which overrides any statutory prohibition that would otherwise outlaw non-consensual recording of conversations.<sup>30</sup> Most recently, the Tenth Circuit joined the parade by concluding in July 2022 that the right to record police was not just protected by the First Amendment, but was so clearly established that police who obstructed a blogger and amateur videographer from filming a roadside drunk-driving traffic stop could be held civilly liable for damages.<sup>31</sup>

The uniquely sensitive role of law enforcement agencies, and the public’s intense interest in holding them accountable, has carried great weight in the growing body of right-to-record case law.<sup>32</sup> But the right is not necessarily limited to the narrow context of policing. Several appellate courts have recognized a broader-based right to gather information, particularly information about functions of governance. As the Third Circuit expansively framed the right in *Fields*, “[t]he First Amendment

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speech, it defies logic to say that a livestream is fully constitutionally protected speech but a recording of the same event with the intent to later upload it for public viewing is not. *Id.* at 377.

<sup>29</sup> See Clay Calvert, *Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of Death*, 27 SEATTLE U. L. REV. 721, 727–29 (2004) (discussing constitutional challenges raised to state anti-voyeurism statutes when lawmakers have attempted to criminalize nonconsensual photography in public spaces, where U.S. law has long recognized that no reasonable expectation of privacy applies).

<sup>30</sup> See Aidan J. Coleman & Katharine M. Janes, Comment, *Caught on Tape: Establishing the Right of Third-Party Bystanders to Secretly Record the Police*, 107 VA. L. REV. ONLINE 166, 168 (2021) (“Federal appellate courts across the country have consistently recognized the existence of a valid First Amendment right in recording the police in public spaces.”).

<sup>31</sup> See *Irizarry v. Yehia*, 38 F.4th 1282, 1290–92 (10th Cir. 2022) (summarizing rulings from six other circuits, including the First, Third, Fifth, Seventh, Ninth and Eleventh Circuits, which agree that filming police is protected by the First Amendment and conclude that the consensus constitutes clearly established law); see also *Ramos v. Flowers*, 56 A.3d 869, 879 (N.J. Super. Ct. App. Div. 2012) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) (concluding that a police officer violated clearly established First Amendment law by confiscating documentarian’s camera and otherwise interfering with his film about street gangs: “Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest in protecting and promoting ‘the free discussion of governmental affairs.’”).

<sup>32</sup> See, e.g., *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (observing that the importance of protecting the public’s ability to share information about the performance of government officials is “particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties”).

protects the public's right of access to information about their officials' public activities."<sup>33</sup> Similarly, the Eleventh Circuit has phrased the right in a way that reaches beyond the context of policing: "The First Amendment protects the right to gather information about what public officials do on public property, and specifically, a right to record matters of public interest."<sup>34</sup> On the basis of that broad understanding, a district court in Georgia extended the right to nondisruptively shoot video to apply to the lobby area of a municipal building, which was open to public foot traffic and displayed no prohibitions against filming.<sup>35</sup> This growing body of case law suggests room to argue for a right to film on the publicly accessible areas of state college campuses, particularly if the videographer's purpose is to illuminate the functioning of government agencies and officials.

The right to shoot photos and videos has also been put to the test in a recent series of First Amendment challenges which are known colloquially as "ag-gag" laws—state statutes pushed by the agribusiness lobby meant to inhibit the recording of farm facilities and operations without the owner's consent.<sup>36</sup> The laws have been challenged both by journalists and by animal-welfare organizations, which see the ag-gag movement as a direct response to advocacy videos exposing mistreatment of animals on farms and in research laboratories.<sup>37</sup> At least three federal appellate courts have found these restrictive statutes to be wholly or partially unconstitutional—and in doing so, have recognized audio and video recording to be constitutionally protected activity.<sup>38</sup> For instance, in considering Idaho's prohibition on recording the activities of agricultural facilities without the owner's consent, the Ninth Circuit rejected the state's contention that the act of creating recordings is not

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<sup>33</sup> *Fields v. City of Philadelphia*, 862 F.3d 353, 359 (3d Cir. 2017).

<sup>34</sup> *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000).

<sup>35</sup> *See Dunn v. City of Fort Valley*, 464 F. Supp. 3d 1347, 1367 (M.D. Ga. 2020) ("[T]he right to record public officials on public property is a clearly established First Amendment right.").

<sup>36</sup> *See Shaakirrah R. Sanders, Ag-Gag Free Nation*, 54 WAKE FOREST L. REV. 491, 508–11 (2019) (explaining varieties of ag-gag statutes, some of which directly penalize bringing a recording device into agricultural facilities without permission and others which penalize gaining entry to agricultural facilities under false pretenses).

<sup>37</sup> *See Samantha Darnell, The Chilling Effect of Ag-Gag Laws on Unexpected Parties & the Free Market*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 453, 455 (2019) (stating that, after People for the Ethical Treatment of Animals used undercover tactics to expose mistreatment of laboratory research animals, state legislators began enacting laws to restrict such recording activity).

<sup>38</sup> *Irizarry v. Yehia*, 38 F.4th 1282 (10th Cir. 2022); *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219 (10th Cir. 2021); *Animal Legal Def. Fund v. Reynolds*, 8 F.4th 781 (8th Cir. 2021); *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018).

constitutionally protected.<sup>39</sup> “It defies common sense to disaggregate the creation of the video from the video or audio recording itself,” the judges wrote.<sup>40</sup> “The act of recording is itself an inherently expressive activity; decisions about content, composition, lighting, volume, and angles, among others, are expressive in the same way as the written word or a musical score.”<sup>41</sup> Adjudicating a 2017 challenge to a Wyoming ag-gag statute, the Tenth Circuit explicitly drew on the body of police-recording law to recognize a right to collect information about agricultural operations: “An individual who photographs animals or takes notes about habitat conditions is creating speech in the same manner as an individual who records a police encounter.”<sup>42</sup>

Although the law seemed to be evolving decidedly toward rigorous protection for filming, the U.S. Court of Appeals for the D.C. Circuit diverged from the consensus in its August 2022 *Price v. Garland* decision. In a 2-1 decision departing from seemingly well-established First Amendment principles, the court’s majority created a reduced level of constitutional protection for the act of filming.<sup>43</sup> The court slapped down a First Amendment challenge brought by a documentary filmmaker aggrieved by a National Park Service rule requiring him to obtain a permit, applying a deferential level of review because, in the majority’s view, shooting a film is not itself “communicative.”<sup>44</sup> Further, the D.C. Circuit rejected the notion of a generalized right to photograph on public property, conceiving the right more narrowly—as a right to record government officials transacting official business.<sup>45</sup>

It is true that most of the case law recognizing a right to film has taken place in the context of recording matters of public concern, not photography for educational or recreational purposes.<sup>46</sup> Whether the same solicitude for videography would extend to artistic, recreational, or educational recording on a college campus is an unsettled question. Nevertheless, at least some subset of filming on college

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<sup>39</sup> 878 F.3d at 1204.

<sup>40</sup> *Id.* at 1203.

<sup>41</sup> *Id.*

<sup>42</sup> *W. Watersheds Project v. Michael*, 869 F.3d 1189, 1197 (10th Cir. 2017).

<sup>43</sup> 45 F.4th 1059, 1064 (D.C. Cir. 2022).

<sup>44</sup> *Id.* at 1068.

<sup>45</sup> *Id.* at 1071.

<sup>46</sup> *See, e.g., Askins v. Dep’t of Homeland Sec.*, 899 F.3d 1035, 1044 (9th Cir. 2018) (“The First Amendment protects the right to photograph and record matters of public interest” in the context of two plaintiffs who were prevented from capturing images of U.S. Customs and Border Patrol officers doing their jobs.).

campuses—like the filming of agribusiness enterprises—is being done for purposes of public awareness and accountability. At least as to that subset of filming, the First Amendment should offer strong protection.

In sum, it is increasingly—though not universally—accepted that photography and videography are protected by the First Amendment as an extension of engaging in expression. Any policy enforced by a state college or university that restricts the ability to gather images, in spaces otherwise accessible without trespassing, will almost certainly be subject to rigorous First Amendment scrutiny if challenged.

### III. ZONING FREE SPEECH: WHAT THE LAW SAYS ABOUT EXPRESSIVE ACCESS TO COLLEGE CAMPUSES

#### A. *Forum Over Substance: The Confusing Constitutional Status of Campus Property*

The right to engage in expression on public property varies with the nature of the property. When property is regarded as a “public forum” amenable to expressive use, the speaker’s rights are at their highest and the government regulator’s discretion is at its lowest.<sup>47</sup> A few categories of property (streets, parks and sidewalks) are regarded as *per se* forums in the eyes of First Amendment law because they have traditionally been places wide-open for speakers to express themselves.<sup>48</sup> Other spaces—including non-physical “spaces,” such as a program for obtaining government funds—can attain forum status by virtue of affirmative government designation.<sup>49</sup>

Once property is categorized as a forum, either by tradition or by designation, rigorous First Amendment standards constrain how much the government can regulate speech. Any regulation that is based on the content or viewpoint of the speaker’s message will be presumptively unconstitutional unless it can surmount

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<sup>47</sup> See *Frisby v. Schultz*, 487 U.S. 474, 479 (1988) (“Our cases have recognized that the standards by which limitations on speech must be evaluated ‘differ depending on the character of the property at issue.’”) (quoting *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 44 (1983)).

<sup>48</sup> See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (“Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”).

<sup>49</sup> See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (recognizing the state university’s system of allocating student fees as “metaphysical” forum for expression, to which speakers can assert a First Amendment right of access).

“strict scrutiny,” meaning that the regulation must be the most narrowly tailored solution to achieve a compelling government objective.<sup>50</sup> If a regulation is not based on content—that is, “content-neutral”—then the scrutiny somewhat relaxes.<sup>51</sup> A content-neutral regulation targeting the “time, place or manner” of speech is subject to an intermediate level of scrutiny, meaning that it will be constitutional as long as it is reasonably well-tailored to address a legitimate government purpose and leaves open ample alternative means for the speaker to reach the intended audience.<sup>52</sup> For purposes of a content-neutral regulation, “tailoring” means that the regulation does not “burden substantially more speech than is necessary to further the government’s legitimate interests.”<sup>53</sup>

The campus of a state university is like a small municipality, often containing recreational and cultural facilities, eateries, bookstores, and other amenities that the entire surrounding community uses.<sup>54</sup> Many are seamlessly integrated into their communities, so that a cyclist or jogger—or protester—might venture into campus property without even being conscious of it.<sup>55</sup> But just because property is open to public foot traffic does not necessarily mean that it will be treated as a forum amenable to public expression.<sup>56</sup>

The Supreme Court made the distinction in *United States v. Kokinda*, in which a plurality found that the sidewalk outside a U.S. post office was not a public forum,

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<sup>50</sup> *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citing *Cary v. Brown*, 447 U.S. 455, 461 (1980)).

<sup>51</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 166–67 (2015).

<sup>52</sup> *Perry Educ. Ass’n*, 460 U.S. at 45 (citation omitted).

<sup>53</sup> *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

<sup>54</sup> See Stephen Douglas Bonney, *The University Campus as Public Forum: The Legacy of Widmar v. Vincent*, 81 UMKC L. REV. 545, 562 (2013) (“[M]ost public college and university campuses are physically open to all outsiders and, in fact, invite many outsiders to visit campus to audit classes, to use the libraries and other facilities, and to attend lectures, community forums, athletic events, movies, plays, and other theatrical and musical productions.”).

<sup>55</sup> See *Brister v. Faulkner*, 214 F.3d 675, 682 (5th Cir. 2000) (noting that sidewalks outside University of Texas performing arts center were not visibly distinct from adjoining municipal sidewalks, so that protesters handing out leaflets were not on notice that they were entering university “enclave” where—in the university’s view—sidewalks ceased being public forums).

<sup>56</sup> See Joseph D. Herrold, *Capturing the Dialogue: Free Speech Zones and the “Caging” of First Amendment Rights*, 54 DRAKE L. REV. 949, 976 (2006) (acknowledging uncertainty over classification of campus property and observing that “the streets, sidewalks, and plazas of a public university may or may not be a public forum depending on what a court deems the purpose of the university campus to be.”).

because it was designed solely to connect the building with the parking lot for the use of postal customers, not to facilitate public foot traffic in the municipality.<sup>57</sup> Under the principle applied in *Kokinda*, the forum status of property is a case-by-case, fact-specific determination, looking to the property's intended purpose and the extent to which expressive use of the property would interfere with that primary intended purpose.<sup>58</sup>

Somewhat confusingly, courts have also recognized the concept of a "limited" public forum that operates as a forum only for certain categories of authorized speakers, or for certain categories of speech.<sup>59</sup> When a piece of property is regarded as merely a "limited" forum, then the government's burden to restrict speech diminishes considerably. A regulation on speech will be constitutional so long as it is viewpoint-neutral and is reasonable in light of the nature and purpose of the forum.<sup>60</sup> For instance, the open-mic period at a school board meeting is widely regarded as being a limited public forum for the purpose of discussing business within the school board's jurisdiction.<sup>61</sup> Therefore, the board can enforce content-based restrictions—e.g., forbidding speech about topics irrelevant to the school system—without running afoul of the First Amendment, even though content-based distinctions would be impermissible in other types of forums.<sup>62</sup> Even in a limited

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<sup>57</sup> 497 U.S. 720, 729–30 (1990).

<sup>58</sup> See *Hotel & Rest. Emps. Union v. N.Y. Dept. of Parks*, 311 F.3d 534, 546–47 (2d Cir. 2002) (stating, in a case involving labor protests on the plaza outside New York's Lincoln Center, that a property's forum status is assessed based on "its physical characteristics, the objective ways in which it is used, and the City's intent in constructing and opening it to the public.>").

<sup>59</sup> See *Bowman v. White*, 444 F.3d 967, 975 (8th Cir. 2006) ("Substantial confusion exists regarding what distinction, if any, exists between a 'designated public forum' and a 'limited public forum.'").

<sup>60</sup> See *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983) ("In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.>").

<sup>61</sup> See, e.g., *Eichenlaub v. Twp. of Indiana*, 385 F.3d 274, 280–81 (3d Cir. 2004) (stating that public township meeting is a limited public forum for citizens to address concerns); see also Frank D. LoMonte & Clay Calvert, *The Open Mic, Unplugged: Challenges to Viewpoint-Based Constraints on Public-Comment Periods*, 69 CASE W. RES. L. REV. 19, 33–34 (2018) (stating that, in adjudicating First Amendment challenges by speakers, four circuit courts have categorized the public comment period at a government meeting as a "limited" forum, though at least one district court has applied a more speech-protective standard).

<sup>62</sup> LoMonte & Calvert, *supra* note 61, at 33 (stating that if an open-mic period is viewed as only a limited public forum, "content discrimination is permissible and government restrictions are viewed more deferentially").

public forum, however, regulators cannot cross the line into viewpoint discrimination, preferencing one side of a contested issue over another.<sup>63</sup>

Courts widely agree that the walkable open spaces of a state college constitute a public forum.<sup>64</sup> It is less clear, though, whether a campus qualifies as a forum for all users or just for the limited subset of users—students, employees, and official-business visitors—for whom the space is primarily designed and maintained. Challenges to geographic restrictions of speech on college campuses have produced widely diverging analyses, depending on the character of the particular piece of property to which the speaker seeks access.<sup>65</sup>

At one extreme, some courts have deemed walkable open spaces on college campuses to be traditional public forums like municipal streets, sidewalks, and parks. For example, in *McGlone v. Bell*, the Sixth Circuit found that sidewalks along the perimeter of Tennessee Tech University were traditional public forums because they “blend into the urban grid and are physically indistinguishable from public sidewalks.”<sup>66</sup> However, many, if not most, federal courts take a narrower view, finding that campus greenspaces and walkways are only limited public forums set aside for use by authorized campus insiders, such as students and employees. Those insiders enjoy robust free-speech protection, but protection diminishes if outsiders

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<sup>63</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

<sup>64</sup> See Davis, *supra* note 6, at 274 (“[C]ommentators have argued that open areas on university campuses should be considered public fora. Courts have often agreed, finding public areas on campuses to be designated public fora despite the insistence of the universities to the contrary. Courts often have found that a university has opened its campus to expressive activity (and thereby created a designated public forum) with surprising ease.”) (parentheses in original).

<sup>65</sup> See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (analyzing a federal fundraising campaign as an intangible forum and stating that “in defining the forum we have focused on the access sought by the speaker”).

<sup>66</sup> 681 F.3d 718, 733 (6th Cir. 2012). See also *Smith v. Tarrant Cnty. Coll. Dist.*, 670 F. Supp. 2d 534, 538 (N.D. Tex. 2009) (in adjudicating a challenge to a Texas college’s policy of relegating speech to permit-controlled free-speech zones, the court stated, “[a]reas that are traditionally considered public forums do not lose this character merely due to the fact they are on a school campus”); *Students Against Apartheid Coal. v. O’Neil*, 660 F. Supp. 333, 338 (W.D. Va. 1987) (observing “the similarity between an open campus lawn and a traditional public forum like municipal parks” and further, applying strict scrutiny to a university’s decision to deny students permission to erect symbolic protest structures on campus green); *Spartacus Youth League v. Bd. of Trs. of Ill. Indus. Univ.*, 502 F. Supp 789, 799 (N.D. Ill. 1980) (finding that student unions and surrounding walkways are traditional public forums, where expression is compatible with the property’s primary intended use, subject to reasonable time, place, and manner restrictions).

demand access to the property for self-expression.<sup>67</sup> Other courts have agreed that outdoor campus areas are only limited forums, yet open for expression to all users—not just students and employees—by virtue of the property’s character and use.<sup>68</sup> At this latter subset of campuses, all speakers have strong protection against content- or viewpoint-based restrictions—but, unlike a traditional public forum, the limited forum is less durable and is subject to “un-designation” should the owner decide to cease hosting speakers.<sup>69</sup> Exemplifying how fact-specific—and confusing—this area of First Amendment law has become, the Fifth Circuit has come down on both sides of the question—sometimes concluding that campus property is a traditional public forum,<sup>70</sup> and sometimes not.<sup>71</sup>

In recent years, college First Amendment case law has largely grown up around challenges to compulsory anti-harassment codes and the containment of protest speech in geographically limited “free speech zones.” In the case of anti-harassment speech codes, courts have regularly struck down attempts to legislate civility, finding the regulations unduly broad or vague, irreconcilable with the strong presumption in

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<sup>67</sup> See *Bloedorn v. Grube*, 631 F.3d 1218, 1232 (11th Cir. 2011) (holding that sidewalks, a pedestrian mall and other walkable areas of state university campus were limited public forums for use by students, employees and guests, but not for external visitors); *ACLU v. Mote*, 423 F.3d 438, 444–45 (4th Cir. 2005) (rejecting a First Amendment challenge by a campus outsider who was denied space to distribute political leaflets, and stating that a college campus is “a non-public forum for members of the public not associated with the university”); *Hershey v. Goldstein*, 938 F. Supp. 2d 491, 511 (S.D.N.Y. 2013) (reviewing college’s decision to exclude outsiders from leafleting on campus walkways under deferential reasonableness standard, in light of the college campus serving as an “enclave” for educational purposes); *Rock for Life-UMBC v. Hrabowski*, 643 F. Supp. 2d 729, 744 (D. Md. 2009) (stating that a college campus is a public forum for class of approved users, but nonforum as to outsiders); *Univ. Sys. v. Nevadans for Sound Gov’t*, 100 P.3d 179, 190 (Nev. 2004) (“Typically, when reviewing restrictions placed on students’ speech activities, courts have found university campuses to be designated public forums. However, when the rights being restricted belong to nonstudents, courts have generally held university facilities and campuses to be limited public or nonpublic forums.”).

<sup>68</sup> See *Bowman v. White*, 444 F.3d 967, 976 (8th Cir. 2006) (holding that outdoor common area on a college campus is “unlimited designated public forum” for all speakers regardless of official university affiliation).

<sup>69</sup> See Frank D. LoMonte, *Everybody Out of the Pool: Recognizing a First Amendment Claim for the Retaliatory Closure of (Real or Virtual) Public Forums*, 30 U. FLA. J.L. & PUB. POL’Y 1, 17–24 (2019) (explaining that designated or limited forums are subject to government closure, unlike traditional forums, but describing split among courts as to whether closure decisions can be subject to First Amendment retaliation claims).

<sup>70</sup> *Brister v. Faulkner*, 214 F.3d 675 (5th Cir. 2000).

<sup>71</sup> *Justice for All v. Faulkner*, 410 F.3d 760 (5th Cir. 2005).



favor of freewheeling campus discourse.<sup>72</sup> In Wisconsin, a federal district court invalidated a university policy making it a punishable offense to “demean” others or make “discriminatory remarks.”<sup>73</sup> A Michigan court struck down a disciplinary code that defined punishable acts of discriminatory harassment to include any speech that “stigmatizes or victimizes” others.<sup>74</sup> Applying that ruling, a sister Michigan court likewise deemed a university antidiscrimination code unconstitutionally broad because it extended to any behavior—even unintentional behavior—that could be considered “demeaning” or “infer negative connotations” about others.<sup>75</sup> In other words, even with the best of intentions to target only low-value harassment speech, universities’ content-based disciplinary codes still regularly flunk First Amendment scrutiny.

In the context of geographic “zoning” of campus protests, courts generally agree that universities cannot declare lawns, walkways and other open spaces off-limits for expressive use by channeling expression exclusively into designated protest zones.<sup>76</sup> For example, a federal district court found that the University of Cincinnati violated the First Amendment by cabining students’ expressive activity onto one corner of a common area—described as “less than one tenth the size of a football field” or 0.1% of the total land area of the campus—from which the plaintiff speakers were unable to effectively reach a mass audience.<sup>77</sup> At least for authorized users of the campus, all outdoor areas—not just those set aside by administrators—

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<sup>72</sup> See *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1125–27 (11th Cir. 2022) (holding that campus regulations against discriminatory harassment and “bias-related incidents,” which proscribed a wide range of “humiliating” or “offensive” speech and acts, including condoning humiliating conduct by others or failing to intervene to stop biased acts, were unconstitutionally overbroad); *DeJohn v. Temple Univ.*, 537 F.3d 301, 317–18 (3d Cir. 2008) (finding that a disciplinary code prohibiting “hostile,” “offensive” or “gender-motivated” speech at a public university could inhibit core political and religious speech, rendering it unconstitutionally overbroad).

<sup>73</sup> *UWM Post v. Bd. of Regents of Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991).

<sup>74</sup> *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989).

<sup>75</sup> *Dambrot v. Cent. Mich. Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993).

<sup>76</sup> See Neal H. Hutchens & Frank Fernandez, *Searching for Balance with Student Free Speech: Campus Speech Zones, Institutional Authority, and Legislative Prerogatives*, 5 BELMONT L. REV. 103, 117 (2018) (“[C]ourts have interpreted institutional policy in ways that are sympathetic to student speech rights in open campus areas.”); see also Davis, *supra* note 6, at 278 (“Several cases involving speech zone regulation have found that those zones were unconstitutional because university officials had too much discretion in deciding what activities would be permitted.”).

<sup>77</sup> *Univ. of Cincinnati Chapter of Young Ams. for Freedom v. Williams*, No. 12-cv-155, 2012 WL 2160969 (S.D. Ohio June 12, 2012) at \*1, \*7.

are widely understood to be open for any lawful type of expression, subject to reasonable restrictions on time, place and manner, such as controls on noise or traffic safety.<sup>78</sup>

It is much less clear whether any *indoor* space qualifies as a forum. The analysis would turn on the traditional use and character of the space, meaning it is unlikely that the interior of a building would qualify as a forum because buildings are not understood to be places thrown open for indiscriminate expressive use.<sup>79</sup> Still, the forum status of a university campus is not an all-or-nothing question; campuses contain many different types of properties, some of which are amenable to expressive use and others which are not.<sup>80</sup> Outside the college context, there is some authority that even the interior spaces of government buildings are amenable to nondisruptive filming, if the buildings are otherwise open for the public to transact business.<sup>81</sup> Some portion of a campus building could be recognized as forum property if it has been held open for expressive use, such as the lobby area of a student union.<sup>82</sup> Nevertheless, the First Amendment entitlement to film will be clearer in an open outdoor area, since a university will understandably have countervailing concerns with managing distractions inside a building that do not apply to a campus green

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<sup>78</sup> See *Roberts v. Haragan*, 346 F. Supp. 2d 853, 861 (N.D. Tex. 2004) (“[T]o the extent the campus has park areas, sidewalks, streets, or similar common areas, these areas are public forums, at least for the University’s students, irrespective of whether the University has so designated them or not.”).

<sup>79</sup> See *Auburn All. for Peace & Just. v. Martin*, 684 F. Supp. 1072, 1077 (M.D. Ala. 1988) (“Few would suggest that a university would be forced to allow a speech or a demonstration in the reading room of the library. Such a prohibition would be reasonable because the speaker or demonstrator would interfere with the rights of others who presumably sought the reading room for quiet and reading, not speeches.”).

<sup>80</sup> See *Bloedorn v. Grube*, 631 F.3d 1218, 1232 (11th Cir. 2011) (“Plainly, Georgia Southern University’s campus contains a multitude of facilities and land—including classrooms, lecture halls, private offices, laboratories, dormitories, a performing arts center, sports facilities, open spaces, a botanical garden, a planetarium, a center for wildlife education, and a museum. Thus, any attempt to affix a single label on so large and diverse a campus likely would render the forum analysis meaningless.”).

<sup>81</sup> See *Iacobucci v. Boulter*, 193 F.3d 14, 24–25 (1st Cir. 2019) (finding that broadcaster had clearly established a First Amendment right to film both inside city meeting room and in adjoining hallway where several committee members had retired to confer); *Dunn v. City of Fort Valley*, 464 F. Supp. 3d 1347, 1367–68 (M.D. Ga. 2020) (finding that police violated citizen journalist’s clearly established First Amendment rights by citing him for trespass when he refused to stop filming publicly viewable areas inside city hall).

<sup>82</sup> See *Riemers v. State*, 767 N.W.2d 832, 843–44 (N.D. 2009) (stating that a portion of student union where organizations were allowed to station tables for purposes of displaying information became a designated public forum).

where people are riding bikes, lounging in hammocks, and otherwise enjoying a park-like atmosphere.

*B. Clearly Stated: Lawmakers Step Up to Clarify Campus Speech Rights*

Since 2015, twenty-two states have enacted statutes that curtail the authority of public colleges and universities to restrict speech on campus property.<sup>83</sup> Georgia became the latest state to designate any publicly accessible outdoor area on a state college campus as a “public forum” for expression when Governor Brian Kemp signed House Bill 1 into law in May 2022.<sup>84</sup>

This wave of statutes is largely inspired by model legislation promoted by a conservative advocacy organization, the American Legislative Exchange Council (“ALEC”).<sup>85</sup> The ALEC model legislation states that any person, not just a student or employee, is allowed to engage in “non-commercial expressive activity” so long as it is legal and not materially disruptive.<sup>86</sup> However, the legislation does not define what is meant by “commercial” activity, which leaves that issue to be resolved, ultimately, by the courts if a disagreement arises over whether speech is “commercial” so as to fall outside the statute’s protection. Although the ALEC model legislation contemplates that even external users enjoy broad expressive access to campus property, not every state has chosen to go so far.

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<sup>83</sup> See ALA. CODE § 16-68-3 (West 2020); ARIZ. REV. STAT. § 15-1864 (West 2019); ARK. CODE ANN. § 6-60-1005 (West 2019); COLO. REV. STAT. § 23-5-144 (LexisNexis 2017); FLA. STAT. ANN. § 1004.097 (West 2022); GA. CODE ANN. § 20-4-11.1 (West 2022); IND. CODE § 21-39-8-10 (2022); IOWA CODE ANN. § 261H.4 (West 2019); KY. REV. STAT. ANN. § 164.348 (West 2019); LA. STAT. ANN. § 17:3399.35 (2022); MO. REV. STAT. § 173.1550 (2015); MONT. CODE ANN. § 20-25-1503 (West 2021); N.C. GEN. STAT. ANN. § 116-300 (West 2017); N.D. CENT. CODE § 15-10.4-02 (2021); OHIO REV. CODE ANN. § 3345.0213 (West 2021); OKLA. STAT. ANN. tit. 70 § 2120 (West 2022); S.D. CODIFIED LAWS § 13-53-51 (2019); TENN. CODE ANN. § 49-7-2405 (West 2018); TEX. EDUC. CODE ANN. § 51.9315 (West 2021); UTAH CODE ANN. § 53B-27-203 (West 2017); VA. CODE ANN. § 23.1-401 (West 2016); W. VA. CODE § 18B-20-3 (2021); see also Victoria Smith Ekstrand & Chengyuan Shao, *The State of Campus Free Expression in North Carolina: A Close Look at the “Restore/Preserve Campus Free Speech Act,”* 19 FIRST AMEND. L. REV. 285, 286 (2021) (discussing recent wave of enactments and legislatures’ motivation).

<sup>84</sup> See Moody, *supra* note 6.

<sup>85</sup> *Id.*

<sup>86</sup> FORMING OPEN AND ROBUST UNIVERSITY MINDS (FORUM) ACT (AMER. LEGIS. EXCH. COUNCIL 2018), <https://alec.org/model-policy/forming-open-and-robust-university-minds-forum-act/> [<https://perma.cc/6PKX-8SZQ>].

Designating campus property as a public forum means that the highest degree of First Amendment protection applies. Eight of the twenty-two state statutes—Arizona, Florida, Indiana, Louisiana, Missouri, Montana, Texas and Utah—provide that the open spaces on college campuses are open to expressive use by any member of the public, with no qualifier that the speaker must be affiliated with the campus.<sup>87</sup> For instance, Florida’s Campus Free Expression Act provides that “a person who wishes to engage in an expressive activity in outdoor areas of campus may do so freely, spontaneously, and contemporaneously[,]” as long as the expressive conduct is lawful and does not disrupt university functions.<sup>88</sup> Significantly, Florida’s 2019 statute goes further than its sister statutes by explicitly identifying the recording of video and audio as protected expression on college campuses.<sup>89</sup>

Other statutes are equivocal. For instance, North Carolina’s statute simply incorporates existing constitutional standards by stating that speakers’ access to campus “shall be consistent with First Amendment jurisprudence regarding traditional public forums, designated public forums, and nonpublic forums,” providing no additional clarity beyond the somewhat equivocal guidance courts have furnished about the forum status of campuses.<sup>90</sup> Georgia’s statute protects the right of “[a]ny person” to engage in “noncommercial expressive activity” on a college campus, but then provides that campuses should not be deemed to be public forums for those outsider speakers—perhaps an attempt to guarantee that free-speech disputes involving outside speakers will be adjudicated in state court without opening up a federal constitutional recourse.<sup>91</sup>

Eleven states are more explicit in declaring that only campus insiders are entitled to use the open areas of college campuses for expression. For instance, North Dakota extends the right to students, faculty, and invited guests,<sup>92</sup> while Colorado

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<sup>87</sup> See ARIZ. REV. STAT. § 15-1864 (West 2019); FLA. STAT. ANN. § 1004.097 (West 2022); IND. CODE § 21-39-8-10 (2022); LA. STAT. ANN. § 17:3399.35 (2022); MO. REV. STAT. § 173.1550 (2015); MONT. CODE ANN. § 20-25-1503 (West 2021); TEX. EDUC. CODE ANN. § 51.9315 (West 2021); UTAH STAT. § 53B-27-203 (West 2017).

<sup>88</sup> FLA. STAT. ANN. § 1004.097 (West 2022).

<sup>89</sup> See *id.* § 1004.097(3)(a) (defining protected campus expression as “the recording and publication, including the Internet publication, of video or audio recorded in outdoor areas of campus”).

<sup>90</sup> N.C. GEN. STAT. § 116-300(5) (West 2017).

<sup>91</sup> GA. CODE ANN. § 20-4-11.1(e) (West 2022).

<sup>92</sup> See N.D. CENT. CODE § 15-10.4-02(5)(a) (2021) (“An institution shall maintain the generally accessible, open, outdoor areas of the institution’s campus as traditional public forums for free speech by students, faculty, and invited guests, subject to reasonable time, place, and manner restrictions.”).

assures only students of access.<sup>93</sup> The term “campus community” is used frequently in state laws to suggest that a lesser degree of protection will apply to people who have no university affiliation. Ohio’s statute is typical; it provides that the open outdoor areas on state college campuses “are public forums for campus communities.”<sup>94</sup> In this latter category, state law might allow for filming policies to give preferential access to students and other campus insiders, so long as the policy is otherwise consistent with First Amendment interpretations for that state.

#### IV. CAPPING THE LENS ON CAMPUS FILMING

In November 2011, students at the University of California-Davis staged a peaceful sit-in to show solidarity with the nationwide “Occupy” economic-justice movement.<sup>95</sup> As protesters sat on a campus lawn with their arms locked—defying an order from UC’s chancellor to dismantle their tent encampment—a campus police officer nonchalantly walked down the line of nonviolent demonstrators and gassed them directly in the face with pepper spray.<sup>96</sup> A student bystander, Thomas Fowler, chronicled the officer’s actions in a smartphone video, which racked up 1.3 million views on YouTube within a matter of days and was aired on CNN and other national media platforms, spawning protests across the country.<sup>97</sup> One local journalist vividly captured the intensity of the resulting public backlash against police, and the role that Fowler’s video played in it:

[T]he campus name is being evoked by millions around the globe as a touchstone of civilian protest and alleged police brutality. That breathtakingly rapid transformation is a testament to how imagery, and the ability of just about anyone

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<sup>93</sup> See COLO. REV. STAT. § 23-5-144(3)(a) (2017) (“An institution of higher education shall not limit or restrict a student’s expression in a student forum, including subjecting a student to disciplinary action resulting from his or her expression, because of the content or viewpoint of the expression or because of the reaction or opposition by listeners or observers to such expression.”).

<sup>94</sup> OHIO REV. CODE ANN. § 3345.0213(a)(1) (West 2021). See also ALA. CODE § 16-68-3(a)(4) (West 2020) (“[T]he outdoor areas of a campus of a public institution of higher education shall be deemed to be a forum for members of the campus community[.]”).

<sup>95</sup> Tami Abdollah, *Thousands Rally at UC Davis After Pepper Spraying Incident*, KPCC (Nov. 21, 2011), <https://www.kpcc.org/2011-11-21/thousands-uc-davis-students-rally-campus-after-pep> [<https://perma.cc/57P9-VALM>].

<sup>96</sup> *Id.*

<sup>97</sup> Nick Miller, *UC Davis ‘Pepper Spray’ Video: The Accidental Journalist*, SACRAMENTO NEWS & REV. (Nov. 24, 2011), <https://www.newsreview.com/sacramento/content/uc-davis-pepper-spray-video-the-accidental-journalist/4506147/> [<https://perma.cc/S8YV-59A2>].

to spread it, has changed the way people get information—and how movements can get fired up because of technology and social media.<sup>98</sup>

The controversy did not end there. Five years later, journalists revealed that the university had paid at least \$175,000 to a marketing firm and a public-relations agency to scrub references to the pepper-spray episode from the internet, in what the university admitted was an attempt to polish its image and that of UC's chancellor, who was heavily criticized for mismanaging the incident.<sup>99</sup>

The UC-Davis experience teaches three important lessons about the role of filming on college campuses. First, that universities are sometimes places where compelling national news is made. Second, that video, unlike mere words on a page, has a unique power to outrage people and catalyze them into action.<sup>100</sup> And third, that universities are fixated on burnishing their reputations, even at the cost of distorting history, unless they are carefully watched by objective observers.

#### A. *T.V. Versus P.R.*

At times, universities' interests in controlling their image have come into tension with the interests of speakers in filming on university property without the risk of a content-based university veto. Such a conflict arose at California's Sacramento State University when the university sought to enact a restrictive filming policy that imposed content-based restrictions even on student-made films.<sup>101</sup> As proposed, the 2018 policy raised obvious constitutional red flags: it purported to apply to any use of camera equipment on campus property, without limitation, and required (among other things) that anyone using a camera on campus obtain written permission before filming a campus logo and written consent form from anyone

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<sup>98</sup> Kevin Fagan, *How Viral Video Put Occupy UC Davis on the Map*, SF GATE (Nov. 23, 2011), <https://www.sfgate.com/news/article/How-viral-video-put-Occupy-UC-Davis-on-the-map-2290448.php> [<https://perma.cc/5B9F-QCTR>].

<sup>99</sup> Philip Lewis, *UC Davis Spent Thousands to Scrub Pepper-spray References from Internet*, SACRAMENTO BEE (Apr. 13, 2016), <http://www.sacbee.com/news/local/article71659992.html>.

<sup>100</sup> See Kreimer, *supra* note 9, at 347 (“[T]he prospect of private image capture provides a deterrent to official actions that would evoke liability or condemnation. Images allow victims to claim their voice and to leverage widely held norms to shame violators.”).

<sup>101</sup> Claire Morgan, *Sac State Media Policy to Be Revised following Concerns It Is Unconstitutional*, STATE HORNET (Feb. 20, 2018), <https://statehornet.com/2018/02/sac-state-media-policy-to-be-revised-following-concerns-it-is-unconstitutional/> [<https://perma.cc/8C3K-F7CV>].

visible in a picture.<sup>102</sup> By its terms, the policy would have made it a punishable offense for a mother to take a cellphone photo of her graduating daughter in front of the university's entryway logo sign without getting both the university and the daughter to sign consent forms.

Even after the university promised revisions in response to campus criticism, a revised 2020 draft of the policy raised similar alarms.<sup>103</sup> The revised policy purported to apply even to student filmmaking off campus property, and (among many other restrictions) forbade students from making films depicting a wide range of frowned-upon behaviors—including smoking, alcohol use, and violence—without permission from the university president, under threat of discipline up to expulsion.<sup>104</sup> As justification for the rule, a university official mentioned a student-made film in which a scene appeared to depict firearms, although the university gave no indication that the film caused any harm, that real firearms were brought to campus or were possessed unlawfully, or that the film was otherwise not fully protected by the First Amendment.<sup>105</sup>

Universities are famously protective of their reputations and averse to any controversy that might produce adverse reaction, particularly among their key stakeholders: legislators, alumni donors, and prospective students and their parents.<sup>106</sup> There is an obvious pocketbook interest in cultivating a favorable reputation, as one Harvard study found that if a university was involved in a highly publicized controversy, applications for admission decreased by an average of 9% the following year.<sup>107</sup> Indeed, universities are so obsessed with their reputations that their employees have been repeatedly caught falsifying data to boost their

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<sup>102</sup> *Id.*

<sup>103</sup> Madeleine Beck & Chris Wong, 'What Does the Campus Expect Us to Make?': *Sac State Students, Faculty Express Concerns over Proposed Visual Content Restrictions*, STATE HORNET (Mar. 3, 2020), <https://statehornet.com/2020/03/sacstate-2020-visual-sound-policy/> [https://perma.cc/EZL9-JJ8N].

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> See Herrold, *supra* note 56, at 955–56 (“Though the Supreme Court has championed the idea that educational settings welcome the expression of all opinions, officials at educational institutions may not share such opinions, or may fear having the message associated in any way with the college or university.”).

<sup>107</sup> Tom Lindsay, *Scapegoat or Scandal? When Universities Suffer 'Bad Press,'* FORBES (July 21, 2016), <https://www.forbes.com/sites/tomlindsay/2016/07/21/scapegoat-or-scandal-when-universities-suffer-bad-press/?sh=40b719b87946> [https://perma.cc/VBR4-DG8B].

institutions' standings in national rankings.<sup>108</sup> Not infrequently, universities' interests in controlling how they are portrayed by the news media have come into conflict with journalists' interests in accessing newsworthy events on campus—and the public's interest in being informed about how university officials do their jobs.<sup>109</sup>

Nevertheless, no matter how highly universities prioritize their interest in a favorable public image, “reputation management” is not recognized as a legitimate purpose for restricting speech. To the contrary, the First Amendment protection of filmmaking is undiminished no matter how unflattering the film might be to government officials and agencies.<sup>110</sup> As the Supreme Court memorably stated in a

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<sup>108</sup> See Sarah Brown, *Columbia U. Won't Submit Data to 'U.S. News' Rankings After Professor Alleged False Information*, CHRON. HIGHER EDUC. (June 30, 2022), <https://www.chronicle.com/article/columbia-u-wont-submit-data-to-u-s-news-rankings-after-professor-alleged-false-information> [<https://perma.cc/A969-K6EC>] (reporting that a Columbia University math professor uncovered discrepancies in data reported to a national ranking service, including false information about class sizes, percentages of faculty holding doctorates, and other metrics); Alyssa Lukpat, *Former Temple U. Dean Found Guilty of Faking Data for National Rankings*, N.Y. TIMES (Nov. 29, 2021), <https://www.nytimes.com/2021/11/29/us/temple-university-moshe-porat-fraud.html> [[perma.cc/9CFB-YZRK](https://perma.cc/9CFB-YZRK)] (reporting that a former college administrator was convicted of fraud for conspiring to inflate Temple University's rankings with motivation of obtaining more money by falsifying data about enrollment, test scores, and student employment); Justin Pope, *Colleges Caught in Obsession Over Rankings*, NBC NEWS (Feb. 5, 2012), <https://www.nbcnews.com/id/wbna46272142> [<https://perma.cc/572N-Y3K2>] (reporting that a senior administrator at a California college resigned after admitting he inflated college entrance exam scores for years to publications such as *U.S. News and World Report*, and that Baylor University paid students to retake standardized tests for no reason other than to boost university's average test scores in national rankings).

<sup>109</sup> See Julie Strupp, *American University Kicks Reporters Off Campus*, WASHINGTONIAN (May 3, 2017), <https://www.washingtonian.com/2017/05/03/wamu-reporter-others-kicked-off-campus-while-covering-american-university-protests/> [[perma.cc/2YF9-45P3](https://perma.cc/2YF9-45P3)] (reporting that American University officials ejected journalists who were covering campus racial-justice protests); Danika Worthington, *Journalists Banned From Reporting on University of Colorado Boulder Allowed into Chancellor's Cottage*, DENVER POST (May 2, 2017), <https://www.denverpost.com/2017/05/02/journalists-banned-university-colorado/> [[perma.cc/TTS3-JXPM](https://perma.cc/TTS3-JXPM)] (reporting that police and private security guards posted photos of four local journalists singled out for exclusion from covering campus protests, a decision the college administration later acknowledged was mistaken).

<sup>110</sup> See, e.g., *Huminski v. Rutland Cnty.*, 134 F. Supp. 2d 362 (D. Vt. 2001) (holding that a speaker was entitled to an injunction against enforcement of trespass notices that barred him from any courthouse in Vermont because he parked a van outside his local courthouse bearing signs criticizing the legal expertise of a state-court judge); see also *Fed'n of Turkish-Am. Soc'ys, Inc. v. Am. Broad. Cos.*, 620 F. Supp. 56, 58 (S.D.N.Y. 1985) (in refusing to enjoin distribution and exhibition of motion picture “Midnight Express” despite complaints that it portrayed Turkish government and law enforcement as corrupt, the court stated, “[t]he First Amendment protects the offensive utterance fully as much as it protects the bland or uncontroversial”).



case overturning a “breach of peace” conviction against a speaker who delivered an inflammatory political speech in a raucous meeting hall:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. . . . That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.<sup>111</sup>

### *B. Capping the Lens: How Colleges Restrict Image-Gathering*

A Brechner Center review of publicly available policies from forty of the largest U.S. public colleges and universities across thirty-two states found that most assert a high degree of control over shooting photos or videos on campus.<sup>112</sup> While some explicitly limit their reach to “commercial” filming, others are broader and restrict routine newsgathering activity without institutional consent. All of the institutions reviewed require advance permission for at least some types of filming activity; none provided any blanket exception to allow anyone to film in publicly accessible outdoor areas.

Recurring features commonly found in campus filming policies include: (1) a prohibition against filming identifiable logos, marks, and even buildings without express written consent; (2) a requirement that members of the news media get permission from a public-affairs office before filming, and in some cases, accept a university escort to monitor them; and (3) a requirement that commercial filmmakers furnish details about the content of their films, and in some instances, submit actual copies of their scripts for university approval as a prerequisite for being allowed on campus.

The University of Oklahoma has one of the most comprehensively restrictive policies of any campus surveyed. At Oklahoma, all commercial filming—which is broadly defined to include any broadcast or print media, other than student films—

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<sup>111</sup> *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) (internal citation omitted).

<sup>112</sup> The review was limited to state institutions because the First Amendment does not govern the conduct of authorities at private colleges and universities.

requires a permit, a fee, and a “production release agreement.”<sup>113</sup> The university forbids using any identifiable images of the campus without permission from the campus director of licensing.<sup>114</sup> The university also reserves the right to demand preapproval of the finished film before it is distributed.<sup>115</sup> The permit requirement and fee are waived for news organizations, but news crews still may not come onto the campus without permission from the university’s public affairs office.<sup>116</sup>

A comparably detailed set of restrictions is on the books at the University of Wyoming.<sup>117</sup> There, the university broadly construes “commercial” filmmaking to mean all filming by nonstudents, and requires a permit application at least thirty days in advance for any filming deemed to be commercial.<sup>118</sup> The university forbids using its name, logo, or any identifier of the university as the filming location without approval.<sup>119</sup> University approval hinges on whether “the proposed identification is determined to be in the University’s best interest.”<sup>120</sup> The decision whether to grant a permit is informed by a set of enumerated factors—some are content-neutral, such as safety,<sup>121</sup> while others are explicitly content-based, such as “how the University is portrayed; and the subject matter of the production.”<sup>122</sup> There is an apparent exception for news reporting, but news organizations are required to request approval through the vice president of communications and marketing; no criteria is specified for when the vice president will or will not approve news reporting, nor is there any time limit within which a decision must be rendered.<sup>123</sup> While the policy requires no

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<sup>113</sup> *On-Campus Filming and Photography Guidelines*, U. OKLA., [https://static.soonersports.com/custompages/old\\_site/pdf/genrel/2011-12/misc\\_non\\_event/lic\\_film\\_photo\\_guidelines.pdf](https://static.soonersports.com/custompages/old_site/pdf/genrel/2011-12/misc_non_event/lic_film_photo_guidelines.pdf) [https://perma.cc/425S-L73C] (last visited Jan. 25, 2023).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *University of Wyoming Filming and Photography Policy*, U. WYO., [http://www.uwyo.edu/generalcounsel/\\_files/docs/uw%20film%20policy%20final%203.10.16.pdf](http://www.uwyo.edu/generalcounsel/_files/docs/uw%20film%20policy%20final%203.10.16.pdf) [https://perma.cc/5N9T-M545] (last visited Jan. 25, 2023).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

permit for “incidental” filming by students, employees, or visitors if done unobtrusively, it forbids the later use of such footage for commercial purposes without university approval.<sup>124</sup>

## V. SHOOT/DO NOT SHOOT: RATING THE RULEBOOKS

Based on prevailing judicial interpretations about what governments may permissibly regulate on public property, bolstered by the growing number of state statutes that declare college outdoor areas to be “public forums,”<sup>125</sup> it is doubtful that colleges can lawfully enforce rigid controls over filming. This section examines some of the most likely theories on which an aggrieved speaker might mount a constitutional challenge to a campus filming policy.

### A. *Content Considerations Cloud Constitutionality*

On traditional or designated forum property, content-based standards are almost certain to be declared unconstitutional. Content-based distinctions are also impermissible in a limited public forum if the speaker is among the class of users for whom the forum is reserved. If property is not a public forum for the speaker seeking access, content-based regulations are still invalid if they are not based on a need to preserve the intended use and character of the property. In a public forum, content-based controls over constitutionally protected expression are subject to strict scrutiny.

In the realm of filming on college campuses, several types of content-based distinctions are at play. Some policies are overtly content- or even viewpoint-based because they require filmmakers to submit their scripts for advance review and allow government officials to refuse to grant a permit if they disapprove of a filmmaker’s message. For example, the University of Iowa’s policy states explicitly that scripts for commercial productions will be reviewed for anything that “conflicts with the mission and values of the University, portrays students or faculty in a negative manner, or is derogatory to higher education.”<sup>126</sup> The University of Michigan’s

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<sup>124</sup> *Id.*

<sup>125</sup> *See supra* Section III.B.

<sup>126</sup> UNIV. OF IOWA, OPERATIONS MANUAL, FILMING ON CAMPUS, § 37.5(E) REQUIREMENTS (2015), <https://opsmanual.uiowa.edu/community-policies/filming-campus> [<https://perma.cc/AZ4B-BNXC>]. Essentially identical wording is on the books at the University of California-Riverside: “The University has the right to deny filming requests if, in its sole judgment, the project conflicts with the mission and values of the University, portrays students or faculty in a negative manner, or is derogatory to higher education.” UNIV. OF CAL.-RIVERSIDE, UCR POLICIES AND PROCEDURES, CAMPUS FILMING, POL’Y NO.

policy states that a commercial filming permit may be refused “if the overall content of the script is in conflict with the goals and ideals of the University.”<sup>127</sup> Boise State University reserves discretion to refuse a filming permit if the film “could adversely affect the reputation or goodwill of Boise State, its students, faculty, staff or other affiliates.”<sup>128</sup> Giving a government agency veto power over a production based on the production’s viewpoint will not pass any degree of constitutional scrutiny on any type of government property because content discrimination is permitted only where necessary to avoid interference with the primary use of the property.<sup>129</sup> Shooting a film that carries a message contrary to a university’s “values” or “goals” will not interrupt others’ use of campus property any more than shooting a film consistent with the institution’s “values” or “goals” would. Such regulations are not based on the effect the filming process will have on the property, but rather, on the effect that the finished film will have on its eventual viewers.

The Supreme Court dealt with a comparable viewpoint-based restriction in *Schacht v. United States*, a case involving a statute that criminalized wearing a U.S. military uniform without authorization.<sup>130</sup> The law made an exception for film or theatrical performances, but only “if the portrayal does not tend to discredit that armed force,” which the Court found to be impermissible viewpoint discrimination.<sup>131</sup>

Though commonplace among colleges, prohibiting the use of college logos, marks, or even recognizable buildings in films, too, is a content-based restriction.<sup>132</sup>

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700-15 § 4(D) (2019), <https://fboapps.ucr.edu/policies/index.php?path=viewPolicies.php&policy=700-15> [<https://perma.cc/669W-HAJ9>].

<sup>127</sup> *Procedures: Planning Phase*, UNIV. OF MICH. FILM OFF., <https://filmoffice.vpcomm.umich.edu/procedures/> [<https://perma.cc/WVF4-8XMG>] (last visited Jan. 25, 2023).

<sup>128</sup> BOISE STATE UNIV., UNIVERSITY POLICY 10030(4) (2015), <https://www.boisestate.edu/policy/communications-and-marketing/commercial-filming-and-photography/> [<https://perma.cc/87WM-PG5R>].

<sup>129</sup> See Jon Garon, *Star Wars: Film Permitting, Prior Restraint & Government’s Role in the Entertainment Industry*, 17 LOY. L.A. ENT. L.J. 1, 48–49 (1996) (opining that, if a permitting ordinance is “designed to discourage speech or filming because of its content, the regulation would presumptively violate the First Amendment”) (internal quotes omitted); see also *id.* at 53 (“Basing the decision to allow filming on the review of the script because of its content alone or to allow the unfettered discretion of the permit officer would fail a test of reasonableness and be deemed arbitrary and capricious.”).

<sup>130</sup> 398 U.S. 58 (1970).

<sup>131</sup> *Id.* at 63.

<sup>132</sup> See UNIV. OF CAL.-IRVINE, OFFICIAL UNIVERSITY POLICIES & PROCEDURES, SEC. 900-31: GUIDELINES FOR FILMING AND PHOTOGRAPHY ON THE UC IRVINE CAMPUS (2011), <https://www.policies.uci.edu/policies/procs/900-31.php> [<https://perma.cc/B57Z-JAYW>] (providing that any reproduction of

Because an enforcing authority would have to examine the content of the film to determine whether a violation occurred, a prohibition against gathering images of recognizable landmarks and signage is content-based.<sup>133</sup> Some colleges even go as far as to say that the name of the institution may not be mentioned in a film without written consent,<sup>134</sup> a restriction that is likely to inflict a significant chilling effect on any documentary filmmaker seeking to make a nonfiction film that would portray the college unflatteringly.<sup>135</sup> And some indicate that approval for identifying the university and its landmarks will be granted or withheld on the basis of viewpoint; for instance, Montana State University requires approval for filming any “visually

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images of university “names, marks, logos, or trademarks . . . is prohibited unless written permission is obtained in advance from the University”); RUTGERS UNIV., UNIVERSITY POLICY SEC. 80.1.1, PERMISSION FOR EXTERNAL COMPANIES TO FILM, VIDEOTAPE, AND PHOTOGRAPH AT RUTGERS (2022), <https://communications.rutgers.edu/brand-policies/filming-photography> (“Use of the Rutgers name, signage and identifiable items, landmarks, and locations is prohibited without written permission.”).

<sup>133</sup> See *Ness v. City of Bloomington*, 11 F.4th 914, 924 (8th Cir. 2021) (finding a regulation that prohibited the filming of children in public parks without parental consent to be content-based: “[A]n official must examine the content of the photograph or video recording to determine whether a child’s image is captured.”); see also Garvey-Potvin, *supra* note 10, at 691 (commenting, in analyzing a transit system’s restrictions on photography and videography, that a ban on capturing images that could be used in an attempt to defeat security measures, or plan an act of violence or disruption, is inherently content-based and thus subject to strict scrutiny).

<sup>134</sup> See, e.g., *Guidelines for Motion Picture/Video/Film or Commercial Photography*, UNIV. OF N.M., 3, <https://ucam.unm.edu/marketing/film-guidelines/unm-film-guidelines.pdf> [<https://perma.cc/R45F-TPVS>] (last visited Jan. 25, 2023) (“The University of New Mexico may not be identified without expressed written permission.”); UNIV. OF WISC.-MADISON, FILM, TELEVISION, AND COMMERCIAL PRODUCTION ON CAMPUS, POLICY NO. UW-202 (2021), <https://policy.wisc.edu/library/UW-202> [<https://perma.cc/ZJK5-YSP2>] (stating that, without written consent, university may not be identified, even indirectly, “through its name, signs, logos, or recognizable structures”).

<sup>135</sup> For example, in 2015, filmmakers released “The Hunting Ground,” a searing examination of rape on college campuses focusing largely on Florida State University and its nationally prominent athletic program, where an award-winning quarterback was investigated, but never charged, in an alleged sexual assault. See Mark Hinson, *‘Hunting Ground’ Takes Aim at Rape on Campus, Plus FSU*, TALLAHASSEE DEMOCRAT (Mar. 26, 2015), <https://www.tallahassee.com/story/entertainment/2015/03/26/hunting-ground-takes-aim-rape-campus-plus-fsu/70505722/> [<https://perma.cc/5TLM-QM3A>] (describing film as “sharply critical of how colleges like FSU handle, or mishandle, student-on-student rape cases on campus”). If the university had veto authority over the use of its name in documentary films, it is highly unlikely that “The Hunting Ground” would ever have been produced or released, given the university administration’s sharply adverse reaction to it. See Mike Fleming Jr., *Campus Rape Docu ‘The Hunting Ground’ Prompts He Said, She Said Dialogue On Alleged Assault By FSU Star Jameis Winston*, DEADLINE (Mar. 4, 2015), <https://deadline.com/2015/03/the-hunting-ground-campus-rape-documentary-florida-state-university-jameis-winston-1201385871/> [<https://perma.cc/7EZX-HWN3>] (reporting that, although the film won acclaim at Sundance Film Festival, FSU’s president denounced it as “seriously lacking in credibility” and “one-sided”).

identifiable landmarks, logos and other campus images” and will approve requests to identify the university in a video recording based on whether the recording is “appropriate and protective of the intrinsic value of” the university’s name and marks.<sup>136</sup>

A different and perhaps more subtle content-based distinction is that between “commercial” filming versus all other types of filming. Colleges understandably may believe they have a free hand to regulate speech that is deemed “commercial” because traditionally, commercial speech received minimal constitutional protection.<sup>137</sup> But that is a mistaken, and outdated, understanding of the law.

Speech that is deemed “commercial” gets diminished—but not nonexistent—First Amendment protection, as compared with noncommercial speech.<sup>138</sup> Once speech is categorized as commercial, certain constitutional safeguards are relaxed; for instance, overbreadth ceases to be a basis for facially invalidating an otherwise permissible regulation of purely commercial speech.<sup>139</sup> Instead of the familiar strict-scrutiny analysis, restrictions on truly “commercial” speech are scrutinized under a somewhat more government-friendly analysis, recognized in the Supreme Court’s landmark *Central Hudson* case, that is akin to intermediate scrutiny.<sup>140</sup>

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<sup>136</sup> MONT. STATE UNIV., FILMING, PHOTOGRAPHY AND AUDIO RECORDING ON CAMPUS POLICY, SEC. 900.00 (2019), [https://www.montana.edu/policy/film\\_photography\\_audiorecording/#A7](https://www.montana.edu/policy/film_photography_audiorecording/#A7) [<https://perma.cc/2L8L-6TTA>].

<sup>137</sup> In *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942), the Court flatly stated that the First Amendment right to distribute literature on public thoroughfares “imposes no such restraint on government as respects purely commercial advertising.” But subsequent cases questioned the vitality of *Valentine* and recognized substantial constitutional protection for advertising. See *Bigelow v. Virginia*, 421 U.S. 809, 810–20 (1975) (declining to follow *Valentine*, and stating that the case cannot be read as holding “that all statutes regulating commercial advertising are immune from constitutional challenge”).

<sup>138</sup> *Va. Pharm. Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 770 (1976).

<sup>139</sup> See *Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 496–97 (1982) (In considering First Amendment facial challenge to city restrictions on marketing drug paraphernalia, the Court stated, “[I]t is irrelevant whether the ordinance has an overbroad scope encompassing protected commercial speech of other persons, because the overbreadth doctrine does not apply to commercial speech.”).

<sup>140</sup> See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 564 (1980) (setting forth analysis for assessing the constitutionality of regulations on the content of otherwise-lawful commercial speech: any regulation must advance a “substantial” government interest, the limitation must directly advance the government’s interest, and the regulation must not be more extensive than necessary to achieve the asserted interest). See also *N. Olmstead Chamber of Com. v. City of N. Olmstead*, 86 F. Supp. 2d 755, 769 (N.D. Ohio 2000) (describing *Central Hudson* standard as “intermediate scrutiny with bite”).

But “commercial speech” is a relatively narrow category under the First Amendment. It literally means speech that does no more than propose a commercial transaction.<sup>141</sup> The fact that money is earned from speech is not enough to trigger the reduced level of “commercial speech” protection. Books, newspapers, and magazines are sold for a profit, yet they are not regarded as less-protected “commercial” forms of speech. If college regulators are using “commercial” in the sense of a commercially distributed motion picture, that is not a meaningful distinction for First Amendment purposes: a James Bond Hollywood blockbuster gets no less protection than an educational film about wildlife.<sup>142</sup> Even when speech is truly “commercial,” government regulations still can be deemed invalid if they are insufficiently tailored to address a purported wrong. While the regulations need not be the least restrictive means of solving a problem, they must be “narrowly tailored to achieve the desired objective.”<sup>143</sup>

In recent years, the gap between the protection of commercial and noncommercial speech has narrowed, as the Supreme Court has moved in the direction of protecting more and more commercial speech. For instance, in *Sorrell v. IMS Health, Inc.*, the Court imported its longstanding skepticism for content-based regulation into the realm of commercial speech, where it had previously been assumed that the government had a free hand to make content-based distinctions.<sup>144</sup> The widespread practice of disfavoring “commercial” filming on university campuses must be viewed against this evolving backdrop of First Amendment law.

Some “forum” cases do allow for preferential treatment of the speakers who are the primary authorized users of the space. For example, a student might be allowed to protest freely but an outside organization might be required to get a

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<sup>141</sup> *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 473–74 (1989).

<sup>142</sup> *See Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (rejecting contention that motion pictures are not constitutionally protected speech because they are profit-motivated business enterprises: “That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.”).

<sup>143</sup> *Fox*, 492 U.S. at 480.

<sup>144</sup> *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011) (applying skeptical review of content-based restrictions on speech to state law restricting disclosure of data about physicians’ prescribing preferences, which pharmaceutical firms use for marketing purposes); *see also* William D. Araiza, *Invasion of the Content-Neutrality Rule*, 2019 BYU L. REV. 875, 889 (2019) (citing Justice Stephen Breyer’s dissent in *Sorrell* and observing that the majority opinion “applies the content-neutrality rule in an unusual context—that is, a context in which essentially all regulation of that type (i.e., all commercial speech regulation) could be described as content-based”) (parentheses in original).

permit.<sup>145</sup> Based on that precedent, it is probably constitutional to give preference to student filmmakers as opposed to outside filmmakers when the distinction is based on the status of the speaker.

But when a regulation allocates differential access based on the “commercial” nature of the speech, the distinction is inherently content-based, which can trigger skeptical judicial scrutiny.<sup>146</sup> Thus, in *City of Cincinnati v. Discovery Network, Inc.*, the Supreme Court considered a municipality’s selective ban on distribution racks for “commercial” publications to be an impermissible content-based regulation on speech.<sup>147</sup> The Court examined the city’s proffered justifications for making the distinction between forbidden “commercial” newsracks and permissible “noncommercial” newsracks—chiefly, aesthetics and beautification—and found the distinction to be irrational since both types of racks would be equally unsightly.<sup>148</sup> Significantly, the Court noted that the city did not attempt to rationalize the distinction by citing the need to protect consumers against misleading commercial

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<sup>145</sup> See *supra* note 67 and accompanying text.

<sup>146</sup> See *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984) (finding in favor of news publisher in First Amendment challenge to selective federal ban on reproducing photos of currency that exempted photos the government deems to be newsworthy or educational: “A determination concerning the newsworthiness or educational value of a photograph cannot help but be based on the content of the photograph and the message it delivers. . . . Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.”); see also *Sorrell*, 564 U.S. at 571 (recognizing that a Vermont statute restricting flow of information about physicians’ prescribing habits was a content-based restriction on speech because it selectively declared commercial marketers of pharmaceuticals to be ineligible to receive and use information that would have been available to others). A California court took a contrary view in a case involving an anti-paparazzi statute that carries enhanced penalties for violating traffic laws when recording someone for a “commercial” purpose. *Raef v. Superior Court*, 240 Cal. App. 4th 1112 (2015). In *Raef*, the court found that singling out commercial photography for an extra measure of punishment did not make the statute content-based. *Id.* at 1126–27; see also *id.* at 1130 (stating that “purposeful conduct may be subject to increased punishment, and the desire to enrich oneself at all costs is a legitimate aggravating factor”). The *Raef* decision, however, is unremarkable because of its context: use of the offender’s intentions as a factor in determining the severity of a non-speech offense (i.e., reckless driving) for sentencing purposes. The Supreme Court already decided, in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), that a sentencing enhancement for bias-motivated crimes implicates no core First Amendment concerns, because a speaker will not, realistically, be “chilled” from expressing constitutionally protected opinions about race in contemplation of someday committing a violent felony. *Id.* at 489.

<sup>147</sup> 507 U.S. 410 (1993).

<sup>148</sup> *Id.* at 424–25.



solicitations, which is the normal justification for allowing the government to make content-based decisions about commercial speech.<sup>149</sup>

The same is true of “commercial” filming on campuses as well. Since the act of *recording* images does not actually *transmit* commercial messages to anyone on campus, the usual rationale for diminishing the constitutional protection of commercial speech has no bearing on whether “commercial” camera crews can use campus property. Accordingly, if a filmmaker denied access to the property on the grounds of being “commercial” were to challenge a campus filming regulation, the precedent of *Discovery Network* would likely make the distinction difficult to justify.<sup>150</sup> Indeed, some campus rules explicitly say that even a *student* who makes a film deemed “commercial” must obtain a permit, which removes any doubt that the rule is based on content rather than on the class of the speaker.<sup>151</sup>

A 2002 First Amendment case challenging a New York City park permitting ordinance offers some insights into what a challenge to college filming regulations might look like. In *Transportation Alternatives, Inc. v. City of New York*, a nonprofit organization that promoted bicycling sought relief from the city’s decision to categorize its awareness-raising bike tour of Central Park as a “commercial” event requiring a \$6,000 permit because the logos of sponsors donating food for the event

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<sup>149</sup> *Id.* at 426.

<sup>150</sup> In the afore-cited *Price* case, the district court relied on *Discovery Network* and found that the National Park Service’s selective requirement of a permit only for commercial filming was a content-based restriction on speech requiring strict scrutiny. *Price v. Barr*, 514 F. Supp. 3d 171, 189 (D.D.C. 2021), *rev’d sub nom.* *Price v. Garland*, 45 F.4th 1059 (D.C. Cir. 2022). On appeal, the D.C. Circuit’s majority did not grapple with—or even cite—*Discovery Network*, but rather, avoided applying strict scrutiny by deciding that the act of gathering images was a less-protected category of expressive activity. *See Price*, 45 F.4th 1059, 1071–72 (D.C. Cir. 2022) (holding that restriction on filmmaking in a national park was subject to review only for reasonableness).

<sup>151</sup> *See Access and Requests: Commercial Filming and Photography on Campus*, ARIZ. STATE UNIV. ENTER. BRAND & MKTG. GUIDE, <https://brandguide.asu.edu/requests/approvals/commercial-filming-photography> [<https://perma.cc/CT7R-5PNH>] (last visited Dec. 28, 2022) (stating that a student seeking to film for a project not related to a class assignment must apply at least fifteen days in advance for a permit like any other filmmaker). One college, Florida State University, goes even further and bans commercial filming entirely. *See Media Resources: Reporting on Florida State University*, FLA. STATE UNIV. NEWS, <https://news.fsu.edu/for-journalists/media-resources/> [<https://perma.cc/2S3Q-JGSM>] (last visited Dec. 28, 2022) (“Commercial crews are not permitted to film on campus.”). A wholesale ban on commercial filming would be highly unlikely to survive constitutional challenge. *See Garon, supra* note 129, at 50–51 (explaining that while the Supreme Court’s *O’Brien* test applies to municipal filming permits, Garon states that, while safety-related limits on filming are constitutional provided they are not unduly burdensome, “[an] ordinance that prohibits filming altogether is likely to be deemed an unreasonable restriction on the form of communication”).

would be displayed.<sup>152</sup> The court accepted that displaying corporate logos for promotional purposes qualified as commercial speech, triggering diminished First Amendment protections.<sup>153</sup> Nevertheless, the court found no fit between a selective permitting system only for corporate-sponsored events and the city's proffered rationale of preventing crowds from damaging the park: "The fact that two events of equal size, that cause equal harm to Parks Department property, are required to pay completely different fees depending on whether there is commercial sponsorship is irrational when measured against the asserted justification for the regulation."<sup>154</sup> A similar line of argument could well be made against campus filming rules that single out "commercial" filming for disfavored status. Unless there is some proof that "commercial" films cause more property damage or greater interference with campus functions than "noncommercial" ones, the distinction is irrational.

While some degree of content-based regulation is permissible if the property is a non-forum (or if the speaker is not an authorized user, in a limited public forum), the restriction still must be reasonable in reference to preserving the character and intended primary use of the property.<sup>155</sup> Even in a non-forum, regulations can go too far if they cut off an entire method of communication.<sup>156</sup> Content-based restrictions on gathering images are unlikely to satisfy this standard. A person filming an uncontroversial nature documentary will take up just as much space, and cause just as much (or as little) interference with the primary use of the property, as a person

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<sup>152</sup> 218 F. Supp. 2d 423, 432 (S.D.N.Y. 2002).

<sup>153</sup> *Id.* at 437–39.

<sup>154</sup> *Id.* at 440. In a somewhat contrary vein, the Eighth Circuit rejected a commercial photographer's challenge to a municipal ordinance that required only commercial enterprises to obtain permits for using city park property. *Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks*, 864 F.3d 905, 919 (8th Cir. 2017). The *Twin Oaks* court scrutinized—and upheld—the permitting ordinance as a content-neutral time, place and manner restriction, not a content-based one. *Id.* at 915. But in that case, the challenged ordinance required a permit for all commercial activity—not just photography or other expressive activity—so the court found the burden on speech to be merely incidental. *Id.* If the ordinance had burdened only commercial activity that is expressive—as campus filming regulations commonly do—there is no predicting how the court's analysis might have changed.

<sup>155</sup> *See Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983) ("In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.").

<sup>156</sup> *See Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 683–85 (1992) (concluding that, even accepting that an airport terminal is a nonpublic forum, a total ban on leafleting is not reasonable, because forbidding distribution of literature is not necessary to preserve the property for its primary purpose).

filming a controversial documentary about crime. If the person making the crime film is not assured of access equal to that of the person making the nature film, then the policy is not about maintaining the forum's intended use at all. Instead, it is about the avoidance of controversy—an impermissible use of government permitting authority.<sup>157</sup>

### B. *The Red Flag of Unbridled Discretion*

When a government agency sets itself up as a gatekeeper, requiring permission before using public property to speak, an additional layer of constitutional scrutiny applies.<sup>158</sup> Permit requirements are analyzed as prior restraints on speech.<sup>159</sup> Prior restraints carry a heavy presumption of unconstitutionality because they prevent speech from ever being heard, as opposed to penalizing the speaker afterward if the speech causes damage, such as defamation or invasion of privacy.<sup>160</sup>

A permit system for using public property is not categorically unconstitutional.<sup>161</sup> But the government cannot require speakers to obtain a permit before speaking unless the government's permitting authority is constrained by clear and objective standards.<sup>162</sup> This safeguard is considered necessary to prevent the

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<sup>157</sup> See *Roberts v. Haragan*, 346 F. Supp. 2d 853, 867–68 (N.D. Tex. 2004) (concluding that the university could not constitutionally enforce a policy that called for giving preference in use of campus property to speech that will “serve or benefit the entire university community” because that standard necessarily requires evaluating content of speakers’ messages).

<sup>158</sup> See *id.* at 869.

<sup>159</sup> See *Watchtower Bible & Tract Soc’y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 165–67 (2002) (“It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. . . . [A] law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition.”).

<sup>160</sup> See Jack M. Balkin, *Old School/New School Speech Regulation*, 127 HARV. L. REV. 2296, 2316 (2014) (“[I]n a system of prior restraint, everything, no matter how innocent, is placed before the government and requires the government’s permission before it can be published. The power—and the vice—of prior restraint is that both protected and unprotected content are lumped together.”).

<sup>161</sup> See *Poulos v. New Hampshire*, 345 U.S. 395, 405 (1953) (finding that a mandatory licensing system for speakers wishing to use public parks was facially constitutional: “The principles of the First Amendment are not to be treated as a promise that everyone with opinions or beliefs to express may gather around him at any public place and at any time a group for discussion or instruction.”).

<sup>162</sup> See *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (“[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license must contain narrow, objective, and definite standards to guide the licensing authority.”) (internal quotes and citation omitted); *City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 769–70 (1988) (disapproving of city ordinance that

government from withholding permits as a means of viewpoint-based censorship.<sup>163</sup> In the campus context, speech regulations have repeatedly been declared unconstitutional because they delegated unbridled permitting discretion to administrators as to who can speak on campus.<sup>164</sup>

With one exception—the University of Vermont (“UVM”)—none of the campus policies examined by the Brechner Center that require permits for filming contained any standards constraining the exercise of permitting discretion. At UVM, campus operating procedures provide that filming “will be permitted” as long as specified conditions are satisfied—for instance, that filming will not interfere with other scheduled events, violate individuals’ privacy, or present an “unreasonable safety hazard”—all of which act as constraints on open-ended permitting discretion.<sup>165</sup> Other than UVM, in no instance was there any indication that if filmmakers satisfied certain prerequisites, they would be assured of receiving permission to film. A typical policy in force at the University of Southern Mississippi provides that commercial filming or photography must be deemed “consistent with the interests of the university” to qualify for a permit.<sup>166</sup> When scrutinizing a policy that requires government permission before speaking, courts will look for such indicators as to whether the policy provides a prompt turnaround time for the permitting decision and whether the agency is required to provide a rejected speaker

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delegated mayor open-ended discretion to impose “other terms and conditions deemed necessary and reasonable” on permits for newspaper distribution boxes).

<sup>163</sup> See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (“Invariably, the Court has felt obliged to condemn systems in which the exercise of [speech-permitting] authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum’s use.”).

<sup>164</sup> See *Pro-Life Cougars v. Lee*, 259 F. Supp. 2d 575, 583–84 (S.D. Tex. 2003) (finding that policy requiring permission for speech on campus plaza, which allowed administrators to deny permit for speech deemed “potentially disruptive,” was not narrowly tailored to meet significant governmental interests, because it was “devoid of any objective guidelines or articulated standards”); *Khademi v. S. Orange Cnty. Cmty. Coll. Dist.*, 194 F. Supp. 2d 1011, 1023 (C.D. Cal. 2002) (concluding that community college rules affording a president sole discretion over who can use campus properties for speech “are unconstitutional and must be stricken” because they provide no standards to guide president’s exercise of permitting discretion).

<sup>165</sup> *University Operating Procedure, Filming on Campus*, UNIV. OF VT. 2 (June 18, 2014), [https://www.uvm.edu/sites/default/files/UVM-Policies/policies/filming\\_on\\_campus.pdf](https://www.uvm.edu/sites/default/files/UVM-Policies/policies/filming_on_campus.pdf) [https://perma.cc/F3US-2ZZU] [hereinafter UVM Policy].

<sup>166</sup> *Filming/Photography on Campus*, UNIV. OF S. MISS. 2–3, [https://pstat-live-media.s3.amazonaws.com/pdf\\_cache/policy/7356950/cd6b16c4-0bbf-476f-8f39-160d03775511/Filming%20-%20Photography%20on%20Campus.pdf](https://pstat-live-media.s3.amazonaws.com/pdf_cache/policy/7356950/cd6b16c4-0bbf-476f-8f39-160d03775511/Filming%20-%20Photography%20on%20Campus.pdf) [https://perma.cc/L959-4HTV] (Jan. 2020).

with an explanation for the denial.<sup>167</sup> A policy will be constitutional if it limits decision-makers to considering, for instance, whether the filming presents a safety hazard or interferes with others' ability to use the property.<sup>168</sup> The lack of objective permitting standards puts campus policies under a cloud of constitutional doubt. A permitting scheme that reserves unfettered discretion to the decision-maker to grant or deny a permit is facially unconstitutional.<sup>169</sup>

In short, a rule that singles out filming for uniquely restrictive permitting requirements is on shaky constitutional footing and the grounding becomes even less solid if the rule lacks clearly specified safeguards to ensure that films will not be obstructed on the basis of content or viewpoint.

### C. *Overbreadth and Underinclusiveness: The Scylla and Charybdis of Unconstitutionality*

Regulations on speech are commonly invalidated as “overbroad” if they restrict more speech than is necessary to accomplish the government’s stated objective.<sup>170</sup> Restrictive speech policies can be successfully challenged as overbroad if they penalize, or inhibit, a substantial amount of harmless speech.<sup>171</sup> When government agencies restrict expression on public property, regardless of the forum status of the property, the analysis ultimately comes down to two questions: is there a government

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<sup>167</sup> See *Epona, LLC v. Cnty. of Ventura*, 876 F.3d 1214 (9th Cir. 2017) (finding a county regulation, which required a landowner to obtain a permit before hosting weddings on his farmland, to be an invalid prior restraint on the grounds of unbridled discretion because it lacked these safeguards). The UVM policy, alone, among those reviewed by Brechner Center researchers, provides an appeal process for a rejected applicant. See UVM Policy, *supra* note 165, at 3 (authorizing an appeal to the university president within five days of denial).

<sup>168</sup> See *Garon*, *supra* note 129, at 56 (explaining that a filming ordinance tailored to address concerns of “public convenience and safety” will be constitutional).

<sup>169</sup> See *Staub v. Baxley*, 355 U.S. 313, 322 (1958) (“It is settled by a long line of recent decisions of this Court that an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.”).

<sup>170</sup> *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798–99 (1984).

<sup>171</sup> *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973); see also *Ness v. City of Bloomington*, 11 F.4th 914, 924 (8th Cir. 2021) (finding that a prohibition against filming children in public parks without parental consent was overinclusive and not narrowly tailored to fit the city’s objective of protecting children against harassment because it afforded no room for photographing matters of public interest, even when the photographer intends to obscure the child’s identity before publishing the photo).

interest at stake sufficient to justify restricting free speech and is the restriction adequately tailored to achieve the government's interests?<sup>172</sup>

Justifying a content-based regulation requires identifying a compelling government objective but campus regulations seldom specify the interest that is purportedly being served by restricting filming. For example, the University of Wisconsin-Madison's filming policy states by way of rationale only that the university "receives many requests to film or photograph" but does not explain whether the reason for restricting filmmakers' access is a concern for overcrowding—or something else.<sup>173</sup> If the interest is in maintaining the institution's reputation by discouraging unfavorable news coverage, or association of the university's name or logos with an unflattering film, that is neither a compelling interest nor viewpoint neutral.<sup>174</sup> If the institution intends to forbid or discourage only filming that portrays the institution unfavorably, or associates the institution with a matter of political controversy, then the prohibition is not about the "time, place and manner" of filming at all. As the First Circuit has stated: "Suspicion that viewpoint discrimination is afoot is at its zenith when the speech restricted is speech critical of the government."<sup>175</sup>

If the government's objective is to prevent filmmakers from interfering with other users of campus property, a complete prohibition on filming without government permission is not narrowly tailored to accomplish that objective.<sup>176</sup> For instance, a blanket prohibition would apply even to someone with an unobtrusively

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<sup>172</sup> See, e.g., *Ness*, 11 F.4th at 923.

<sup>173</sup> UNIV. OF WISC.-MADISON, POLICY NO. UW-202, FILM, TELEVISION, AND COMMERCIAL PRODUCTION ON CAMPUS (2021), <https://policy.wisc.edu/library/UW-202> [<https://perma.cc/8QRA-YKYM>].

<sup>174</sup> See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) ("[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government."); *Chaker v. Crogan*, 428 F.3d 1215, 1227 (9th Cir. 2005) (stating that a statute making it a crime to include false information in a complaint against a police officer only if the false information is critical of the officer, not if the information is favorable, "turns the First Amendment on its head"); *Griffin v. Bryant*, 30 F. Supp. 3d 1139, 1186 (D.N.M. 2014) (holding that forbidding speakers from making "any negative mention" of government employees during town council meetings was an unconstitutional viewpoint-based restriction on speech and stating that "preventing criticism and potentially damaging job-related embarrassment to government employees" is not a constitutionally permissible government objective).

<sup>175</sup> *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 86 (1st Cir. 2004).

<sup>176</sup> See *Students Against Apartheid Coal. v. O'Neil*, 660 F. Supp. 333, 338 (W.D. Va. 1987) (recognizing First Amendment right of student protesters to maintain "shanty town" on central lawn at University of Virginia and stating that there is no indication that erecting the structures was "inimical to the rights of others who use the campus for the purposes for which it was created").

small camera who briefly shoots video in an isolated part of the campus where no one is bothered.<sup>177</sup> A prohibition against journalistic filming without a permit would foreclose even a live broadcast from the exterior of a football stadium for an 11 p.m. newscast—a time when almost no one will be using the property or be disturbed by the broadcaster’s presence. Moreover, there is no legally cognizable privacy interest in a heavily trafficked outdoor area of a college campus, so the privacy of other users of the space cannot be the justification for banning or restricting filming.<sup>178</sup>

Commonplace restrictions on campus filming are vulnerable to challenge on several grounds as insufficiently tailored: (1) they single out only expressive activity for disfavored treatment, even if the impact of filming on the property is no greater than the impact of non-expressive uses; (2) they provide no exception for people filming police transacting official business in public areas, and (3) they restrict even individuals or small groups, regardless of how minimally their filming affects the property.

### 1. Expression as the *Least*-Protected Activity?

Filming does not seem qualitatively more disruptive than other types of activities that campus visitors might undertake (walking a dog, riding a skateboard) in the same space. Nor is it categorically more disruptive than other methods of expression; a person quietly shooting photographs is no more likely to interfere with others’ enjoyment of greenspace than a person noisily preaching or interrupting pedestrians to offer pamphlets. Yet the First Amendment inarguably protects the preacher and the pamphleteer.<sup>179</sup> A restriction that singles out certain categories of

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<sup>177</sup> See Garvey-Potvin, *supra* note 10, at 690 (observing that advances in technology have made photography and videography increasingly inconspicuous, which means that a municipality’s ban on unauthorized filming invariably will be enforced only against professional film crews and others carrying visible camera equipment, not terrorists or other bad actors, who will take pains to do their filming surreptitiously).

<sup>178</sup> See *York v. Gen. Elec. Co.*, 759 N.E.2d 865, 868 (Ohio Ct. App. 2011) (in finding no actionable invasion of privacy when employer hired private investigator to videotape employee outside his home, the court stated, “[I]nvasion of privacy must involve the viewing of affairs which are private and not in public view.”); *Harrison v. Wash. Post Co.*, 391 A.2d 781, 784 (D.C. 1978) (A tort claim against the news organization that aired surveillance camera footage of bystander at scene of bank robbery was dismissed: “[I]t is well settled law that an invasion of privacy action does not lie as to events which take place in public view.”).

<sup>179</sup> See *Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 881 (8th Cir. 2020) (recognizing a First Amendment right of an unregistered student organization to have access to limited public forum area of college campus to distribute pamphlets about political issues); *Bowman v. White*, 444 F.3d 967, 983 (8th Cir. 2006) (holding that, while a college could enforce a three-day advance requirement for

expression for disfavored treatment—i.e., allowing pamphleting but not photography—would be skeptically reviewed, since one use does not necessarily take up more space or create more disruption than the other. There is no indication that universities routinely restrict *non*-expressive uses of their common areas in the name of space management (e.g., requiring visitors to obtain a permit before having a picnic) so singling out only the expressive users of the property as the culprits for overcrowding smacks of pretext.

A federal appeals court dealt with this type of false distinction in striking down a ban on leafleting or demonstrating on the sidewalks outside the U.S. Capitol.<sup>180</sup> The government tried to justify singling out only those expressive activities for prohibition on the basis of safety and crowd control, but the D.C. Circuit found the distinction unconvincing:

If people entering and leaving the Capitol can avoid running headlong into tourists, joggers, dogs, and strollers—which the Government apparently concedes, as it has not closed the sidewalk to such activities—then we assume they are also capable of circumnavigating the occasional protester. . . . Although such concerns may provide a basis for reasonable restrictions on the duration or size of a sidewalk demonstration, they cannot justify classifying the area as a nonpublic forum. We likewise reject the proposition that demonstrators of any stripe pose a greater security risk to the Capitol building and its occupants than do pedestrians, who may come and go anonymously, travel in groups of any size, carry any number of bags and boxes, and linger as long as they please.<sup>181</sup>

Although underinclusiveness is not necessarily fatal to a speech-restrictive policy, it can be a signal that the policy is not adequately tailored to remedy the ills it purports to address—suggesting that some more invidious government motive is at play.<sup>182</sup> For instance, in evaluating a city code that selectively banned distribution racks only for “commercial” publications from public thoroughfares, the Supreme

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outside speakers to apply for speaking permit, it could not constitutionally limit a preacher to five days of speaking per semester).

<sup>180</sup> *Lederman v. United States*, 291 F.3d 36, 39 (D.C. Cir. 2002).

<sup>181</sup> *Id.* at 43.

<sup>182</sup> *See City of Ladue v. Gilleo*, 512 U.S. 43, 52–53 (1994) (stating that, in evaluating First Amendment challenges to a city ordinance that selectively banned only certain categories of yard and window signs, exceptions to a regulation of speech may diminish government’s credibility in justifying a speech-restrictive regulation).



Court found that the selectivity undermined the credibility of the city's stated concern for beautification and avoidance of clutter since commercial publication racks were not visually more offensive than other types of racks.<sup>183</sup> In the case of videography, the primary distinction with electioneering or pamphleteering appears to be a purely image-motivated distinction: only videography causes the government agency discomfort about being depicted to a public viewing audience in an unfavorable light.

## 2. Giving Campus Cops a Free Pass on Scrutiny

Campus filming policies are likewise vulnerable to challenge on "tailoring" grounds if they fail to leave room for recording the activities of police conducting official business in public spaces. In recent decades, universities have staffed-up their police forces and obtained certification for campus officers to exercise arrest authority and the full range of other municipal police powers.<sup>184</sup> According to the most recent available data from the U.S. Department of Justice, 75% of those U.S. colleges and universities with at least 2,500 students have armed police officers and 68% have police officers with state-delegated arrest authority.<sup>185</sup> In total, these campuses housed some 15,000 sworn law enforcement officers, operating essentially indistinguishably from a city or county police force.<sup>186</sup> The activities of college campus police can be of great public interest and concern; in 2015, a University of Cincinnati police officer shot a Black motorist to death during a traffic stop, touching off waves of civil unrest.<sup>187</sup> If a regulation leaves no latitude for a journalist or bystander to record the activities of police on campus, then the regulation is

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<sup>183</sup> *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 425 (1993).

<sup>184</sup> See Josh Moore, *Out from the Curtains of Secrecy: Private University Police and State Open Records Laws*, 2 J. CIVIC INFO. 1, 1, 4 (Oct. 2020) (describing how campus police officers' roles have evolved from "glorified custodians . . . to full-fledged police officers carrying handcuffs, a baton, and often even a pistol").

<sup>185</sup> Brian A. Reaves, *Campus Law Enforcement, 2011–12*, BUREAU OF JUST. STATS. (Jan. 2015), <https://bjs.ojp.gov/content/pub/pdf/cle1112.pdf> [<https://perma.cc/BH6A-6KSP>].

<sup>186</sup> See *id.* at 3 (explaining that, of the 32,000 full-time employees at colleges and universities surveyed, about 15,000 were sworn law enforcement agents).

<sup>187</sup> Maggie Heath-Bourne, *Demonstrators Retrace, Protest Samuel Dubose's Death*, NEWS REC. (July 27, 2015), [https://www.newsrecord.org/news/demonstrators-retrace-protest-samuel-dubose-s-death/article\\_372b8572-3485-11e5-b770-ef863db2d347.html](https://www.newsrecord.org/news/demonstrators-retrace-protest-samuel-dubose-s-death/article_372b8572-3485-11e5-b770-ef863db2d347.html) [<https://perma.cc/4SZ5-2S2V>].

irreconcilable with an overwhelming body of First Amendment case law,<sup>188</sup> and for that additional reason, is likely overbroad.

### 3. Small Footprint, Big Hurdle: The Need for a “*de minimis*” Permit Exception

A permit system that does not exempt small and spontaneous acts of expression is likely to be held unconstitutional.<sup>189</sup> In striking down a municipal ordinance that required any group to obtain a permit when using public streets for a “common purpose,” no matter how small the group, the Sixth Circuit said: “Permit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring.”<sup>190</sup> Excluding individuals or small groups from using public property for expression is constitutionally problematic because the exclusion does not advance the primary justifications for which permits exist: managing large crowds, protecting public safety, and avoiding property damage.<sup>191</sup> Requiring even a lone individual speaker to obtain a permit indicates that the policy lacks tailoring, because a less-restrictive policy would be equally effective at meeting the government’s interests in protecting the property.<sup>192</sup>

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<sup>188</sup> See *supra* notes 30–31 and accompanying text.

<sup>189</sup> See John Juricich, *Freeing Buskers’ Free Speech Rights: Impact of Regulations on Buskers’ Right to Free Speech and Expression*, 8 HARV. J. SPORTS & ENT. L. 39, 53–54 (2017) (summarizing rulings from federal courts: “[P]ermitting schemes restricting a single-speaker or small group are unconstitutional because they do not further the governmental interest in maintaining peace and order.”).

<sup>190</sup> *Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005); *accord Boardley v. U.S. Dep’t. of Interior*, 615 F.3d 508, 520–21 (D.C. Cir. 2010) (applying *City of Dearborn* in invalidating regulation requiring permit for even solitary speakers to use designated free-speech areas of national parks).

<sup>191</sup> See *Boardley*, 615 F.3d at 521–23 (D.C. Cir. 2010) (finding that permit requirement applied to individual who sought to distribute religious literature in national park was unconstitutionally broad: “[W]hy are individuals and members of small groups who speak their minds more likely to cause overcrowding, damage park property, harm visitors, or interfere with park programs than people who prefer to keep quiet? . . . We fail to see why an individual’s desire to be communicative is a strong proxy for the likelihood that she will pose a threat to park security or accessibility.”).

<sup>192</sup> See *Berger v. City of Seattle*, 569 F.3d 1029, 1039 (9th Cir. 2009) (“[W]e and almost every other circuit to have considered the issue have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum.”). In *Berger*, the Ninth Circuit found that a pre-registration requirement for all artistic performers in public parks, even lone individuals, was overbroad and not narrowly tailored to achieve its stated objectives, suggesting that a more narrowly tailored alternative to pre-registration would be simply to penalize any performer who actually behaves disruptively. *Id.* at 1045. This interpretation of the First Amendment could apply with equal logic to college campus regulations that compel members of the press to pre-register before filming in public spaces.

None of the policies reviewed as part of this study provided any relief from permitting a small, low-impact filming operation. While many policies exempted casual or recreational filming by campus insiders,<sup>193</sup> none indicated that a lone documentary filmmaker or photojournalist could avoid the need for a permit simply by virtue of minimal impact on the property. The lack of a categorical permit exception for low-impact filming falls especially hard on those who seek to react nimbly to time-sensitive news events, particularly those without a Hollywood studio budget who have neither the time nor the resources to navigate the permitting process.<sup>194</sup>

#### D. Singling Out Newsgathering for Disfavored Treatment

Most campus policies reviewed for this study afford newsgathering some relief from the permitting strictures that apply to commercial filmmaking.<sup>195</sup> Some, however, offer relief only for coverage of “breaking news” (e.g., a fire or a car crash), so that a journalist working on a longer-term investigative report—or a documentary film—would need a permit and, presumably, have to surmount the same content-based review as a moviemaker.<sup>196</sup> One, Kent State University, waives the

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<sup>193</sup> See *Access and Requests: Commercial filming and photography on campus*, ARIZ. STATE UNIV. ENTER. BRAND & MKTG. GUIDE, <https://brandguide.asu.edu/requests/approvals/commercial-filming-photography> [<https://perma.cc/C3TD-X6SJ>] (last visited Dec. 28, 2022) (“Individuals may take photographs, film video on any campus, and record written and spoken statements . . . for personal, noncommercial use without permission[.]”); Univ. of Ill.-Chicago, *Photography and Videography Guidelines*, UIC TODAY (Dec. 27, 2022, 2:14 PM), <https://today.uic.edu/resources/photo-video-policies/> [<https://perma.cc/LAG6-L6KG>] (“Personal photography and videotaping are permitted on campus and within all facilities[.]”).

<sup>194</sup> See *Boardley*, 615 F.3d at 521–23 (pointing out that a permit requirement “effectively forbids spontaneous speech” and noting that, while large-scale events require elaborate advance planning, individuals and small groups “frequently wish to speak off the cuff, in response to unexpected events or unforeseen stimuli”); see also Kreimer, *supra* note 9, at 402–03 (pointing out that the chilling effect of restrictions on photography are likely to fall on knowledgeable parties who are conscious of the law and that legally sophisticated people who do not want their activities recorded can take advantage of prohibitions to seek sanctions against those making the recordings).

<sup>195</sup> See Univ. of Nev.-Las Vegas, *Guidelines For Commercial Filming and Photography*, DIV. OF INTEGRATED MKTG. & BRANDING, <https://www.unlv.edu/integratedmarketing/commercial-filming-request> [<https://perma.cc/FJ7X-839D>] (last visited Dec. 28, 2022) (stating that news photography and filming “does not require a film permit”); *Filming & Photography Guidelines*, UNIV. OF TEX.-AUSTIN MKTG. & COMM’NS, <https://ucomm.utexas.edu/resources/filming-guidelines> [<https://perma.cc/A7PP-6TN5>] (last visited Dec. 28, 2022) (stating that filming by “conventional news media outlets does not require a permit”).

<sup>196</sup> See *UCLA Policy 863: Filming and Photography on Campus § 4(C)*, UNIV. OF CAL.-L.A. (Jan. 23, 2004), <http://www.adminpolicies.ucla.edu/pdf/863.pdf> [<https://perma.cc/Q6Y4-T6YX>] (stating that news

requirement of applying two weeks in advance for a permit only for news coverage of “university-organized news conferences and media events,” not for stories that journalists initiate themselves.<sup>197</sup>

Journalists do not have any greater standing than ordinary citizens to demand access to otherwise nonpublic spaces for purposes of gathering news.<sup>198</sup> On the flip side, journalists do not have any inferior claim of access, either.<sup>199</sup> If a space is open to the public, then it cannot be selectively closed to journalists.<sup>200</sup> Aside from the requirement of a filming permit, the overwhelming majority of campus policies reviewed by the Brechner Center required journalists—but only journalists—to get permission from a campus public-relations officer before coming onto the campus and filming—or, at least strongly suggested that advance permission was necessary.<sup>201</sup> Several go even further and require journalists to accept an official

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reporting is exempt from permit or location fees, with news reporting defined as “‘active’ or ‘breaking’ news, by a qualified news reporting service”); UVM Policy, *supra* note 165 (using same definition).

<sup>197</sup> KENT STATE UNIV., POLICY NO. 5-12.11(B)(3), ADMINISTRATIVE POLICY REGARDING RECORDING OF UNIVERSITY PROPERTY FOR A COMMERCIAL OR OTHER NON-UNIVERSITY RELATED PURPOSE (2021), <https://www.kent.edu/policyreg/administrative-policy-regarding-recording-university-property-commercial-or-other-non> [https://perma.cc/8XM7-6E3Z].

<sup>198</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (The Court stated that “the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”).

<sup>199</sup> See Timothy Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 944 (1992) (“[E]ven where the public has no constitutional right of access and is merely permitted to be present, both the Supreme Court and the lower courts appropriately view the exclusion of the press while admitting the public as unconstitutional.”).

<sup>200</sup> See *Sacramento Bee v. U.S. Dist. Ct.*, 656 F.2d 477, 483 (9th Cir. 1981) (The court found that the trial court erred in closing criminal court proceedings only to journalists “because the press may have the same access to public trials as does the public.”); *Nicholas v. Bratton*, 376 F. Supp. 3d 232, 259 (S.D.N.Y. 2019) (The court ruled in favor of a photojournalist who was singled out for exclusion from covering the site of a building collapse and had his press pass suspended because “whenever an area is open to either the general public or to some members of the press, the First Amendment restricts the government’s ability to selectively regulate the press’s access to that area.”); *Lewis v. Baxley*, 368 F. Supp. 768, 777 (M.D. Ala. 1973) (holding that journalists cannot be singled out for exclusion from state legislative observation galleries that are open to the public).

<sup>201</sup> See *UCLA Policy 863*, *supra* note 196 (“News organizations must get verbal permission from the Office of Media Relations before News Reporting can commence.”); GA. INST. OF TECH., *FILMING AND PHOTOGRAPHY ON CAMPUS* (2019), <https://policylibrary.gatech.edu/campus-use-facilities/filming-and-photography-campus> [https://perma.cc/9D6H-TD8H] (providing that news organizations “are required to coordinate on-campus visits” with the university communications office). A number of policies are phrased in terms of a request rather than an enforceable requirement, leaving it unclear whether a news organization that filmed without consulting the campus public-relations office would face any consequences for doing so. See, e.g., Kan. State Univ., *Photo and Video Guidelines at Kansas State*

escort while on campus, including one that threatens unescorted journalists with detention by campus police.<sup>202</sup> Only rarely does a college affirmatively assure journalists of unfettered access. One outlier, the State University of New York at Buffalo, states: “News media are not required to obtain permission before filming in public areas of the campus.”<sup>203</sup>

On campuses that are public forums by virtue of court ruling or statute, any regulation selectively excluding journalists from the premises would be flatly unconstitutional. Even on property that is a nonpublic forum, it is unclear that a government agency could justify selectively excluding journalists as either reasonable or content-neutral. If a hobbyist birdwatcher would be free to shoot photos on campus for personal use, then requiring a journalist to obtain permission—or even an official escort—before being allowed to gather images is a content-based distinction. The distinction is not about the impact the photographer has on the property, but rather about what the photographer is filming and what they plan to do with it.

Here, too, the problem of “unbridled discretion” comes into play. None of the campus policies reviewed by the Brechner Center provided any standards to govern the exercise of discretion by public-relations officials to admit or exclude journalists; nor did any policy specify any way for a journalist denied admittance to the campus

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*University*, K-STATE NEWS (Apr. 8, 2022), <https://www.k-state.edu/media/mediaguide/video-guidelines.html> [<https://perma.cc/8Q9E-RVYB>] (“Notification to News and Communications Services that media will be photographing or filming on campus is requested . . . .”); Univ. of Md., *On-Campus Filming and Photography Guidelines*, MD. BRAND, <https://brand.umd.edu/university-of-maryland-media-policy-and-faqs> [<https://perma.cc/QG7W-XTWH>] (last visited Dec. 28, 2022) (“News media who plan to film or photograph on UMD’s campus are asked to notify University Communications in advance.”); UNIV. OF MISS., *MEDIA RELATIONS AND COMMUNICATIONS POLICY* (2021), <https://policies.olemiss.edu/ShowDetails.jsp?istatPara=1&policyObjidPara=12712320> [<https://perma.cc/S6WU-KKHK>] (“Journalists who plan to visit should notify [the university communications office] to ensure the appropriate assistance with sources, logistics and access to locations.”).

<sup>202</sup> See *University of Alabama at Birmingham Media Policy Guidelines*, UNIV. OF ALA.—BIRMINGHAM 5 (Nov. 2015), [https://www.uab.edu/news/images/Media\\_Policy\\_Guidelines\\_11302015.pdf](https://www.uab.edu/news/images/Media_Policy_Guidelines_11302015.pdf) [<https://perma.cc/D4V4-CXUJ>] (“University Police will stop and detain media without an approved escort until University Relations can be contacted to approve the activity or provide an escort.”); *Policy 3100, News Media Relations*, NASSAU CMTY. COLL. 2 (2017), [https://www.ncc.edu/aboutncc/ourpeople/board\\_of\\_trustees/pdfs/Policy\\_3100\\_News\\_Media\\_Relations.pdf](https://www.ncc.edu/aboutncc/ourpeople/board_of_trustees/pdfs/Policy_3100_News_Media_Relations.pdf) [<https://perma.cc/L5QK-X9QW>] (“While on College property or upon entering College facilities, all news media representatives must be accompanied by a staff member designated by the Office of Governmental Affairs and Media Relations.”).

<sup>203</sup> State Univ. of N.Y. at Buffalo, *Media Relations Policies, How We Work with Media*, UNIV. AT BUFFALO NEWS CTR., <https://www.buffalo.edu/news/about-us/policies.html> [<https://perma.cc/MKF9-RXAH>] (last visited Dec. 28, 2022).

to appeal the decision. Government agencies are notorious for rationing access as a way of punishing news organizations for unfavorable coverage.<sup>204</sup> The temptation for colleges to use their discretion to refuse permission for news organizations pursuing unflattering stories would be hard to resist, particularly since permitting discretion is delegated to the very employees—those working in public relations—whose job is to promote a favorable image of the institution.<sup>205</sup>

If, as case law makes clear, there is a right to use campus property for protest, then it is implausible that there is no concomitant constitutional right for the news media to cover those protests. The point of protest is to attract attention. If college authorities cannot directly stifle protest, the law cannot allow them to achieve the same forbidden result indirectly by choking off public awareness.

## VI. CONCLUSION AND RECOMMENDATIONS

Imagine that the nonprofit advocacy organization People for the Ethical Treatment of Animals (PETA) wants to call attention to a major public university's use of animals in laboratory experiments, convinced that the animals are being mistreated and confined inhumanely. To raise public awareness, PETA wants to make a documentary film, which it hopes to exhibit to attendees at film festivals and perhaps license to a television broadcaster. Would the organization be able to send a film crew to capture images of the exterior of university research laboratories for inclusion in the movie? At many—if not most—of America's public universities, the answer is probably "no." If the film will be commercially exhibited, then the filmmakers arguably will run up against prohibitions against commercial filmmaking on campus. If the university perceives that the film will convey an unfavorable portrayal, its rules probably reserve total discretion to deny the filmmakers a permit.

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<sup>204</sup> See *PEN Am. Ctr., Inc. v. Trump*, 448 F. Supp. 3d 309, 316 (S.D.N.Y. 2020) (observing that then-President Donald Trump "repeatedly barred the access of the White House press corps to press conferences and the White House entirely[] after members sp[oke] or report[ed] critically about [him]"); see also *Balt. Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006) (describing how Maryland's governor ordered staff to freeze out two *Baltimore Sun* reporters from access to interviews, believing their coverage was unfavorably slanted).

<sup>205</sup> Courts have identified the danger that, if given free rein to decide which journalists can and cannot cover news events, government image-minders will give selective access to journalists who are perceived as offering favorable coverage. See *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 9 (1st Cir. 1986) ("The danger in granting favorable treatment to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive. Such a practice is unquestionably at odds with the first amendment. Neither the courts nor any other branch of the government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information.").

Even if they are admitted to the campus, the filmmakers may be denied permission to capture images of identifiable logos or symbols, limiting them to anodyne images that may fail to fully convey their intended story.

On any ordinary piece of public property, PETA would have a compelling First Amendment case against anyone who tried to prevent them from filming.<sup>206</sup> The film addresses a matter of public interest and concern, the type of speech that typically enjoys the highest possible constitutional protection.<sup>207</sup> Any non-university government agency that tried to obstruct the filming because of the producers' message would run squarely into longstanding prohibitions against selective, viewpoint-based enforcement.<sup>208</sup> Indeed, even the U.S. Department of Homeland Security has acknowledged a First Amendment right to film and photograph the exterior of federal courthouses and other DHS-protected facilities.<sup>209</sup> The question is whether public higher educational institutions are so much different from any other government agency that decades' worth of boilerplate First Amendment constraints should be excused.

Such a black-and-white distinction between "town" and "gown" seems indefensible, both as a matter of fact and as a matter of legal principle. A public university is, in many ways, indistinguishable from a municipality. It provides

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<sup>206</sup> See cases cited *supra* note 36 and accompanying text (describing the unconstitutionality of laws that restrain capturing images of agribusiness operations); see generally Justin Marceau & Alan K. Chen, *Free Speech and Democracy in the Video Age*, 116 COLUM. L. REV. 991 (2016) (making the case that video recording is constitutionally protected, either as speech or as an essential precursor to speech and fulfills essential public accountability functions in a democracy).

<sup>207</sup> See *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986) ("State action designed to retaliate against and chill political expression strikes at the heart of the First Amendment.").

<sup>208</sup> See *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 899 (9th Cir. 2018) ("Viewpoint discrimination is the most noxious form of speech suppression."); see also *Putnam Pit, Inc. v. City of Cookeville*, 221 F.3d 834, 845 (6th Cir. 2000) (ruling that, even in the nonpublic forum of a municipality's website, a publisher could not be denied the ability to post a link to his publication on the basis of the publication's disfavored viewpoint).

<sup>209</sup> *Musumeci v. U.S. Department of Homeland Security (Challenging Government Regulation Restricting Photography on Federal Property)*, NYCLU, <https://www.nyclu.org/en/cases/musumeci-v-us-department-homeland-security-challenging-government-regulation-restricting> [https://perma.cc/UJ7K-KWDT] (last visited Aug. 19, 2023). DHS in fact has acknowledged that the right extends even to publicly accessible interior areas of federal buildings, such as "entrances, lobbies, foyers, corridors and auditoriums." U.S. DEPT. OF HOMELAND SEC., FED. PROT. SVC., HQ-ORO-002-2018, OPERATIONAL READINESS ORDER, PHOTOGRAPHY AND VIDEOTAPING FEDERAL FACILITIES (Mar. 30, 2018), <https://www.dhs.gov/sites/default/files/publications/Operational%20Readiness%20Order%20HQ-ORO-002-2018%20Photography%20and%20Videotaping%20....pdf> [https://perma.cc/UYG7-Y6LH].

housing, policing, health care, food services, roads, libraries, and other services associated with municipal government, and in many communities, it is the most powerful economic and political force.<sup>210</sup> Indeed, as one federal court observed in invalidating an overbroad campus-speech policy, it is especially important to curtail government censorship authority on a state university campus because a campus is a self-contained community where *every inch* is government property, meaning that an aggrieved speaker cannot get refuge from heavy-handed speech restrictions *anywhere* within the community.<sup>211</sup> Nothing about photography or videography is so categorically irreconcilable with the effective management of an educational institution that the two cannot coexist, especially since universities have broad discretion to enforce reasonable regulations on the time, place, and manner of filming.<sup>212</sup> There is no principled basis for singling out college campuses for restrictions on newsgathering that would be recognized as unconstitutional if applied to the lawn of a city hall or a county courthouse.<sup>213</sup>

College campuses are regularly in the news. This is particularly true during the current “culture war” environment in which ideological battles are being waged over

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<sup>210</sup> See Kara Harris, *America’s College Towns Are Facing an Economic Reckoning*, BLOOMBERG NEWS (Aug. 21, 2020), <https://www.bloomberg.com/news/articles/2020-08-21/what-the-pandemic-is-doing-to-college-towns> [<https://perma.cc/UTG6-HMDB>] (describing how college towns, such as State College, Pa., and Ames, Iowa, depend on public universities to drive their economies and how shutting down face-to-face learning during COVID-19 adversely affected those economies); Karen Foshay, *In Alabama, Running—and Winning—Against the Political ‘Machine,’* AL-JAZEERA AMERICA (Apr. 8, 2015), <http://america.aljazeera.com/watch/shows/america-tonight/articles/2015/4/8/alabama-running-against-the-political-machine.html> [<https://perma.cc/53C2-CQBY>] (describing how the University of Alabama’s fabled “machine” of fraternities and sororities has long controlled campus elections and can carry decisive weight in local and state elections as well).

<sup>211</sup> See *Roberts v. Haragan*, 346 F. Supp. 2d 853, 862–63 (N.D. Tex. 2004) (“First Amendment protections and the requisite forum analysis apply to all government-owned property; and nowhere is it more vital, nor should it be pursued with more vigilance, than on a public university campus where government ownership is all-pervasive.”).

<sup>212</sup> See *Adderley v. Florida*, 385 U.S. 39, 47 (1966) (explaining that the government is afforded discretion to manage protest activity “to preserve the property under its control for the use to which it is lawfully dedicated”); *Spartacus Youth League v. Bd. of Trs. of Ill. Indus. Univ.*, 502 F. Supp. 789, 799 (N.D. Ill. 1980) (“[A] university may impose a greater array of time, place and manner restrictions than would be allowed in other types of public forums. This, however, does not lessen or negate its quality as a public forum.”).

<sup>213</sup> See *Bonney*, *supra* note 54, at 558 (“[W]here members of the university community have the right to use the sidewalks and green spaces on campus for purposes of communication and where the physical characteristics of those sidewalks and green spaces make them indistinguishable from other public sidewalks and parks, a university would be hard pressed to prohibit speech in those campus areas.”).



the way sensitive political and cultural issues are being taught.<sup>214</sup> Journalists and documentarians need easy access to conduct interviews on college campuses to bring essential stories to the public, which can promote better-informed public policy decisions.<sup>215</sup> Without ready access to campuses, journalists and filmmakers may be left to rely on second- or third-hand information served up by public-relations officers, rather than information directly from the young people whose voices deserve representation. Requiring the campus office in charge of marketing and public relations to sign off on each request to film—as many universities do—almost guarantees a decision process that serves the university’s reputational interests over the public’s need for information.<sup>216</sup>

The only reason that restrictive campus filming requirements might prove to be legally defensible is the federal courts’ widespread refusal to recognize the park-like outdoor areas of public college campuses as general-purpose public forums. Even though a university commons serves as a community gathering spot in the same way that a municipal park does, and even though a university sidewalk is often indistinguishable from the sidewalks in the adjoining municipality, the judiciary’s double standard leaves filmmakers and journalists in doubt about their entitlement to gather images of higher education institutions.

Some of the confusion is rooted in the Supreme Court’s ill-chosen phrase in its landmark *Perry Education* case, which can be read to suggest that a forum exists only if property has been thrown open “for indiscriminate use by the general

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<sup>214</sup> See Brendan Cantwell, *The Culture War Has Come for Higher Ed*, CHRON. HIGHER EDUC. (July 12, 2021), <https://www.chronicle.com/article/the-culture-war-has-come-for-higher-ed> [<https://perma.cc/TC6L-8E8Y>] (using the controversy over University of North Carolina’s decision to withhold tenure from Pulitzer Prize-winning journalism professor Nikole Hannah-Jones, known for her strong views on racial injustice, as a microcosm of ideologically charged disputes playing out in national media); Philip Bump, *The New Culture War Targeting American Universities Appears to be Working*, WASH. POST (July 10, 2017), <https://www.washingtonpost.com/news/politics/wp/2017/07/10/the-new-culture-war-targeting-american-universities-appears-to-be-working/> [<https://perma.cc/25M9-DMGB>] (describing the conservative media’s focus on free-speech issues in higher education, including exclusion of controversial speakers and content warnings issued in connection with sensitive classroom readings).

<sup>215</sup> See *Ramos v. Flowers*, 56 A.3d 869, 880 (N.J. Super. 2012) (“Ensuring the public’s right to gather information about their officials not only aids in the uncovering of abuses . . . but also may have a salutary effect on the functioning of government more generally . . .”).

<sup>216</sup> See Kathryn Foxhall, *The Growing Culture of Censorship by PIO*, COLUM. JOURNALISM REV. (Aug. 3, 2022), <https://www.cjr.org/criticism/public-information-officer-access-federal-agencies.php> [<https://perma.cc/K679-XKFN>] (lamenting the growing influence of public information officers employed by government agencies, who often use their gatekeeping authority to keep journalists from interviewing subject-matter experts in search of firsthand authoritative information).

public.”<sup>217</sup> In the first place, the *Perry Education* phrase refers only to “designated” forum property and not “traditional” public forum property, so it has no bearing on whether the sidewalks or lawns of state colleges qualify as *traditional* forums.<sup>218</sup> This distinction matters quite a bit because “designated” forums are places where the government has affirmatively set aside property for expressive use, while “traditional” forums simply have that status because of their character and nature, regardless of any affirmative government designation.<sup>219</sup> No one argues that state universities have affirmatively invited the general public to come speak on campus lawns and sidewalks. The question is why a park or a sidewalk ceases being a *traditional* public forum just because its owner has “university” in front of its name.

More to the point, “indiscriminate” cannot be read in an ultra-literal manner to suggest that nothing short of an unfettered free-for-all will make a piece of property into a public forum. Even in a park—the archetype of what federal courts have always treated as a traditional forum—regulators enforce all manner of restrictions on how people can use the premises.<sup>220</sup> For instance, during the “Occupy” movement of 2011–12, protesters demonstrating against economic inequities consistently lost constitutional challenges to park rules that forbade sleeping, erecting structures or remaining on the premises after closing hours.<sup>221</sup> So the fact that a university sidewalk or lawn is not thrown open for every conceivable public use does not end the forum inquiry. The better question is: What uses of sidewalks and parks are typically allowed in a municipality (where those properties are universally regarded as traditional forums) and yet disallowed on the sidewalks and lawns of a college

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<sup>217</sup> *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 47 (1983).

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 45.

<sup>220</sup> See, e.g., N.Y.C., N.Y., RULES tit. 56 § 1-04 (2022) (enumerating nineteen different categories of activities that New York City disallows in municipal parks or for which permits are required, including operating aircraft, allowing animals to run loose, bathing in fountains, camping, storing materials on sitting areas, engaging in commercial solicitation, and more).

<sup>221</sup> See Udi Ofer, *Occupy the Parks: Restoring the Right to Overnight Protest in Public Parks*, 39 FORDHAM URB. L.J. 1155, 1159–60 (2012) (surveying First Amendment cases spawned by the Occupy movement asserting a right to occupy parks for expressive purposes and concluding that “litigation has proven largely unproductive, as many years of bad precedent have greatly limited the ability of members of the public to make constitutional arguments for the right to engage in overnight protest activities in public parks”); see also *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (holding that the National Park Service’s ban on sleeping in parks was a permissible content-neutral regulation that only incidentally burdened First Amendment rights of protesters who sought to sleep in a District of Columbia park as part of a housing-equity protest).

campus within that municipality? If the answer is “none,” then there is no principled distinction between the sidewalk that runs through a state university and the sidewalk on the opposite side of the street maintained by the municipality.

Concurring in the Eighth Circuit’s *Bowman v. White*, which found that the open, park-like areas of the University of Arkansas’ campus were designated public forums, Judge Kermit Bye cogently explained why such spaces are instead properly viewed as traditional public forums.<sup>222</sup> Rather than uncritically accepting colleges’ assertion that they need control over the premises to further their educational purposes, Bye instructed courts to look primarily at how the property is actually used:

The issue is not whether the mission of the University as a whole is to provide full access to everyone on all topics, but whether the University created the spaces for public access and a purpose not incompatible with expressive conduct and such spaces have historically been used for expressive conduct. The University’s overall mission is irrelevant to a proper First Amendment forum analysis.<sup>223</sup>

The Eighth Circuit majority’s opinion in *Bowman* neatly illustrates how courts have mangled the analytical distinction between traditional and designated forums. After observing that a university commons has all the physical qualities of a municipal park—thus pointing toward traditional public forum status—the majority considered the university’s insistence that its mission is not to provide a platform for all speakers on all topics.<sup>224</sup> But the university advanced that argument in support of its position that campus property is a non-forum as opposed to a designated forum.<sup>225</sup> Whether a government proprietor invites people to use property for speech is relevant in deciding between non-forum and designated forum status, as the University of Arkansas’ lawyers understood. But it is not relevant in analyzing whether property qualifies as a *traditional* public forum. A park is a forum even if the government owner would prefer that no one use it for speech and believes that expressive activity detracts from the park’s primary recreational purpose.<sup>226</sup> When courts start their

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<sup>222</sup> 444 F.3d 967, 984 (8th Cir. 2006) (Bye, J., concurring).

<sup>223</sup> *Id.* at 985.

<sup>224</sup> *Id.* at 978.

<sup>225</sup> *Id.*

<sup>226</sup> The Supreme Court has recognized only two prerequisites for a category of property to qualify as a traditional public forum. First, the property must have been held in trust for public use, and second, the property must have been a place that people traditionally use for speech and assembly. *Perry Educ. Ass’n*

analysis by asking whether universities have invited the public to use the property for expression, they are skipping a crucial first step, which requires first asking: Is the property sufficiently similar to a municipal park or sidewalk to qualify as a traditional public forum? Only if the answer is “no” should courts then proceed to ask whether the property has been affirmatively held open (i.e., “designated”) for expressive use.

If at least some part of college campuses—the walkways and greenspaces that the community is invited to use and enjoy—qualify as traditional forum property, then the question of whether colleges can restrict filming is a simple one: not without a far more compelling justification than protecting the college’s reputation.<sup>227</sup>

The dearth of judicial authority addressing colleges’ ability to restrict filming may be because colleges seldom impose sufficiently stiff penalties on violators to motivate a legal challenge.<sup>228</sup> When Sacramento State University authorities were questioned about the sweeping breadth of the university’s written prohibitions against filming, they insisted that the policies would not be enforced according to their literal terms and that—despite what the policies said on paper—students would be free to produce media without content-based restrictions, including posts on social media.<sup>229</sup> But even if few people are being prosecuted or disciplined for unapproved filming, the mere existence of an overly broad prohibition can carry a powerful chilling effect that deters speech.<sup>230</sup> As the Supreme Court stated in striking down a

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v. Perry Loc. Educators’ Ass’n, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). Notably, the Court’s analysis does not contemplate any affirmative declaration by the government that the property is thrown open for expressive use.

<sup>227</sup> Several college policies explicitly cite protecting the institution’s reputation as a motivation for regulating filming. See GA. INST. OF TECH., *supra* note 201 (“This policy protects the daily operations of education, research, other campus activities, and the Institute’s reputation and brand while appropriately supporting Georgia’s film industry.”); UNIV. OF MISS., MEDIA RELATIONS AND COMMUNICATIONS POLICY (2021), <https://policies.olemiss.edu/ShowDetails.jsp?istatPara=1&policyObjidPara=12712320> [<https://perma.cc/99EJ-5FYA>] (stating that purpose of policy regulating media access is “to enhance the University of Mississippi’s image, brand and reputation”).

<sup>228</sup> See Jeremy Bauer-Wolf, *The Tribe Has Spoken: College ‘Survivor’ a Hit*, INSIDE HIGHER EDUC. (July 30, 2018), <https://www.insidehighered.com/news/2018/07/30/college-survivor-tributes-popping-across-country> [<https://perma.cc/9G4C-Y9ML>] (citing the University of Maryland’s written policy, which requires even students to apply at least ten days in advance before obtaining permission to film, but which went unenforced as students filmed and aired several seasons of a popular campus-themed *Survivor* knockoff).

<sup>229</sup> Beck & Wong, *supra* note 103.

<sup>230</sup> See *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1123 (11th Cir. 2022) (in adjudicating an overbreadth challenge to a campus speech code, the court stated that “[n]either formal punishment nor the

chillingly broad statute that criminalized distributing videos of animal abuse: “[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”<sup>231</sup> The very existence of such enforcement discretion—i.e., the fact that an institution like Sacramento State would assure the public that the policy will not be enforced as it is written on paper—is itself problematic, because it telegraphs that the prohibition is likely to be applied selectively to disfavored speakers.<sup>232</sup>

Importantly, the public forum analysis may not even be the proper fit for evaluating a First Amendment claim when there is no disagreement about whether the property is open for public foot traffic—as is true of the walkable areas of campuses. It is unclear that forum doctrine should apply to restrictions on expression when the dispute is not over the ability to gain access to property but over the scope of expressive use of the property.<sup>233</sup> Take, for instance, the court’s analysis in *Connell v. Town of Hudson*, a case involving a dispute between police and a photojournalist over the right to take news photos of an accident scene.<sup>234</sup> The case arose when police interfered with a photographer’s newsgathering near a fatal car crash by threatening to arrest him for “disturbing the peace” if he did not obey their order to move to a distant vantage point.<sup>235</sup> The *Connell* judge did not analyze the

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formal power to impose it is strictly necessary to exert an impermissible chill on First Amendment rights—indirect pressure may suffice”).

<sup>231</sup> *United States v. Stevens*, 559 U.S. 460, 480 (2010). The Fifth Circuit made this same point in the context of a dispute over the forum status of sidewalks at the University of Texas at Austin, which were not visibly distinct from nearby municipal sidewalks: “If individuals are left to guess whether they have crossed some invisible line between a public and nonpublic forum, and if that line divides two worlds—one in which they are free to engage in free speech, and another in which they can be held criminally liable for that speech—then there can be no doubt that some will be less likely to pursue their constitutional rights . . . .” *Brister v. Faulkner*, 214 F.3d 675, 682–83 (5th Cir. 2000).

<sup>232</sup> *See Kreimer, supra* note 9, at 402–03 (pointing out that, because casual photographers will likely be unaware that their activities might be regulated, those most likely to be chilled are sophisticated parties, such as news organizations, with access to legal advice: “[P]unishments of image capture are well adapted to selective enforcement against political outsiders and those who annoy subjects with sufficient resources to mount litigation.”).

<sup>233</sup> *See Bd. of Airport Comm’rs of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569, 573–74 (1987) (acknowledging uncertainty and analyzing a restriction on expressive activity inside a municipal airport terminal under the facial overbreadth doctrine rather than as a restriction on forum property, where there was no dispute that speakers could gain access to the property for purposes other than speaking).

<sup>234</sup> 733 F. Supp. 465 (D.N.H. 1990).

<sup>235</sup> *Id.* at 467.

forum status of the property where the photography took place; rather, the judge viewed the matter as a case about the First Amendment right to gather news and the limits of police authority to interfere with a journalist's lawful behavior.<sup>236</sup> This is a sensible way to analyze the right to cover news on state college campuses as well. If something newsworthy is happening on a part of the campus where it is legal for non-photographer bystanders to observe it, then nothing about news photography is categorically more disruptive to university functions than dog walking, picnicking, or any other activity that takes up space on campus property. If a police officer would not have lawful grounds to eject a person who is walking a dog or eating a picnic lunch without a permit, then the officer should likewise have no basis for ejecting a photographer. This method of analysis properly allocates the burdens that First Amendment law has long recognized; the burden is not for the photographer to identify an affirmative right to photograph, but for the government regulator to identify a lawful basis to remove someone for nondisruptive photography.

Because there is no apparent body of First Amendment case law involving campus filming rules, there is no imminent hope that the federal courts will conclusively establish the boundaries of state colleges' authority over filming. The job, then, falls to state policymakers. Florida is unique in maintaining a statute that expressly references the right to film and photograph on campus.<sup>237</sup> There is no indication that since the statute was enacted in 2019, university campuses in Florida have devolved into Hollywood backlots where filmmakers run amok, interfering with the delivery of educational services. Other states should consider statutorily clarifying the right to film as Florida has, because there is obvious confusion, as evidenced by the disconnect between university policies and prevailing constitutional standards. The existence of relatively hands-off policies toward filming—such as the policy in force at the University of Vermont<sup>238</sup>—demonstrates that it is possible for a college to maintain orderly operations and still comply with the First Amendment standards that apply on public property.

Now that essentially every student is carrying a powerful pocket-sized video camera, it makes little sense to draw a rigid line excluding news photographers from a space, like a student union building, where amateur recreational smartphone

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<sup>236</sup> *See id.* at 471 (asserting that a reasonable police officer would have understood “that he could not chase a photographer away from an accident unless that photographer was unreasonably interfering with police activity”).

<sup>237</sup> FLA. STAT. ANN. § 1004.097(3) (West 2022).

<sup>238</sup> *See* UVM Policy, *supra* note 165 and accompanying text.

photography is taking place constantly.<sup>239</sup> Indeed, the line between “amateur” and “professional” news photography is a blurry one, as news organizations depleted by layoffs regularly depend on amateurs to supply newsworthy images; in this way, eyewitnesses increasingly are conscripted as “citizen journalists” to chronicle their observations for a public audience.<sup>240</sup> If recreational photography is countenanced—or even encouraged—then it is especially questionable whether a government agency can selectively prohibit disfavored subcategories of recording based on what the speaker intends to do with the images.<sup>241</sup> A more narrowly tailored standard might restrict gathering images in spaces where there is a reasonable expectation of privacy or where the space is not open to public foot traffic so that the presence of a video crew would be disruptive to state business (e.g., the difference between photographing in the lobby of City Hall versus the interior of the mayor’s office).<sup>242</sup>

Capturing images is often a uniquely locational activity. While a speaker who wants to reach a campus audience with a message might have alternative channels to do so—purchasing advertisements, posting to social media, handing out leaflets on sidewalks leading to campus—no such obvious alternative exists when a photographer or filmmaker needs an image.<sup>243</sup> A filmmaker who is trying to depict

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<sup>239</sup> See Kreimer, *supra* note 9, at 340–41 (commenting that the 2002 advent of cellphone cameras into the U.S. marketplace, along with outlets for public distribution such as YouTube, radically changed the practice of image capture, making it effortless and immediate).

<sup>240</sup> See Frank D. LoMonte & Philip J. Sliger, *Smartphone Security for the Mobile Journalist: Should Reporters Give Police the Finger?*, 23 N.C. J.L. & TECH. 214, 222 (2021) (“[S]hort-staffed newsrooms are more reliant on video contributed by eyewitnesses or reshared from non-journalists’ social media pages.”); Jeremy Barr, *Journalists Want to Know: Can We Use Your Disaster Photo, Please?*, WASH. POST (Oct. 5, 2022), <https://www.washingtonpost.com/media/2022/10/05/media-disaster-photo-requests/> [perma.cc/9LMW-CZ8Q] (“Journalists pleading with regular people to republish their images of a natural disaster has become an almost daily ritual on social media, where local, national and global outlets search constantly for newsworthy images taken by regular people.”).

<sup>241</sup> See *Spartacus Youth League v. Bd. of Trs. of Ill. Indus. Univ.*, 502 F. Supp. 789, 800 (N.D. Ill. 1980) (pointing out, in a First Amendment challenge to college’s ban on the distribution of literature by external visitors, that selectively allowing insiders to use common areas for distributing literature is a tacit acknowledgment that handing out literature is compatible with the function and purpose of the property).

<sup>242</sup> See Herrold, *supra* note 56, at 983 (making the point, in the context of free-speech zones, that narrower alternatives exist to fulfill the government’s legitimate security concerns: “For most events, a government imposed free speech zone is unnecessary because authorities can effectively maintain crowd control and detain or arrest anyone who becomes violent or disturbs the peace.”).

<sup>243</sup> Outside the context of filming, courts have recognized that speakers sometimes need access to specific pieces of property if far-removed alternatives do not satisfy the test of adequacy. For instance, in *Students Against Apartheid Coalition v. O’Neil*, 660 F. Supp. 333 (W.D. Va. 1987), the court protected the right of students to use the central campus lawn at the University of Virginia for a mock “shanty town” protest

a fraternity house where a rape occurred cannot stand on a municipal sidewalk miles away from the building and capture an adequate replacement image.<sup>244</sup> Even a content-neutral time, place, and manner regulation is impermissible if it fails to leave the speaker adequately effective alternative channels.<sup>245</sup> A person filming a newsmagazine documentary about a particular college cannot simply substitute “replacement” images of some other place. Thus, a regulation that fails to allow access to *any* portion of the campus likely flunks the test of a defensible time, place, and manner regulation.<sup>246</sup>

Higher education institutions benefit immensely from opening their campuses to public visitors. According to NCAA figures, colleges took in over \$1 billion just in sales of football tickets between September 2016 and August 2017.<sup>247</sup> Millions more change hands for admission to concerts, theatrical performances and other ticketed events, as well as for sales of college logo merchandise. In the twenty-first century, colleges are well aware that nearly every one of those ticket-holding visitors will be carrying a smartphone capable of shooting photos and videos and likely will use it to memorialize their visit. Once colleges invite people with cameras onto their campuses by the thousands, administrators cannot credibly contend that filming

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directed at college trustees, observing that the demonstrators needed access to that piece of property to make sure that it was seen by trustees coming and going from their quarterly meetings. *See id.* at 339 (stating that “when a state body provides a citizen with an alternative forum for expression it should open up a forum that is accessible and where the intended audience is expected to pass”).

<sup>244</sup> *See* Garon, *supra* note 129, at 83–84 (explaining that a permitting rule that fails to allow leeway for journalists to cover “on-the-spot news” will likely be unconstitutional because the option of applying days or weeks in advance for a permit would not be deemed a reasonably adequate alternative).

<sup>245</sup> *See* Powell v. Noble, 798 F.3d 690, 701 (8th Cir. 2015) (“A restriction must be reasonable in light of the purpose which the forum at issue serves and the reasonableness of a restriction on access is supported when substantial alternative channels remain open for the restricted communication.”) (internal quotation marks and citations omitted).

<sup>246</sup> *See* Garon, *supra* note 129, at 51 (The Supreme Court’s standard for a permissible content-neutral time, place, and manner regulation “requires the jurisdiction to provide an opportunity to film. An ordinance that prohibits filming altogether is likely to be deemed an unreasonable restriction on the form of communication”). For a case that is instructive by contrast, see *Riemers v. State*, 767 N.W.2d 832 (N.D. 2009). In *Riemers*, the Supreme Court of North Dakota found that campus policies restricting where people could solicit signatures on petitions was a permissible time, place, and manner rule. *Id.* Although the plaintiff was limited in his desired use of student apartment housing and the student union building for his signature gathering, he was able to use open outdoor spaces on the campus, which constituted a reasonable alternative. *Id.* at 841, 843–44.

<sup>247</sup> *The Economics of College Sports: How Does College Football Make Money?*, CITADEL TODAY (July 30, 2018), <https://today.citadel.edu/economics-college-sports-college-football-make-money/> [perma.cc/N2V7-Q647].



disrupts the effective operation of a college campus. Indeed, colleges regularly encourage people to take photos and videos, and share them on social media—without needing permits—when doing so advances the college’s self-interest in publicity.<sup>248</sup> Colleges have thus tacitly acknowledged that photography in outdoor campus areas is neither invasive of privacy nor disruptive to institutional operations.

To the extent that photos or videos do prove harmful, legal remedies narrower than prohibition exist. For instance, if a college’s trademarked logos are misused to falsely suggest that the college endorses an unsavory enterprise, a civil action for dilution or infringement will lie.<sup>249</sup> First Amendment law strongly prefers remedies that redress proven harms after speech is disseminated over prior restraints that broadly prevent speech from ever being heard.<sup>250</sup>

Both the scholarly and popular press have focused quite a bit of attention in recent years on the fraught relationship between higher education institutions and the

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<sup>248</sup> At Saint Louis University, for instance, visitors are encouraged to take a “selfie tour” and use social media to share photos of themselves at designated campus landmark locations. *Saint Louis University Selfie Tour*, ST. LOUIS UNIV., <https://www.slu.edu/about/st-louis/tours/selfie-spots.php> [<https://perma.cc/3XHP-TXV9>] (last visited Aug. 19, 2023); see also UNIV. OF MD.-BALT., *Submit Your #ProudtoWorkHere Selfie or Photo for a Chance to Win a UMB Prize*, ELM (Nov. 18, 2020), <https://elm.umaryland.edu/announcements/Announcements-Content/Submit-Your-ProudtoWorkHere-Selfie-or-Photo-for-a-Chance-to-Win-a-UMB-Prize.php> [<https://www.marshall.edu/sustainability/green-trail-selfie-scavenger-hunt/>] (offering prizes for university employees who share photos of themselves at work on campus); *150 Selfie Challenge*, NE. ILL. UNIV., <https://www.neiu.edu/academics/community-professional-education/arts-and-culture/150-selfie-challenge> [<https://perma.cc/TX3N-25CX>] (last visited Aug. 19, 2023) (offering cash prizes for students to take selfie photos at designated campus locations); *Green Trail Selfie Scavenger Hunt*, MARSHALL UNIV.: SUSTAINABILITY DEP’T, <https://www.marshall.edu/sustainability/green-trail-selfie-scavenger-hunt/> [[perma.cc/35XC-A5GG](https://perma.cc/35XC-A5GG)] (last visited Aug. 19, 2023) (promoting competition, with T-shirt prizes, for students to gather and share photos outside energy-efficient campus buildings).

<sup>249</sup> See Chih-Hong (Henry) Tsai, *The Trademark/Domain Name Protection War: A Comparative Study of the U.S., UDRP and Taiwanese Law*, 12 J. MARSHALL REV. INTELL. PROP. L. 350, 358–60 (2013) (explaining the range of legal remedies available under Lanham Act and Federal Trademark Dilution Revision Act).

<sup>250</sup> See *Schneider v. State*, 308 U.S. 147, 162 (1939) (“[T]he purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it. . . . There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.”); *Berger v. City of Seattle*, 569 F.3d 1029, 1043–44 (9th Cir. 2009) (en banc) (observing, in disapproving of city’s permitting scheme for street performers, that the city’s interest in curbing misbehavior by performers could be met by simply enforcing existing misconduct penalties rather than forcing all performers to obtain permits).

First Amendment.<sup>251</sup> Accommodating a wide-open, “anything goes” expression on a college campus carries obvious risks and tradeoffs; for instance, hosting divisive speakers may inflict significant security expenses on campus communities.<sup>252</sup> But accommodating nondisruptive filming and photography is a cost-free way for colleges to demonstrate their adherence to First Amendment values; the only downside risk is to the colleges’ own carefully burnished images. The filming policies of higher educational institutions should “walk the walk” of free inquiry for which universities have so long professed to stand.

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<sup>251</sup> See, e.g., Terri R. Day & Danielle Weatherby, *Speech Narcissism*, 70 FLA. L. REV. 839 (2018) (arguing that “political correctness” has been taken to extreme on college campuses in the name of sparing listeners offense); Charles S. Nary, *The New Heckler’s Veto: Shouting Down Speech on University Campuses*, 21 U. PA. J. CONST. L. 305 (2018) (discussing instances in which controversial speakers have been disinvited from campuses, interrupted while speaking, or otherwise prevented from reaching a student audience because of their perceived distasteful political views); Katherine Mangan, *If There Is a Free-Speech ‘Crisis’ on Campus, PEN America Says, Lawmakers Are Making It Worse*, CHRON. HIGHER EDUC. (Apr. 2, 2019), <https://www.chronicle.com/article/if-there-is-a-free-speech-crisis-on-campus-pen-america-says-lawmakers-are-making-it-worse> [<https://perma.cc/9NXX-PP8H>] (summarizing a report from the anti-censorship group PEN America, which documented 100 clashes over free-speech rights in recent years, often resulting from university regulators’ concern over making campuses more welcoming to students from underrepresented racial and ethnic groups).

<sup>252</sup> Clay Calvert, *Reconsidering Incitement, Tinker and the Heckler’s Veto on College Campuses: Richard Spencer and the Charlottesville Factor*, 112 NW. U. L. REV. ONLINE 109, 117 (2018) (stating that the University of Florida paid more than \$500,000 for security to maintain order when white nationalist Richard Spencer spoke on campus, while security for a speech by right-wing provocateur Milo Yiannopoulos at the University of California, Berkeley, cost \$800,000). See also *Feminist Majority Found. v. Hurley*, 911 F.3d 674, 695–96 (4th Cir. 2018) (finding that state university could be held liable under federal Title IX antidiscrimination statute if it were proven that the university contributed to a hostile environment for women by refusing to take steps within its control to protect women from gender-based retaliatory harassment speech, both on campus and online).

