

Notes

CELL PHONES, POLICE RECORDING, AND THE INTERSECTION OF THE FIRST AND FOURTH AMENDMENTS

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ABSTRACT

In a recent spate of highly publicized incidents, citizens have used cell phones equipped with video cameras to record violent arrests. Oftentimes they post their recordings on the Internet for public examination. As the courts have recognized, this behavior lies close to the heart of the First Amendment.

But the Constitution imperfectly protects this new form of government monitoring. Fourth Amendment doctrine generally permits the warrantless seizure of cell phones used to record violent arrests, on the theory that the recording contains evidence of a crime. The Fourth Amendment inquiry does not evaluate a seizing officer's state of mind, permitting an official to seize a video for the very purpose of suppressing its contents. Moreover, Supreme Court precedent is typically read to ignore First Amendment interests implicated by searches and seizures.

This result is perverse. Courts evaluating these seizures should stop to recall the Fourth Amendment's origins as a procedural safeguard for expressive interests. They should remember, too, the Supreme Court's jurisprudence surrounding seizures of obscene materials—an area in which the Court carefully shaped Fourth Amendment doctrine to protect First Amendment values. Otherwise reasonable seizures can become unreasonable when they threaten free expression, and seizures of cell phones used to record violent arrests are of that stripe. Courts should therefore disallow this breed of seizure, trusting the political branches to craft a substitute procedure that will protect law-

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enforcement interests without doing violence to First Amendment freedoms.

INTRODUCTION

When Jennifer Gondola left New Haven's Pulse Nightclub on a Saturday night in June of 2012, the arrest was already in progress. The suspect, a young man, kicked and thrashed on the ground. Officers struggled to handcuff him.¹ A crowd gathered and shouted. Gondola, along with several others in the bunch, produced her cell phone and began to film.²

The video, posted on the Internet the next week,³ paints a grainy portrait of a messy encounter between citizens and police. The crowd voices support for the suspect as the tussle continues.⁴ Finally, an officer forces the man facedown onto the pavement and handcuffs him. Sergeant Chris Rubino, shouting and pointing, puts his foot on the prone suspect's head.

"Stop resisting!" shouts Rubino.

"Put that shit on YouTube!" someone yells.

"Why does he have his foot on his head? That's crazy, yo," says Gondola.⁵

The encounter between the suspect and the police eventually began to calm, but the controversy surrounding the event escalated. An officer spotted Gondola filming.⁶ Rubino approached her and demanded that she stop. She refused on the ground that it was her "civil right" to record what was happening.⁷

"Well, I have a right to review it," Rubino allegedly replied.⁸ Gondola promptly placed the phone in her bra; Rubino handcuffed her and instructed a female officer to remove it.⁹ The officer did, and

1. Paul Bass, *Sgt. Arrests Video-Taker; IA Probe Begins*, NEW HAVEN INDEP. (June 4, 2012, 5:17 PM), http://www.newhavenindependent.org/index.php/archives/entry/sgt._probed_after_arresting_video-taker.

2. *Id.*

3. *Seized Video of New Haven Arrest Released*, WTNH NEWS 8 (July 3, 2012, 3:01 PM), http://www.wtnh.com/dpp/news/new_haven_cty/rawlings-arrest-gondola-video#.UIGJVFFcRFI.

4. New Haven Indep., "Stop Resisting!", YOUTUBE (June 12, 2012), http://www.youtube.com/watch?v=dMOhKdyxn60&feature=player_embedded.

5. *Id.*

6. Bass, *supra* note 1.

7. *Id.*

8. *Id.*

9. *Id.*

Gondola was taken in for booking, her phone in the custody of the police whose actions were recorded on its data card.¹⁰ It would be returned to Gondola ten days later.¹¹

In the weeks that followed, some suggested that Gondola might file a civil rights lawsuit against Sergeant Rubino and the City of New Haven.¹² The theory was that her video fell within the ambit of the First Amendment, and that Rubino had violated the Fourth Amendment by seizing the phone that held it. Indeed, the affair engendered constitutional concerns not only on the part of Gondola's attorney,¹³ but also on the part of the public.¹⁴ For many who weighed in, schooled in the law or not, the notion that Rubino could seize a video that might showcase his own illegal conduct was intensely uncomfortable.

Nevertheless, when Rubino told Gondola that he had a "right to review" the video and then ordered another officer to take her phone,¹⁵ he almost certainly spoke truthfully and acted lawfully. The Fourth Amendment's exigent-circumstances doctrine permits police to effect a search or seizure, absent a warrant, to prevent the imminent loss of evidence.¹⁶ As long as an officer has probable cause to believe the seized item is evidence of a crime, and has objectively reasonable grounds to believe he must act immediately to preserve that evidence,¹⁷ the seizure is reasonable notwithstanding the officer's subjective motivation¹⁸ or the mere evidentiary nature of the seized material.¹⁹ That calculus changes but little when police seize items protected by the First Amendment. In such cases, *Zurcher v. Stanford*

10. *Id.*

11. Paul Bass & Thomas MacMillan, *State Wins Delay To "Research" Camera-Grabbing*, NEW HAVEN INDEP. (June 13, 2012, 3:37 PM), http://www.newhavenindependent.org/index.php/archives/entry/video_shows_sgt_.

12. *Id.*

13. *See id.* ("If 'any member of the media is filming anything that might involve a crime,' cops could 'shortcut the legal process and the legal protections everyone has in the name of protecting evidence.'" (quoting Gondola's attorney, Diane Polan)).

14. *See, e.g.*, okaragozian1, Comment to Paul Bass, *Rubino: I'll Be Vindicated*, NEW HAVEN INDEP. (Jun. 7, 2012, 2:16 PM), http://www.newhavenindependent.org/index.php/archives/entry/rubino_ill_be_vindicated ("[The] 4th Amendment . . . prohibit[s] the 'taking' of the device . . .").

15. Bass, *supra* note 1.

16. *Brigham City v. Stewart*, 547 U.S. 398, 403 (2006).

17. *Berglund v. City of Maplewood*, 173 F. Supp. 2d 935, 943–44 (D. Minn. 2001).

18. *Brigham City*, 547 U.S. at 404.

19. *Zurcher v. Stanford Daily*, 436 U.S. 547, 559 (1978).

*Daily*²⁰ requires only that the procedural strictures of the Fourth Amendment be applied with “scrupulous exactitude.”²¹ The theory is that when properly observed, Fourth Amendment procedure affords “sufficient protection” to First Amendment interests.²²

Should Gondola press her claim, the City of New Haven might rest comfortably on *Berglund v. City of Maplewood*,²³ a case applying *Zurcher* to an exigent-circumstances seizure. In *Berglund*, the plaintiff, a newsman, argued and fought with police at a banquet.²⁴ His camera ran throughout the encounter.²⁵ He claimed that the police were excessively forceful; the police, that he engaged in disorderly conduct.²⁶ Berglund was arrested, and the police tried to obtain the tape of the encounter from his coworker.²⁷ When the coworker refused to release it, the police seized the tape without a warrant.²⁸ In an action under 42 U.S.C. § 1983,²⁹ Berglund alleged that, because his video of the violent arrest was First Amendment material, the Fourth Amendment prohibited the seizure.³⁰

The District Court for the District of Minnesota disagreed. Because Berglund’s camera was running during the confrontation, it was reasonable for police to believe that it contained evidence of a crime—Berglund’s disorderly conduct.³¹ It was likewise reasonable for police to think that evidence might be lost if they did not seize the tape, because Berglund’s coworker “was in the position to destroy the video recording . . . [and] the tape could be destroyed, erased or tampered with if they did not take it”³² Berglund’s First Amendment interests did not figure in the exigent-circumstances analysis at all.

20. *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

21. *Id.* at 564 (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1964)) (quotation marks omitted).

22. *Id.* at 565.

23. *Berglund v. City of Maplewood*, 173 F. Supp. 2d 935 (D. Minn. 2001).

24. *Id.* at 940–41.

25. *Id.*

26. *Id.* at 940.

27. *Id.* at 941.

28. *Id.*

29. 42 U.S.C. § 1983 (2006). Section 1983 has not been amended since Berglund brought his suit. *See* 42 U.S.C. § 1983 (1994 & Supp. IV 1998).

30. *Berglund*, 173 F. Supp. 2d at 942.

31. *Id.* at 943–44.

32. *Id.* at 944.

The seizure of Gondola's phone neatly tracks *Berglund*. Gondola, like Berglund, recorded throughout the confrontation,³³ during which the recorded suspect engaged in behavior that might reasonably be thought criminal.³⁴ Had she left the scene with her phone, Gondola, like Berglund's coworker, would have been "in the position to destroy the video recording"³⁵ by simply deleting it. Moreover, Gondola's demeanor during the arrest—sympathetic toward the suspect, hostile toward the police—would bolster the inference that she would not preserve evidence to be used against the suspect in court.³⁶ Finally, even if the requirement of "scrupulous exactitude" can ever meaningfully enhance protection for First Amendment materials—any constitutional provision, it seems, ought to be scrupulously applied under all circumstances—it counted for little in *Berglund*, and presumably would not avail Gondola either.³⁷

In all this, Officer Rubino's subjective motivation would be irrelevant.³⁸ His conduct would enjoy an identical shield whether he legitimately desired to preserve evidence of a crime or simply wanted to dispossess Gondola of a recording that depicted his own misconduct.³⁹

33. Bass, *supra* note 1.

34. In Connecticut, a person is guilty of interfering with an officer if he or she "obstructs, resists, hinders, or endangers any peace officer" in the performance of the peace officer's duties. CONN. GEN. STAT. § 53a-167a (2010). The suspect's conduct during the arrest—kicking, thrashing, profane shouting—seems more than adequate to support the charge. See New Haven Indep., *supra* note 4.

35. See *Berglund*, 173 F. Supp. 2d at 944.

36. See Bass & MacMillan, *supra* note 11 (describing an exchange in which Gondola encourages the suspect to "keep quiet" so as to avoid later maltreatment at the hands of police).

37. See *Berglund*, 173 F. Supp. 2d at 943–44 (engaging the exigent-circumstances analysis in full without even mentioning the protected nature of the seized recording).

38. See *Brigham City v. Stewart*, 547 U.S. 398, 404 (2006).

39. This Note does not contend that Rubino *did* seize Gondola's phone to suppress its contents, only that he constitutionally *could* have. A recent story from Texas brings the problem into even sharper focus. See Selwyn Crawford & Travis Hudson, *Witnesses to End of Chase Where Garland Officer Fired 41 Shots Say Police Deleted Cell Phone Photos, Video*, DALLASNEWS.COM (Sept. 12, 2012, 8:20 AM), <http://www.dallasnews.com/news/crime/headlines/20120911-witnesses-to-end-of-chase-where-garland-officer-fired-41-shots-say-police-deleted-cellphone-photos-video.ece>. During an automobile chase, a police car hit the suspect's truck. *Id.* An officer fired forty-one shots into the truck, killing the suspect. *Id.* A witness claiming that police gave the suspect inadequate time to follow an exit order filmed the scene using his cell phone just after the event. *Id.* The witness said that after he finished filming, officers seized his phone and returned it four days later—with the video deleted. *Id.*

In sum, as the doctrine stands today, no part of the exchange between Rubino and Gondola violated the Constitution of the United States. This Note argues that should not be so.

From Paul Revere's engraving of the Boston Massacre⁴⁰ to the images of Rodney King's beating in Los Angeles,⁴¹ citizens who record and publicize the actions of law-enforcement officials have served the core First Amendment purpose of placing the deeds of government officers before the public for critical examination.⁴² For the authors of *Cato's Letters*⁴³—writings “essential to an understanding of the [F]irst [A]mendment”⁴⁴—the right of the public to air official misdeeds was the best sign, and the surest guarantee, of a free people and a healthy government: “A free people will be shewing that they are so, by their freedom of speech. . . . [I]t is the part and business of the people, for whose sake alone all public matters are, or ought to be, transacted, to see whether they be well or ill transacted.”⁴⁵

In recent years, the proliferation of handheld camera phones and the ease of publishing video on the Internet have allowed citizens like Gondola to engage First Amendment tradition with considerably more ease than has ever been possible.⁴⁶ Cheap, simple, and effective,

40. See Jonathan Eric Pahl, Note, *Court-Ordered Restrictions on Trial Participant Speech*, 57 DUKE L.J. 1113, 1117 (2008) (describing the public outcry that followed the Massacre and the publication of Revere's work).

41. See N. Stewart Hanley, Note, *A Dangerous Trend: Arresting Citizens for Recording Law Enforcement*, 34 AM. J. TRIAL ADVOC. 645, 655–56 (2011) (relating the story of King's arrest, the public release of the film, and the riots that followed the officers' acquittal at trial).

42. See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 599 (7th Cir. 2012) (“To the founding generation, the liberties of speech and press were intimately connected with . . . the right of the people to see, examine, and be informed of their government.”).

43. JOHN TRENCHARD & THOMAS GORDON, *CATO'S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS* (Ronald Hamowy ed., Liberty Fund 1995) (1720).

44. David Bogen, *The Origins of Freedom of Speech and Press*, 42 MD. L. REV. 429, 446 (1983).

45. Thomas Gordon, *Of Freedom of Speech: That the Same Is Inseparable from Publick Liberty*, in 1 *CATO'S LETTERS: OR, ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS*, *supra* note 43, at 110, 111.

46. And they have engaged it with enthusiasm. See Stephanie Claiborne, Comment, *Is It Justice or a Crime To Record the Police?: A Look at the Illinois Eavesdropping Statute and Its Application*, 45 J. MARSHALL L. REV. 485, 494 (2012) (“There are thousands of postings on YouTube . . . from civilians that have recorded police officers abusing authority while making arrests.”).

recording the police in the digital age offers a unique opportunity⁴⁷ for citizens to serve “a cardinal First Amendment interest” by “gathering information about government officials in a form that can readily be disseminated.”⁴⁸ So it has been that conduct like Bay Area Rapid Transit Officer Johannes Mehserle’s shooting of Oscar Grant,⁴⁹ the tasing of college student Andrew Meyer at a political event,⁵⁰ and Rubino’s heavy-handed arrest in New Haven has been placed immediately in the public eye, engendering debate, outcry, and calls for change.⁵¹

This Note argues that to ensure the vitality of this opportunity, courts should reconsider the application of the Fourth Amendment in cases like Gondola’s. In short, it argues that when a citizen uses a cell phone to record video of an arrest, police should not be permitted to *physically* seize the phone under the exigent-circumstances exception to the warrant requirement.⁵² Because of the First Amendment

47. See Steven A. Lutt, Note, *Sunlight Is Still the Best Disinfectant: The Case for a First Amendment Right To Record the Police*, 51 WASHBURN L.J. 349, 354 (2012) (“In 1991 [the year of King’s assault], the chances that someone with a video camera was ‘watching’ were relatively small . . . [T]echnological advances of the last decade have ushered in a new, unprecedented era of heightened police visibility.”).

48. Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011).

49. See Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes To Preserve the Civilian’s Right To Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 488 (2011) (“Mehserle pins . . . Grant face down against the ground, draws his gun, and fires. . . [T]he videos instantly appeared on YouTube and social media websites.”).

50. See Lutt, *supra* note 47, at 355 (“One illustrative example shows officers holding down and [t]asing Andrew Meyer, a University of Florida student who had disrupted a campus forum where Senator John Kerry was speaking. . . . The incident was captured on video from several different angles and created an Internet phenomenon.”).

51. See, e.g., Lutt, *supra* note 47, at 355 (“The [Meyer] videos were also instrumental in sparking serious debate over the use of Tasers on college campuses and a broader debate over police use of force in general.”); Sean Maher, *Protest Against BART Police Expected To Draw 1,000*, OAKLAND TRIB. (Jan. 14, 2009), http://www.insidebayarea.com/oakland-bart-shooting/ci_11442605 (“More than 1,000 people are expected to march and . . . protest against the BART police killing of Oscar Grant III The public outcry has been in response to witness cell phone videos leaked to the media . . .”).

52. Some of the arguments that apply to cell phone seizures also apply to the seizure of other devices that can be used to record arrests, like digital cameras or camcorders. Other arguments are unique to cell phones. See *infra* Part III.B. This Note focuses strictly on the seizure of cell phones used as recording devices for three reasons. First, the Note uses the Gondola case as a jumping-off point, and Gondola used a cell phone. Second, nearly all the other citizen-recorders in recent headlines used cell phones when they recorded arrests. See, e.g., Alderman, *supra* note 49, at 488 (“In the age of the iPhone . . . it was little surprise that the passengers captured the footage [of Oscar Grant’s shooting] on cell phones equipped with digital video cameras”); Seth F. Kreimer, *Pervasive Image Capture and the First*

concerns they engender, such seizures should be deemed unreasonable within the meaning of the Fourth Amendment.⁵³ Outside that narrow constitutional constraint, legislatures would remain free to craft procedures that balance the needs of law enforcement with the protection of speech. After surveying a range of permissible options, this Note urges a policy recently enacted in the District of Columbia, under which officers are instructed to “seize” the needed evidence—a video file—by obtaining a duplicate of the file, dispossessing the citizen of neither the phone nor the recording.⁵⁴

Analysis proceeds in four Parts. Part I makes the case for a First Amendment right to film police activity in public areas, concluding that either of two separate theories supports the existence of such a right. Part II examines the interplay between the Fourth and First Amendments in two contexts. In the first area, the seizure of allegedly obscene materials, the Supreme Court has sought to protect First Amendment interests by imposing procedural strictures beyond the dictates of the Fourth Amendment. It has justified those enhanced protections by reference to two First Amendment concerns: a wariness about prior restraints and a fear of chilling protected speech.⁵⁵ In the second area, the use of a warrant to search a newspaper office in *Zurcher v. Stanford Daily*, the Court seemed to adopt a less speech-protective approach. It defined the scope of the newspaper’s protection by the procedural strictures of the Fourth

Amendment, 159 U. PA. L. REV. 335, 337 (2011) (“In the aftermath of the Iranian election during the summer of 2009, authorities sought to impede reporting on efforts to suppress opposition demonstrators. Yet cell phone videos disseminated over social-networking sites illuminated both official abuse and the scope of civil resistance.”). Third, the seizure of a cell phone implicates some interests not at play in the case of, for instance, a camcorder seizure, *see infra* Part III.B, so the First Amendment calculus differs from one to the other. Rather than assess the constitutional significance of seizures across a broad spectrum of devices, this Note adopts a narrower focus.

53. This argument is in many ways a particularized application of Professor Akhil Amar’s admonition that Fourth Amendment doctrine should take account of “constitutional reasonableness”: “In thinking about the broad command of the Fourth Amendment, we must examine other parts of the Bill of Rights to identify constitutional values that are elements of constitutional reasonableness.” Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 805 (1994) (footnote omitted).

54. *See infra* Part IV.C. The term “seize” is here used in the colloquial sense, not the constitutional sense. Determining whether and when the District’s policy amounts to a Fourth Amendment seizure of a person, her phone, or her video file is beyond the scope of this Note. Much more importantly, it is unnecessary in this piece, which focuses on only those cases in which the presence of exigent circumstances justifies a seizure within the meaning of the Fourth Amendment. *See supra* notes 33–37 and accompanying text.

55. *See infra* Part II.A.

Amendment, not the substantive values of the First. But the Court did so only after carefully considering and ultimately rejecting the argument that searches like the one before it would impose prior restraints on speech and chill expression.⁵⁶ Part III returns to the question of exigent-circumstances seizures of cell phones. Using Rubino’s seizure of Gondola’s cell phone as the paradigm, it argues that such seizures can function as egregious prior restraints on speech and likely deter citizens from recording police. It therefore concludes that cell phone seizures should not be governed by *Zurcher*’s broad rule. Like obscenity seizures, cell phone seizures are good candidates for heightened protections crafted to insulate First Amendment values. Part IV considers several potential safeguards, concluding that two interests—the First Amendment interest in government monitoring, and law enforcement’s interest in preserving crime evidence—are best served if police officers “seize” video by mandating its electronic transmission, not by physically seizing cell phones.

This Note therefore argues that courts should deem seizures like Gondola’s unreasonable, trusting that legislatures can prescribe a procedure that serves the needs of police without doing violence to the First Amendment.

I. THE CASE FOR A FIRST AMENDMENT RIGHT TO FILM POLICE

“[T]here is practically universal agreement,” wrote the Supreme Court in *Mills v. Alabama*,⁵⁷ “that a major purpose of [the First] Amendment [is] to protect the free discussion of governmental affairs.”⁵⁸ It can hardly be doubted that the act of recording law-enforcement officers, and submitting images of official conduct for evaluation by the public, lies close to the heart of the First Amendment’s spirit. The question is whether existing constitutional doctrine accommodates such behavior. This Part examines four theories of First Amendment protection that have been advanced by commentators or considered by courts. It dismisses the first two as doctrinally unsound, but concludes that each of the latter two theories supports the claim that the act of recording police is within the aegis of the First Amendment.

56. *Zurcher v. Stanford Daily*, 436 U.S. 547, 565–66 (1978); see *infra* Part II.B.

57. *Mills v. Alabama*, 384 U.S. 214 (1966).

58. *Id.* at 218.

A. *Recording as Expressive Conduct Per Se*

A citizen silently recording an arrest is not “speaking” in the usual sense. But the First Amendment extends protection to conduct that is “sufficiently imbued with elements of communication.”⁵⁹ One commentator argues that the recording act meets this threshold, and can claim protection as an expressive act calculated to send a message in and of itself: “[A]larm or distrust of officers, or emotional support for an accused.”⁶⁰

This theory is likely foreclosed by the Supreme Court’s holding in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*⁶¹ In *Rumsfeld*, the Forum for Academic and Institutional Rights, “an association of law schools and law faculties,”⁶² argued that law schools’ exclusion of military recruiters from their campuses qualified as expressive conduct, intended to express disapproval of the military’s practice of discriminating based on sexual orientation.⁶³ The Court disagreed, holding that such conduct was not “inherently expressive” because it did not communicate a clear message without additional accompanying speech.⁶⁴ The absence of recruiters from campus might indicate only that “the law school’s interview rooms [were] full,” or that the military preferred to interview elsewhere.⁶⁵

The claim that recording police activity is expressive conduct suffers from the same infirmity: recording, without more, is ambiguous. Impassive filming might indicate support for the victim (by monitoring official conduct), support for the police (by gathering evidence of a crime and the attendant arrest), or support for nobody in particular (in the fashion of an objective newsgatherer). The recording act likely finds no constitutional shield as expressive conduct.

59. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974)) (quotation mark omitted).

60. Mario Cerame, Note, *The Right To Record Police in Connecticut*, 30 QUINNIPIAC L. REV. 385, 417 (2012).

61. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47 (2006).

62. *Id.* at 47–48.

63. *Id.* at 51–53.

64. *Id.* at 66.

65. *Id.*

B. Recording, Standing Alone, as Falling Within a “Right To Gather Information”

An enticing theory of protection for recording rests on *Richmond Newspapers, Inc. v. Virginia*,⁶⁶ in which a plurality of the Court held that “the amalgam of the First Amendment guarantees of speech and press,” as well as assembly, protects the right to observe proceedings at criminal trials.⁶⁷ The Court reasoned that “[p]eople assemble in public places not only to speak or to take action, but also to listen, observe, and learn,” and that traditionally, the public had been permitted access to criminal proceedings because public presence “has been thought to enhance the integrity and quality of what takes place.”⁶⁸ It is plausible to argue that the “integrity and quality” of police conduct is every bit as important as the “integrity and quality” of judicial conduct, and the spaces where recording tends to occur are as public as a courtroom.⁶⁹ Recording, the argument concludes, should therefore fall comfortably within the protective scope of *Richmond Newspapers*. The syllogism is sound as far as it goes, but its major premise, *Richmond Newspapers*, is flawed.

First, *Richmond Newspapers* is arguably at odds with *Zemel v. Rusk*,⁷⁰ in which the Court held that a ban on travel to Cuba—though it compromised the appellant’s efforts to collect information about U.S. foreign policy—did not implicate the First Amendment.⁷¹ It is easy to see why “[t]he right to speak and publish does not carry with it the unrestrained right to gather information;”⁷² it is harder to see why *Zemel* should come out differently than *Richmond Newspapers*. Americans travelled freely to Cuba until the 1961 ban,⁷³ just as citizens have traditionally enjoyed access to courtrooms.⁷⁴ The appellant in each case sought access to a traditionally open forum to

66. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

67. *Id.* at 577–78 (plurality opinion).

68. *Id.* at 578.

69. *See, e.g.*, Alderman, *supra* note 49, at 488 (describing the Mehserle shooting, which occurred on a subway platform); Bass, *supra* note 1 (describing the plaza where Gondola recorded the arrest).

70. *Zemel v. Rusk*, 381 U.S. 1 (1965).

71. *Id.* at 16–17. The Court held that the law was a restriction on action, not on speech. *Id.*

72. *Id.* at 17.

73. *Id.* at 3.

74. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980) (plurality opinion) (“[A] trial courtroom also is a public place where the people generally . . . have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.”).

collect information of public import.⁷⁵ And it is “hard to contend that the way in which a government operates its criminal justice system is of any greater concern from a democratic-decisionmaking point of view than the impact of its foreign policy.”⁷⁶

Second, as *Zemel* suggests, a robust First Amendment right to “gather information” is simply impractical.⁷⁷ Gathering information is, after all, incidental to practically the entire universe of human conduct. Affording that conduct constitutional privilege would throw wide the First Amendment’s doors to an enormous range of behavior entirely divorced from any affirmative act of speaking. As Professor Barry McDonald points out, such a rule “confuse[s] means with ends.”⁷⁸ That is, the Framers valued the acquisition of information, but they chose to facilitate it by protecting the speech constituting the information, not by policing the acquisition directly.⁷⁹

Third, the Court has been decidedly chary about extending *Richmond Newspapers* beyond its origins in the criminal courtroom. In *Los Angeles Police Department v. United Reporting Publishing Corp.*,⁸⁰ for instance, the Court considered a law that denied access to address information of arrested persons for commercial purposes.⁸¹ The plaintiff argued that *Richmond Newspapers* should be extended to embrace these facts.⁸² But as Professor McDonald notes, the majority, dissenting, and concurring opinions all accepted that “California could have withheld the arrestee address information from the public without violating the First Amendment,” and none so much as mentioned *Richmond Newspapers*.⁸³ Professor McDonald concludes that, in *United Reporting*, “the Court signaled that any person attempting to expand the *Richmond Newspapers* right of access beyond its current moorings may well bear a significant burden in doing so.”⁸⁴

75. Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards a Realistic Right To Gather Information in the Information Age*, 65 OHIO ST. L.J. 249, 326 (2004).

76. *Id.*

77. See *Zemel*, 381 U.S. at 16–17 (“There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.”).

78. McDonald, *supra* note 75, at 327 (emphasis omitted).

79. *Id.* at 327.

80. *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32 (1999).

81. *Id.* at 35.

82. McDonald, *supra* note 75, at 301.

83. *Id.*

84. *Id.* at 302.

Thus, the facts of police recording present a fair argument from *Richmond Newspapers*, but the case is unlikely to prove a font of meaningful protection. The plea for First Amendment solicitude is not best made with a focus on the act of recording alone.

C. *ACLU of Illinois v. Alvarez: Recording as Conduct Integral to Wholly Protected Speech*

The first winning argument for constitutional protection couches recording as part and parcel of a continuing act of speech. In *ACLU of Illinois v. Alvarez*,⁸⁵ the Seventh Circuit relied on this reasoning to strike down an eavesdropping statute that proscribed the audio recording of any conversation in the absence of consent from all parties.⁸⁶

The argument works from the premise that “[a]s a general matter, ‘state action to punish the publication of truthful information seldom can satisfy constitutional standards.’”⁸⁷ It then looks backward from dissemination of the recording, undoubtedly protected, to the conduct necessary to produce it in the first instance,⁸⁸ and recognizes that there is “no fixed First Amendment line between the act of creating speech and the speech itself: . . . ‘The process of expression . . . has never been thought so distinct from the expression itself that we could disaggregate Picasso from his brushes and canvas’”⁸⁹

“This observation,” the *Alvarez* court reasoned, “holds true when the expressive medium is mechanical rather than manual.”⁹⁰ And because “[l]aws enacted to control or suppress speech may

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

86. *Id.* at 586, 596. The ACLU desired to “implement a ‘program of promoting police accountability by openly audio recording police officers without their consent.’” *Id.* at 588.

87. *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (quoting *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102 (1979)).

88. This view requires the assumption that dissemination is intended; otherwise, it smacks of *Richmond Newspapers* and an unbounded right to gather information. Courts have generally been willing to make that assumption. *See, e.g., Alvarez*, 679 F.3d at 586, 596 (reasoning backward from dissemination when the ACLU sought to record police as part of its “police accountability program”); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (“Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal First Amendment interest”).

89. *Alvarez*, 679 F.3d at 596 (quoting *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1061–62 (9th Cir. 2010)).

90. *Id.* That is, when the object of regulation is a camera, not a paintbrush.

operate at different points in the speech process,”⁹¹ to proscribe the creative act is functionally to prohibit the dissemination of the created product.⁹² The front-end ban implicates the First Amendment as surely as a back-end regulation, and the recording act merits the full protection of the Speech Clause.⁹³

This is not to suggest that the intent to gather and disseminate information transforms any restriction on conduct into a restriction on speech. *Zemel* should not have come out differently if the challenger had wanted to write a news article about Cuba. And this Note does not quarrel with the result in, for instance, *Pell v. Proconier*,⁹⁴ in which the Court held that the press enjoys no First Amendment right to enter prisons to interview prisoners.⁹⁵ This Part asks whether the government *may* curtail information gathering in a place the citizen has a right to be, not whether it *must* allow the citizen to access certain places so that she might gather information there. The argument is not that the government must facilitate speech by throwing wide the prison doors, but that it must suffer speech in accordance with the First Amendment’s negative injunction.

D. *Glik v. Cunniffe: Protection Under the Press Clause*

The second persuasive argument for protection differs little from the one advanced in *Alvarez*, but warrants special mention. In *Glik v. Cunniffe*,⁹⁶ the First Circuit held that the First Amendment protects the right of private citizens to film “government officials engaged in their duties in a public place,”⁹⁷ and seemed to ground the right in the province of the press.

The first part of the analysis in *Glik* largely paralleled *Alvarez*’s reasoning: “Gathering information about government officials in a

91. *Id.* (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 336 (2010)).

92. *See id.* at 597 (“If . . . the eavesdropping statute does not implicate the First Amendment *at all*, the State could effectively control or suppress speech by the simple expedient of restricting an early step in the speech process rather than the end result.”).

93. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

94. *Pell v. Proconier*, 417 U.S. 817 (1974).

95. *Id.* at 832–35.

96. *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011).

97. *Id.* at 82. In *Glik*, a man walking near Boston Common saw three police officers arresting a suspect. *Id.* at 79. He thought the officers were being rough with the suspect and used his cell phone to film the arrest from a comfortable remove. *Id.* at 79–80. The officers ordered him to stop, then arrested him for violating Massachusetts’s wiretap statute, disturbing the peace, and aiding in the escape of a prisoner. *Id.* at 80. *Glik* was his § 1983 action. *Id.* at 79–80.

form that can readily be disseminated to others serves a cardinal First Amendment interest.”⁹⁸ The First Circuit did not articulate the source of this right within the First Amendment, and used neither the term “free speech” nor the term “free press.” But in the second part of its analysis, the court emphasized that the challenger’s behavior was protected notwithstanding his lack of affiliation with the organized media: the “public’s right of access to information is coextensive with that of the press.”⁹⁹ Constitutional protection for newsgathering, wrote the court, “cannot turn on professional credentials.”¹⁰⁰

This invocation of the principle that the Press Clause protects a function, not a profession,¹⁰¹ suggests a right nestled within the freedom of the press rather than the freedom of speech. That suggestion is at odds with nearly four decades of jurisprudence that has “mainly treated the Press Clause as a superfluous subset of the Speech Clause,”¹⁰² but at least one commentator has argued that the Press Clause can naturally cabin a “right to gather information” in a way the Speech Clause cannot—and is therefore the sensible source of the right.¹⁰³ *Glik* does not stake out that position in so many words, but the case might stand for a second theory of protection, one resting on a reinvigorated Press Clause.

* * *

It does not really matter whether *Alvarez*’s speech theory or *Glik*’s press theory carries the day. Each is at heart the same: the act of gathering information by recording rides to protection on the coattails of intended dissemination. No matter which clause does the work—whether a prohibition on recording restricts the dissemination of “speech” at square one, or such a proscription imperils the “press”—the First Amendment protects a right to record public officials performing their duties.

Indeed, at least two Federal Courts of Appeals have announced such a right without articulating any doctrinal justification at all. In

98. *Id.* at 82.

99. *Id.* at 83.

100. *Id.* at 84.

101. See *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) (“[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”).

102. McDonald, *supra* note 75, at 258.

103. *Id.* at 354–55.

Smith v. City of Cumming,¹⁰⁴ the Eleventh Circuit held that “[t]he First Amendment protects the right to gather information about what public officials do on public property,” specifically to “record matters of public interest.”¹⁰⁵ The court did not announce which clause does the work, or how. Likewise, in *Fordyce v. City of Seattle*,¹⁰⁶ the Ninth Circuit simply recognized a “First Amendment right to film matters of public interest,”¹⁰⁷ without saying more. Protection by ipse dixit admittedly fails to satisfy. But the federal reporters are bereft of cases denying protection to the recording act, and the full protection of the First Amendment stands as the law of four circuits.

In sum, the starting point is this: whatever the theory, all citizens enjoy the constitutional right to film official actions undertaken by the police in the public square.¹⁰⁸

II. THE INTERSECTION OF THE FIRST AND FOURTH AMENDMENTS

“What is significant to note,” wrote the Court in *Stanford v. Texas*,¹⁰⁹ is that the history of the Fourth Amendment “is largely a history of conflict between the Crown and the press.”¹¹⁰ That “history of conflict,”¹¹¹ characterized by the use of general warrants to seize publications tending toward seditious libel and dramatized in English cases like *Entick v. Carrington*¹¹² and *Wilkes v. Wood*,¹¹³ set the stage for the adoption of the Fourth Amendment as a barrier between the

104. *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000). *Smith* concerned a § 1983 claim in which the plaintiff alleged he had been prevented from videotaping police activity. *Id.* at 1332.

105. *Id.* at 1333.

106. *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995). *Fordyce*, like *Smith*, was a § 1983 action, arising from the plaintiff’s arrest while filming a local protest. *Id.* at 438.

107. *Id.* at 439.

108. This recording right is (like all speech) “subject to reasonable time, place, and manner restrictions.” *Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011). Because police recording by definition occurs during and near sensitive law-enforcement operations, laws designed to limit interference and protect bystanders (including filmers) will cabin the particulars of the recording act. But the core right, to record “an arrest in a public space . . . [without] interfer[ing] with the police officers’ performance of their duties,” *id.*, runs as deep as any protection found within the First Amendment.

109. *Stanford v. Texas*, 379 U.S. 476 (1965).

110. *Id.* at 482.

111. *Id.*

112. *Entick v. Carrington*, (1765) 95 Eng. Rep. 807 (K.B.).

113. *Wilkes v. Wood*, (1763) 98 Eng. Rep. 489 (K.B.).

prying state and the private papers of the citizenry.¹¹⁴ Constitutional limits on searches and seizures, in other words, were from the start bound up with First Amendment concerns.¹¹⁵

Part II considers the interplay of the First and Fourth Amendments in two more contemporary arenas. In the first, the Court's line of cases on the seizure of alleged obscenity, doctrine has been driven by two concerns peculiar to the First Amendment: unwillingness to abide prior restraints on expression and fear of chilling protected speech. Part II.A shows that in these cases, First Amendment substantive values, not Fourth Amendment procedural strictures, have defined the contours of limits on seizures.

But in the second area—the Court's decision in *Zurcher v. Stanford Daily*, concerning an evidentiary seizure from a newspaper office—the Court held just the opposite, defining the substantive protections of the First Amendment by the Fourth's procedural limitations.¹¹⁶ Part II.B considers a holding that seems on its face to have renegotiated the limits by which the Constitution protects expressive material made subject to the government's power to seize. Taken together, these two areas of doctrine will frame later discussion about how the Fourth Amendment bears on Jennifer Gondola's right to film an arrest.

A. *Obscenity and the First and Fourth Amendments*

The lion's share of the case law addressing the “collision between the Fourth Amendment and the First Amendment” has arisen in the context of obscenity.¹¹⁷ In that area, the uncertain nature of the line between that which can be legitimately proscribed and that which is constitutionally protected¹¹⁸ has given rise to thorny questions

114. Eric Schnapper, *Unreasonable Searches and Seizures of Papers*, 71 VA. L. REV. 869, 875–77 (1985).

115. See Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 133 (2007) (“The First, Fourth, and Fifth Amendments share a common background in concerns about seditious libel.”); William Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 402–03 (1995) (“*Entick* and *Wilkes* are classic First Amendment cases in a system with no First Amendment . . .”).

116. *Zurcher v. Stanford Daily*, 436 U.S. 547, 564–65 (1978).

117. *Tattered Cover v. City of Thornton*, 44 P.3d 1044, 1055 (Colo. 2002) (en banc).

118. *Miller v. California*, 413 U.S. 15 (1973), defines unprotected obscenity; its standard has often been criticized as unclear. See, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 103 (1973) (Brennan, J., dissenting) (“[T]he concept of ‘obscenity’ cannot be defined with sufficient specificity and clarity to . . . prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech . . .”).

concerning the state's power to seize prohibited obscene materials. The Court's answer has often been that the normal strictures of the Fourth Amendment are not equal to the task of protecting the First Amendment interests at stake—that “[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.”¹¹⁹ The Court has justified the imposition of heightened procedural requirements by reference to two First Amendment concerns: a wariness about prior restraints on expression and a fear of chilling protected speech.

1. *The Seizure of Obscenity and Prior Restraint.* “If one constant exists in Supreme Court [F]irst [A]mendment theory, it is that ‘[a]ny prior restraint on expression comes to . . . [the] Court with a ‘heavy presumption’ against its constitutional validity.’”¹²⁰ The chief concern animating the prior restraint doctrine is that the hand of the government censor will operate to exclude disfavored speech before the speech reaches the public market.¹²¹ In the context of obscenity seizures, this danger is particularly acute. The indefinite nature of the obscenity standard, and of statutes that track that standard, lends itself to discretionary official action that suppresses protected speech as well as proscribed obscenity.¹²² The Court has long taken care to guard against that.

In *Marcus v. Search Warrant*,¹²³ the Court recognized that a search warrant arguably unobjectionable in another context may constitute an impermissible prior restraint when aimed at presumptively protected speech. In *Marcus*, a Missouri judge issued a search warrant for a periodical distributor's warehouse on the strength of an officer's affidavit that it housed obscene magazines.¹²⁴ The warrant authorized the seizure of all “obscene materials” located at the warehouse, and the executing officers seized “[a]pproximately 11,000 copies of 280 publications.”¹²⁵ Writing for the Court, Justice

119. *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973).

120. Martin H. Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 53 (1984) (alteration in original) (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

121. *See Marcus v. Search Warrant*, 367 U.S. 717, 736–37 (1961) (“The public's opportunity to obtain the publications was . . . determined by the distributor's readiness and ability to outwit the police by obtaining and selling other copies before they in turn could be seized.”).

122. *See supra* note 118.

123. *Marcus v. Search Warrant*, 367 U.S. 717 (1961).

124. *Id.* at 722.

125. *Id.* at 722–23.

Brennan—after a lengthy ode to the Fourth Amendment’s origin as a safeguard against the suppression of speech and press¹²⁶—characterized the warrant as an impermissible prior restraint on expression.¹²⁷

Whether a similar warrant could be issued for the seizure of “gambling paraphernalia or other contraband,” wrote Justice Brennan, was beside the point.¹²⁸ Absent pre-seizure procedures designed to “focus searchingly on the question of obscenity,” a narrower warrant eliminating police discretion, and “an adversary proceeding on the issue of obscenity,” imposition of a prior restraint on dissemination was impermissible.¹²⁹ Despite a statutory provision for “rapid trial of the issue of obscenity” following seizure, the Court invalidated the authorizing Missouri law.¹³⁰ Adversary action, the Court indicated, must precede the imposition of restraint.¹³¹

The Court took up the question again in *A Quantity of Copies of Books v. Kansas*,¹³² there confronting the seizure, by warrant, of all 1,715 copies of thirty-one titles from a distributor.¹³³ The procedures observed in *A Quantity of Copies of Books* exceeded in rigor those followed in *Marcus*. The warrant named particular titles to reduce discretion in execution, and the issuing judge conducted an ex parte inquiry, in which he “scrutinized” seven books, and found grounds to believe they were obscene.¹³⁴

This, wrote Justice Brennan for the plurality, was not enough: “[S]ince the warrant here authorized the sheriff to seize all copies of the specified titles, and since [the distributor] was not afforded a hearing on the question of . . . obscenity . . . before the warrant issued,

126. See *id.* at 724 (“[T]he struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power.”); *id.* at 729 (“This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped.”).

127. See *id.* at 736 (“[A]n effective restraint . . . was imposed prior to hearing on the circulation of the publications in this case, because all copies on which the police could lay their hands were physically removed from the newsstands The public’s opportunity to obtain the publications was thus determined by the distributor’s readiness and ability to outwit the police”).

128. *Id.* at 730–31.

129. See *id.* at 732–38.

130. *Id.* at 737–38.

131. *Id.* at 736–38.

132. *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964).

133. *Id.* at 208–09 (plurality opinion).

134. *Id.* at 208.

the procedure was . . . constitutionally deficient.”¹³⁵ Justice Brennan again emphasized that the First Amendment does not necessarily abide seizures of expressive material that might be permissible with respect to other items: “It is no answer to say that obscene books are contraband, and that consequently the standards governing searches and seizures of allegedly obscene books should not differ from those applied with respect to narcotics, gambling paraphernalia and other contraband. We rejected that proposition in *Marcus*.”¹³⁶

A Quantity of Copies of Books thus stands for the proposition that when a seizure operates as a restraint on a seller’s distribution of each copy of a particular title, the seizure is impermissible if not preceded by an adversary hearing on obscenity. An otherwise sufficient warrant will not cure the constitutional defect.

In two later cases, *Lee Art Theatre, Inc. v. Virginia*¹³⁷ and *Roaden v. Kentucky*,¹³⁸ the Court invalidated the seizures of films from adult theatres. In *Lee Art Theatre*, a warrant issued “solely upon the conclusory assertions of [a] police officer” who had viewed the film.¹³⁹ The Court held that without judicial scrutiny, the procedure was not one “designed to focus searchingly on the question of obscenity.”¹⁴⁰ In *Roaden*, the Court held that the warrantless evidentiary seizure of a single reel of film incident to the theatre manager’s arrest for displaying obscenity involved the same infirmity.¹⁴¹ What is remarkable about *Lee Art Theatre* and *Roaden* is not the procedural particulars either case announced for obscenity seizures—each focused only on the lack of preseizure scrutiny by a judge, not on the absence of preseizure adversary hearings¹⁴²—but the Court’s sensitivity to seizures that operate as prior restraints on expression:

[T]he material seized fell arguably within First Amendment protection, and the taking brought to an abrupt halt an orderly and

135. *Id.* at 210.

136. *Id.* at 211–12.

137. *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968) (per curiam).

138. *Roaden v. Kentucky*, 413 U.S. 496 (1973).

139. *Lee Art Theatre*, 392 U.S. at 637.

140. *Id.* (quoting *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961)).

141. *See Roaden*, 413 U.S. at 504 (“Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint and is, in those circumstances, unreasonable under Fourth Amendment standards.”).

142. In his *Roaden* concurrence, Justice Brennan wrote that the Kentucky statute was unconstitutionally overbroad because it did not require such a hearing before the seizure of obscene materials incident to arrest. *Id.* at 507 (Brennan, J., concurring).

presumptively legitimate distribution or exhibition. Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. . . . [R]estraint of . . . expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. . . . [W]e examine what is “unreasonable” in the light of the values of freedom of expression.¹⁴³

Roaden’s conception of restraint is broad and speech protective. The purpose of the seizure in *Roaden* was not, as in *Marcus* or *A Quantity of Copies of Books*, to remove objectionable material from circulation. It was rather to gather evidence in a criminal case.¹⁴⁴ The officer did not seize thousands of publications, as in the prior cases. He took only one copy of the film.¹⁴⁵ *Roaden*’s touchstone of concern is neither the seizure’s purpose nor the quantity of the items seized; it is whether official action disrupts “orderly and presumptively legitimate distribution or exhibition.”¹⁴⁶ When it does, the Court signaled, the action will be treated as a prior restraint and must clear the “higher hurdle in the evaluation of reasonableness”¹⁴⁷ expressed in *Marcus*, *A Quantity of Copies of Books*, *Lee Art Theatre*, and *Roaden*.

In keeping with the principle that prior restraints on dissemination trigger heightened procedural requirements, the Court has declined to impose comparable procedural rigor in their absence. *Heller v. New York*¹⁴⁸ was decided the same day as *Roaden* and involved, like *Roaden*, the seizure of one copy of an allegedly obscene film incident to the arrest of theatre employees.¹⁴⁹ The Court nonetheless upheld the seizure, on the ground that “[t]here ha[d] been no showing that the seizure of a copy of the film precluded its

143. *Id.* at 504. *Roaden*’s language differs somewhat from the language in the earlier obscenity cases. *Marcus*, for instance, invalidated a seizure strictly by reference to the First and Fourteenth Amendments, *see Marcus*, 367 U.S. at 738, but *Roaden* found that a seizure was unreasonable under the Fourth Amendment, *Roaden*, 413 U.S. at 504. The difference is one more of mechanism than of meaning—*Roaden* simply defined Fourth Amendment reasonableness according to First Amendment interests, an operation very much in keeping with Professor Akhil Amar’s theory of “constitutional reasonableness.” *See generally* Amar, *supra* note 53.

144. *Roaden*, 413 U.S. at 497–98 (“[T]he sheriff seized one copy of the film for use as evidence.”).

145. *Id.*

146. *Id.* at 504.

147. *Id.*

148. *Heller v. New York*, 413 U.S. 483 (1973).

149. *Id.* at 485–86. In *Heller*, unlike *Roaden*, the seizure was by warrant. *Id.*

continued exhibition.”¹⁵⁰ Likewise, in *New York v. P.J. Video, Inc.*,¹⁵¹ the Court relied on *Heller* to hold that absent a “claim that the seizure . . . prevented continuing exhibition of the film,”¹⁵² the seizure of several copies of each of ten films from a rental store,¹⁵³ made pursuant to a proper warrant and with an opportunity for a prompt adversary hearing on obscenity, was permissible.¹⁵⁴

In short, the Court’s jurisprudence concerning the seizure of allegedly obscene materials teaches that when the seizure of potentially protected expression functions as a prior restraint on dissemination, free speech controls. First Amendment interests justify the imposition of heightened procedural requirements on seizures that might be in another context unobjectionable.

2. *The Seizure of Obscenity and Chilling Effects.* The chilling-effect doctrine, like the fear of prior restraints, is grounded in the concern that official action will prevent protected speech from reaching the market. The worry is not, as in the context of prior restraints, that direct regulation will sweep valuable speech into its restrictive scope.¹⁵⁵ Rather, it is that individuals will unnecessarily self-censor in an effort to steer wide of the regulated zone.¹⁵⁶

The possibility of chilling protected speech has special salience with respect to obscenity statutes because of the vagueness inherent in anti-obscenity laws that track the constitutional standard.¹⁵⁷ If “[o]bscenity cannot be distinguished ex ante from constitutionally

150. *Id.* at 490. The Court wrote that if no other copies of the film were available, it would be necessary to “permit the seized film to be copied so that showing can be continued pending a judicial determination of the obscenity issue in an adversary proceeding.” *Id.* at 492–93.

151. *New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986).

152. *Id.* at 874 (quoting *Heller*, 413 U.S. at 492).

153. *Id.* at 870.

154. *Id.* at 874–76.

155. *See, e.g.*, *Walker v. City of Birmingham*, 388 U.S. 307, 344–45 (1967) (Brennan, J., dissenting) (“To give these freedoms the necessary ‘breathing space to survive,’ the Court has . . . molded both substantive rights and procedural remedies . . . to conform to our overriding duty to insulate all individuals from the ‘chilling effect’ upon exercise of First Amendment freedoms generated by vagueness, overbreadth and unbridled discretion to limit their exercise.” (citations omitted) (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963))).

156. *See Smith v. California*, 361 U.S. 147, 154 (1959) (explaining that if a strict-liability anti-obscenity statute were permitted to stand, “[t]he bookseller’s self-censorship, compelled by the State, would be a censorship affecting the whole public”).

157. *See supra* note 118.

protected sexually explicit material,”¹⁵⁸ a sensible purveyor of *any* sexually explicit material errs toward the nondistribution of questionable matter, and so declines to disseminate some protected, nonobscene speech. Justice Brennan urged that this “potentially inhibiting effect”¹⁵⁹ justified the wholesale scrapping of the Court’s efforts to define an unprotected sphere of obscenity.¹⁶⁰ Justice Brennan’s view never commanded votes from more than three other Justices in any one case,¹⁶¹ and the Court has made clear that though the imposition of penalties under an obscenity statute that tracks *Miller* might chill protected speech, that alone will not invalidate the statute.¹⁶² But the Court has relied on chilling-effect reasoning to invalidate statutes that fail to achieve *Miller*’s clarity and so work supposed deterrence on protected speech. In *Reno v. ACLU*,¹⁶³ for example, the Court held that the Communications Decency Act¹⁶⁴ (CDA) was unacceptably vague because its definition of proscribed material lacked several of *Miller*’s narrowing elements,¹⁶⁵ and therefore “present[ed] a great[] threat of censoring speech that, in fact, [fell] outside the statute’s scope.”¹⁶⁶

The seizure of alleged obscenity by a procedurally deficient warrant functions like, and raises the same concerns as, a vague statute like the CDA. A warrant like the one in *Marcus*, for example,¹⁶⁷ injects uncertainty into the obscenity standard by vesting the executing officer with discretion to make the obscenity judgment

158. John T. Mitchell, *An Exclusionary Rule Framework for Protecting Obscenity*, 10 J.L. & POL. 183, 199 (1994).

159. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 88 (1973) (Brennan, J., dissenting) (quoting *Smith*, 361 U.S. at 151).

160. *Id.* at 103 (“[T]he concept of ‘obscenity’ cannot be defined with sufficient specificity and clarity to . . . prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech . . .”).

161. Mitchell, *supra* note 158, at 197.

162. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989).

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

164. Communications Decency Act of 1996, Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133–43, *invalidated in part by Reno*, 521 U.S. 844.

165. *Reno*, 521 U.S. at 873–74. The statute banned the electronic transmission of “patently offensive” sexual matter, Communications Decency Act of 1996, 110 Stat. at 134, but it lacked *Miller*’s requirement that the matter be sexual conduct “specifically defined by the applicable state law.” *Reno*, 521 U.S. at 873 (quoting *Miller v. California*, 413 U.S. 15, 24 (1973)). The CDA’s statutory definition of proscribed material further omitted *Miller*’s other two prongs: that the material appeal to the prurient interest and that the banned work, taken as a whole, lack serious political, scientific, literary, or artistic value. *Id.*

166. *Id.* at 871–74.

167. *See supra* notes 124–29 and accompanying text.

on the ground. That uncertainty in turn expands the scope of expression a distributor must self-censor to avoid seizure and prosecution. And so, in the obscenity-seizure cases, the Court was wary of the chilling effect of the power to seize.

In *Marcus*, for instance, the Court opened its analysis with the observation that “a State’s power to suppress obscenity is limited by the constitutional protections for free expression.”¹⁶⁸ It then elaborated on those protections in a discussion of *Smith v. California*,¹⁶⁹ justifying by reference to *Smith* its holding that a warrant to seize obscenity must be treated differently than a warrant to seize other contraband.¹⁷⁰ In *Smith*, the Court had held that states may not regulate the distribution of obscenity under a strict-liability regime. It rested that holding on the premise that such a scheme would unacceptably chill the distribution of nonobscene materials:

[I]f the bookseller is criminally liable without knowledge of the contents [of obscene materials] . . . he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature. . . . The bookseller’s self-censorship, compelled by the State, would be a censorship affecting the whole public, hardly less virulent for being privately administered.¹⁷¹

Self-censorship, by *Smith*’s lights, functions as a de facto state-imposed restriction on speech. Resting in part on that logic, the Court held in *Marcus* that Missouri’s defective procedures¹⁷² “lacked the safeguards which due process demands to assure nonobscene material the constitutional protection to which it is entitled.”¹⁷³ Procedures inadequate to parse the obscene from the merely explicit in the first instance permit not only the direct suppression of protected speech, but the indirect suppression of expression that moved the Court in *Smith*. In *Marcus*, the Court sought to avoid that end by imposing heightened procedural requirements ensuring that warrants to seize obscenity would indeed target only the obscene.¹⁷⁴

168. *Marcus v. Search Warrant*, 367 U.S. 717, 730 (1961).

169. *Smith v. California*, 361 U.S. 147 (1959).

170. *Marcus*, 367 U.S. at 730–31.

171. *Smith*, 361 U.S. at 153–54.

172. *See supra* notes 124–31 and accompanying text.

173. *Marcus*, 367 U.S. at 731.

174. *See supra* notes 127–31 and accompanying text.

It is fair to wonder why the Court, intent on policing the chilling effect of seizures, would decline to impose heightened procedural requirements on evidentiary seizures of obscenity that do not represent prior restraints, as it did in *Heller* and *P.J. Video*.¹⁷⁵ Indeed, *P.J. Video* has been criticized for “ignor[ing] . . . the chilling effect that even an evidentiary seizure can have on the dissemination of protected speech.”¹⁷⁶ And in *Maryland v. Macon*,¹⁷⁷ in which the Court permitted the evidentiary use of two obscene publications taken without a warrant from an adult bookstore,¹⁷⁸ a dissenting Justice Brennan warned of consequences falling “not only upon the specific victims of abuse . . . but also upon all those who, for fear of being subjected to official harassment, steer far wider of the forbidden zone than they otherwise would.”¹⁷⁹

The Court has not explained why the chilling-effect rationale does not justify the extension of *Roaden*'s “higher hurdle” to mere evidentiary seizures, but the answer is probably, like every chilling-effect inquiry, a matter of on-the-ground pragmatism.¹⁸⁰ Because the Constitution bars prosecution for the private possession of obscenity,¹⁸¹ *Marcus* and its progeny—the entire line of obscenity-seizure cases—concern vendors of objectionable material.¹⁸² In that context, one expects that only financially burdensome seizures would deter speech. The inclination to avoid shame, embarrassment, or invasion of privacy might be a relevant mover for seizures from the home, but those concerns likely lack salience when a commercial entity is the object of investigation.

Viewed in that light, the Court's imposition of heightened procedural burdens for prior-restraint seizures, but not for most evidentiary seizures, neatly tracks the capacity of each type of seizure to chill protected speech. The mass seizure of eleven thousand

175. See *supra* notes 148–54 and accompanying text.

176. James H. Jeffries, Note, *Seizing Obscenity: New York v. P.J. Video, Inc. and the Waning of Presumptive Protection*, 65 N.C. L. REV. 799, 812–13 (1987).

177. *Maryland v. Macon*, 472 U.S. 463 (1985).

178. *Id.* at 465.

179. *Id.* at 476 (Brennan, J., dissenting).

180. See Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 808 (1969) (“The chilling effect focuses attention on the practical consequences of state action . . .”).

181. *Stanley v. Georgia*, 394 U.S. 557, 565 (1969).

182. See, e.g., *New York v. P.J. Video, Inc.*, 475 U.S. 868, 869 (1986) (“[F]ive videocassette movies . . . had been seized from respondents' store . . .”); *Marcus v. Search Warrant*, 367 U.S. 717, 721 (1961) (“Appellant . . . is a wholesale distributor of magazines . . .”).

books,¹⁸³ or even the seizure of one reel of film that halts its planned exhibition,¹⁸⁴ disrupts the ordered run of business and imposes financial burdens a merchant might seek to avoid by giving obscenity a needlessly wide berth. On the other hand, the seizure of less than all of a theatre's copies of a film¹⁸⁵ neither disturbs operations nor threatens profits. It therefore seems doubtful that a pre-seizure adversary hearing would insulate protected speech any better than prompt post-seizure proceedings.¹⁸⁶ Heightened procedural strictures for evidentiary seizures would impose burdensome niceties on the state without a correlative salutary effect on expression, and the Court has sensibly eschewed them.

To summarize, the seizure of alleged obscenity represents a collision between the state's power to seize and society's freedom to speak. Guided by concerns about prior restraints and chilling effects, the Court has defined procedural requirements with reference to First Amendment interests, not Fourth Amendment authority. That is why, at first blush, *Zurcher v. Stanford Daily* seems to break with its precursors.

B. *Zurcher v. Stanford Daily*

The First and Fourth Amendments collided again when *Zurcher v. Stanford Daily* came to the Court in 1978. Seven years earlier, demonstrators in Palo Alto had seized and occupied the offices at Stanford University Hospital.¹⁸⁷ Some had attacked police officers.¹⁸⁸ Two days later, the *Stanford Daily* published photographs of the incident indicating that the photographer had witnessed the violence against police.¹⁸⁹

On the theory that the photographer might have captured an assault on film, the Santa Clara County District Attorney's Office

183. See *Marcus*, 367 U.S. at 723 ("Approximately 11,000 copies of 280 publications, principally magazines but also some books and photographs, were seized . . .").

184. See *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973) ("[T]he taking brought to an abrupt halt an orderly and presumptively legitimate distribution or exhibition.").

185. See *Heller v. New York*, 413 U.S. 483, 492 (1973) ("There is no showing . . . that the seizure of the copy prevented continuing exhibition of the film.").

186. See *id.* at 492 ("If . . . following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available . . . , the seizure is constitutionally permissible." (footnote omitted)).

187. *Zurcher v. Stanford Daily*, 436 U.S. 547, 550 (1978).

188. *Id.*

189. *Id.* at 551.

secured and executed a search warrant for the *Daily's* offices.¹⁹⁰ Invoking the First Amendment status of the materials sought, the *Daily* pursued and obtained declaratory relief in federal district court.¹⁹¹ The Ninth Circuit affirmed.¹⁹²

The Supreme Court reversed. After reciting the protections conferred by obscenity cases like *Marcus, A Quantity of Copies of Books*, and *Roaden*,¹⁹³ the Court held that the *Daily's* First Amendment interests added nothing to its case: “Properly administered, the preconditions for a warrant . . . should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.”¹⁹⁴

Zurcher, then, seems a departure from—indeed, a reversal of—the Court’s approach in the obscenity cases. In defining the contours of protection, *Zurcher* looked not to the substantive values of the First Amendment, but to the procedural strictures of the Fourth. But *Zurcher's* core holding—that “the preconditions for a warrant . . . should afford sufficient protection”¹⁹⁵—is not merely a prescription for lower courts; it is a description of a set of facts that presented no danger of prior restraint or speech-chilling effect. *Zurcher*, in other words, is not a case unconcerned with the First Amendment or a fundamental break with *Marcus's* line. It is merely a case grounded in circumstances that posed little threat to expression. Part II.B.2 argues that *Zurcher* is best read to reaffirm the concerns the moved the Court in *Marcus* and its progeny—and assuredly does not provide the government blanket authority to seize expressive materials, like Jennifer Gondola’s cell phone, so long as it observes the usual Fourth Amendment niceties.

1. *Zurcher's Prescriptive Dimension.* *Zurcher's* core holding—that “the preconditions for a warrant . . . should afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices”¹⁹⁶—is prescriptive. It broadly directs lower courts to measure the constitutionality of searches and seizures by reference to the Fourth Amendment, not the

190. *Id.*

191. *Id.* at 552.

192. *Id.* at 553.

193. *Id.* at 564–65.

194. *Id.* at 565.

195. *Id.*

196. *Id.*

First. That prescription seems to cast a wide net, and *Zurcher* stands basically for the proposition that First Amendment rights “are not deserving of more criminal procedure protections than other activities.”¹⁹⁷

*Berglund v. City of Maplewood*¹⁹⁸ typifies the dismissive treatment of First Amendment interests that *Zurcher* is read to justify. The plaintiff in *Berglund* used a video camera to film an arrest—his own—and police seized the camera from his friend.¹⁹⁹ The court first paid “lip service”²⁰⁰ to the notion that the “‘requirements of the Fourth Amendment must be applied with scrupulous exactitude’ when materials seized are protected by the First Amendment.”²⁰¹ It next reasoned that the presence of exigent circumstances obviated the need for a warrant.²⁰² It then held, with no discussion of the particular First Amendment interests at issue, that *Zurcher* and the Constitution had been satisfied.²⁰³ *Berglund*’s relegation of the First Amendment to the constitutional backseat is a rather straightforward application of *Zurcher*’s bare prescription.²⁰⁴

197. Solove, *supra* note 115, at 130. *Zurcher*’s language of course refers to newspaper offices and warrants, but the case is generally taken to sweep more broadly. *See, e.g.*, Tattered Cover, Inc. v. City of Thornton, 44 P.3d 1044, 1055 (Colo. 2002) (en banc) (“The Supreme Court’s pronouncements in *Zurcher* can be read to mean that, beyond the ‘scrupulous exactitude’ requirement, the First Amendment places no special limitation on the ability of the government to seize expressive materials under the Fourth Amendment.”); *infra* notes 198–204 and accompanying text.

198. For further discussion on *Berglund*, see *supra* notes 23–32 and accompanying text.

199. *Berglund v. City of Maplewood*, 173 F. Supp. 2d 935, 941 (D. Minn. 2001).

200. Schnapper, *supra* note 114, at 871.

201. *Berglund*, 173 F. Supp. 2d at 943 (quoting *Zurcher*, 436 U.S. at 564).

202. *Id.* at 944 (“[Officers] believed that the tape could be destroyed, erased or tampered with if they did not take it from [the plaintiff’s companion].”). Noting that *Zurcher* was concerned only with warrants, the *Berglund* court cited *Roaden* for the proposition that the combination of probable cause and exigent circumstances is the equivalent of a warrant. *Id.*

203. *Id.*

204. Congress’s response to *Zurcher*, the Privacy Protection Act, prohibits some seizures of certain materials from a person who has “a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.” Privacy Protection Act, 42 U.S.C. § 2000aa(a) (2006). But the Act contains an exception that is animated when it is reasonable to believe that issuing a subpoena for sought materials would result in their “destruction, alteration, or concealment.” *Id.* § 2000aa(b)(3). The *Berglund* court treated this exception as coextensive with the exigent-circumstances exception to constitutional protection: “[F]or the same reasons . . . defendants did not need to obtain a search warrant under the exigent circumstances exception, the court concludes that defendants[’] actions satisfy the ‘destruction of evidence’ exception to the Act.” *Berglund*, 173 F. Supp. 2d at 950. Gondola’s facts would presumably shake out similarly.

2. *Zurcher's Descriptive Dimension*. But consider *Zurcher* again: “[T]he preconditions for a warrant . . . *should* afford sufficient protection against the harms that are assertedly threatened by warrants for searching newspaper offices.”²⁰⁵ That holding is not just an instruction to lower courts. It is also a description of the expected interplay of the Fourth and First Amendments grounded in *Zurcher's* facts: the seizure by warrant of materials from the formal press.²⁰⁶ Moreover, it is a description the Court offered only after lengthy consideration of two familiar concerns—the risk of prior restraint and chilling effects upon speech. In other words, though *Zurcher's* First Amendment problem was somewhat different than those at issue in the obscenity cases,²⁰⁷ the *Zurcher* Court justified its holding by reference to the same First Amendment interests that drove *Marcus* and its progeny.

a. *The Absence of Prior Restraint in Zurcher*. The *Daily* argued that a subpoena, not a search warrant, was the proper vehicle to secure press photographs because a subpoena would “afford[] opportunity to litigate the State’s entitlement to the material it seeks before it is . . . seized.”²⁰⁸ This argument hearkened to *Marcus's* pre-seizure adversary proceedings,²⁰⁹ and the Court drew the analogy: “The Court has held that . . . seizures . . . entirely removing arguably protected materials from circulation may be effected only after an adversary hearing and a judicial finding of obscenity.”²¹⁰

In rejecting the *Daily's* argument, the Court did not broadly hold that outside the obscenity context, the state has blanket authority to seize First Amendment material if it properly observes Fourth Amendment procedure. Neither did it overturn the decisions

205. *Zurcher*, 436 U.S. at 565 (emphasis added).

206. *See id.* at 551 (“The warrant issued on a finding of ‘just, probable and reasonable cause for believing that . . . evidence material and relevant to the identity of the perpetrators of felonies . . . will be located [on the premises of the Daily.]’” (third alteration in original)).

207. When the state seizes alleged obscenity, the fear is that the vague nature of the obscenity standard will result in the seizure of protected speech. *See Marcus v. Search Warrant*, 367 U.S. 717, 732–33 (1961) (“[O]nly one-third of the publications seized were finally condemned . . .”). In contrast, the warrant in *Zurcher* doubtless targeted protected speech; the question was whether that should enter the Fourth Amendment calculus.

208. *Zurcher*, 436 U.S. at 566.

209. *See Marcus*, 367 U.S. at 737–38 (“[T]he restraint on the circulation of publications was far more thoroughgoing and drastic than any restraint upheld by this Court. . . . Mass seizure in the fashion of this case was thus effected without any safeguards to protect legitimate expression.”).

210. *Zurcher*, 436 U.S. at 566–67.

imposing enhanced procedural strictures on some obscenity seizures.²¹¹ It wrote much more narrowly, noting only that the instant facts presented no risk of prior restraint that would justify heightened procedural requirements: “[S]urely a warrant . . . such as the one issued here for news photographs . . . carries no realistic threat of prior restraint or of any direct restraint whatsoever”²¹² That is not reasoning that purports to govern the relationship between seizures and speech interests forever and in all circumstances. It is reasoning that found no impermissible restraint, and no constitutional harm, on *Zurcher*’s narrow facts.

b. The Absence of Chilling Effects in Zurcher. The *Daily*’s chief argument was that the use of search warrants against newspaper offices would exert a “profoundly chilling effect . . . on the ability of a journalistic organization to carry out its functions.”²¹³ If such warrants could issue, the *Daily* argued, confidential sources would dry up for fear of investigation, and newspapers would decline to publish reports that might lead to invasive office searches.²¹⁴

The Court brushed off that argument, too—but not on the ground that the *Daily*’s parade of horrors was tolerable. The reasoning, rather, was that it would not occur at all:

Nor are we convinced, any more than we were in *Branzburg v. Hayes*, that . . . the press will suppress news because of fears of warranted searches. . . . [F]ew instances in the entire United States since 1971 involv[e] the issuance of warrants for searching newspaper premises. This reality hardly suggests abuse; and if abuse

211. As made clear in *P.J. Video*, when, eight years after *Zurcher*, the Court recited the “special protections” afforded some obscenity seizures before declining to extend those protections to the evidentiary seizure before it. See *New York v. P.J. Video, Inc.*, 475 U.S. 868, 874–75 (1986) (“If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible.” (quoting *Heller v. New York*, 413 U.S. 483, 492–93 (1972))).

212. *Zurcher*, 436 U.S. at 567. The warrant did not issue until after the news article on the hospital occupation—the article to which the photographs were related—had been published. *Id.* at 551.

213. Brief for Respondent, *Zurcher*, 436 U.S. 547 (No. 76-1484), 1977 WL 189744, at *3.

214. *Id.* at *19–21, *23–24.

occurs, there will be time enough to deal with it. Furthermore, the press . . . is not easily intimidated—nor should it be.²¹⁵

Just as *Zurcher* conferred no express constitutional blessing on seizures that function as prior restraints, it did not say that evidentiary seizures of First Amendment material should always be permissible without regard for their tendency to chill protected speech. Indeed, the Court declared there would be “time enough to deal with” that brand of abusive seizure.²¹⁶ *Zurcher* simply was not the case that compelled the Court to do so.

Zurcher seemed to flip the obscenity calculus by defining speech protection by reference to Fourth Amendment procedure, not First Amendment substance, but the case rested on the same concerns as *Marcus* and its speech-protective progeny. *Zurcher*’s prescription depended on the Court’s factbound determination that warrants like the one before it carried no risk of prior restraint and no danger of chilling speech. When a seizure presents the threat of either or both, courts should ask whether *Zurcher*’s descriptive dimension—that the Fourth Amendment’s requirements extend “sufficient protection” to First Amendment interests²¹⁷—still holds true.

III. “SUFFICIENT PROTECTION?” THE GONDOLA SEIZURE

In *Zurcher*, the Court asserted that the Fourth Amendment’s requirements afford “sufficient protection” to First Amendment interests when expressive materials are seized.²¹⁸ Part III argues that, although that assessment accurately described *Zurcher*’s facts, it does not hold true for a “typical” citizen-recorder seizure like Gondola’s in New Haven.

215. *Zurcher*, 436 U.S. at 566 (citation omitted) (citing *Branzburg v. Hayes*, 408 U.S. 665 (1972)). In *Branzburg*, the Court held that no “journalist’s privilege” exempted reporters from revealing, before a grand jury, information gleaned from confidential sources. *Branzburg*, 408 U.S. at 692. It is worth noting that in so holding, the Court pointed out that subpoenas to testify involve “no prior restraint,” *id.* at 681, and that the claimed “inhibiting effect” on speech caused by such subpoenas was “to a great extent speculative,” *id.* at 694.

216. *Zurcher*, 436 U.S. at 566. Perhaps disagreeing with the Court’s empirics, perhaps quarreling more with *Zurcher*’s application than with *Zurcher* itself, Professor Akhil Amar criticizes the case as failing to take true account of expressive interests: “The facts in *Zurcher* cried out for comparison with *Wilkes* . . . yet the greatest search and seizure case in Anglo-American history went unmentioned and unanalyzed.” Amar, *supra* note 53, at 805. This Note takes no position on whether *Zurcher* had the empirics right, and, like Professor Amar, argues its rule should not stretch too broadly.

217. *Zurcher*, 436 U.S. at 565.

218. *Id.*

To review the archetype: A citizen observes an arrest in progress and exercises her First Amendment rights by using a cell phone to record it. The suspect resists; an officer uses force to subdue him. The exigent-circumstances doctrine entitles the arresting officer to seize the phone as evidence of a crime—resisting arrest or a similar offense—after determining that without the seizure, the evidence will be lost. Because that test does not inquire into the officer’s subjective state of mind, the Constitution permits the seizure whether the officer legitimately wishes to preserve evidence, or wants only to suppress a record of his own wrongdoing.

By reference to the Court’s twin concerns in cases involving the seizure of protected expression—prior restraints and chilling effects—this Part argues that the Fourth Amendment fails to extend “sufficient protection”²¹⁹ to the First Amendment interests of citizens like Jennifer Gondola.

A. *Cell Phone Seizures and Prior Restraint*

In the *Marcus* line of cases, the Court imposed heightened procedural requirements for *all* obscenity seizures that operated as prior restraints;²²⁰ in *Zurcher*, the Court reaffirmed its commitment to *Marcus*’s principles.²²¹ As discussed, the recording act is protected speech because it is incident to the ultimate speech act of dissemination.²²² A crime-scene seizure, then, imposes a governmental barrier prior to the final act of speech.²²³ The threat of prior restraint therefore permeates Fourth Amendment doctrine as applied to the Gondola seizure. Indeed, for four reasons, this particular restraint is especially problematic.

219. *Id.*

220. *See, e.g.*, *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973) (“Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore.”).

221. *See supra* Part II.B.

222. *See supra* Part I.C–D.

223. The seizure of Gondola’s camera disrupted the “presumptively legitimate distribution or exhibition” of her video just as surely as did the seizure in *Roaden*, *see Roaden*, 413 U.S. at 504; Gondola’s footage did not reach the public until ten days after it was created, *see supra* note 11 and accompanying text. The seizure did not, of course, represent a final restraint on dissemination, but neither did any of the seizures in the *Marcus* line of cases. *See, e.g.*, *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 212–13 (1964) (“Nor is the order . . . saved because, after all 1,715 copies were seized and removed from circulation, P-K News Service was afforded a full hearing on . . . obscenity [I]f seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public in a free society to unobstructed circulation of nonobscene books.”).

First, the restrained publication concerns truthful speech about the administration of government—speech at the First Amendment’s core.²²⁴ Nonobscene sexually explicit speech is not constitutionally “peripheral,”²²⁵ but “[f]reedom of expression has particular significance with respect to government because . . . here . . . the state has a special incentive to repress opposition”²²⁶ If any speech must be handled with kid gloves, it is core political speech like Gondola’s.

Second, the restraint is imposed by an individual deeply interested in suppressing the speech.²²⁷ The circumstances surrounding the Gondola seizure underscore this point dramatically. Sergeant Chris Rubino, the officer who first demanded Gondola’s phone, was the very officer captured in the video with his foot on the handcuffed suspect’s head. That conduct, deemed excessive force by an internal investigation, later earned Rubino a fifteen-day suspension.²²⁸ Rubino’s incentive to block dissemination of the video can hardly be doubted, but the Fourth Amendment provided him authority to do it.

In other words, present doctrine allows the government to restrain the dissemination of speech critical of the government *because* it is critical of the government,²²⁹ moreover, it permits imposition of the restraint *by* the government actor who is being criticized. As far as speech is concerned, it is as if incumbent political candidates had the power to temporarily bar from the airwaves those advertisements critical of their campaigns. That hardly represents “sufficient protection” of expressive interests,²³⁰ and it comports

224. See *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[A] major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”).

225. *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961) (“[T]he line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed or punished is finely drawn.” (alteration in original) (quoting *Speiser v. Randall*, 357 U.S. 513, 525)).

226. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (quoting THOMAS EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 9 (1966)) (quotation marks omitted).

227. See Crawford & Hudson, *supra* note 39.

228. *New Haven Sergeant Suspended for Excessive Force*, NBC CONN. (Aug. 17, 2012, 2:28 PM), <http://www.nbcconnecticut.com/news/local/New-Haven-Sergeant-Suspended-for-Excessive-Force--166563406.html>.

229. See *supra* note 39 and accompanying text.

230. Cf. *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978).

poorly with a jurisprudence that has refused to countenance even temporary restraints imposed by a disinterested magistrate.²³¹

Third, such a seizure restrains the dissemination of a unique item of media, and for a time keeps that item from the market entirely. One reason the Court disfavors prior restraints is that, unlike *ex post* penalties, they prevent speech from reaching the public in the first instance. That concern runs through the obscenity-seizure cases. As the Court wrote of the seizure in *Marcus*, “The public’s opportunity to obtain the publications was thus determined by the distributor’s readiness and ability to . . . obtain[] and sell[] other copies”²³²

A seizure like the one in New Haven works a more significant deprivation. In *A Quantity of Copies of Books*, the state did not seize every extant copy of *Backstage Sinner* or *The Wife-Swappers*.²³³ The people of Kansas—or at least some people, somewhere—were presumably able to procure the titles from distributors other than P-K News Service.²³⁴ Not so in New Haven. When Rubino seized Gondola’s phone, only one copy of her video existed, because Gondola had just filmed the arrest and had not duplicated the file. For the ten days it was retained by the police, the video, unlike *Backstage Sinner* or *The Wife-Swappers*, was blocked entirely from public consideration.

Fourth, the speech restrained in New Haven was time sensitive because it was news.²³⁵ One might plausibly criticize a case like *A*

231. See *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 208–10 (1964) (invalidating a search warrant issued by a district judge who “scrutinized” the seized books in advance).

232. *Marcus v. Search Warrant*, 367 U.S. 717, 736 (1961).

233. See *A Quantity of Copies of Books*, 378 U.S. at 211 (explaining that the distributor’s ability to circulate the titles depended on whether it undertook to procure other copies); see also *id.* at 215 n.1 (Harlan, J., dissenting) (noting the books’ titles). Likewise, in *Roaden*, Pulaski County seized one copy of *Cindy and Donna*—every copy owned by the theatre, but by no means every copy in the world. *Roaden v. Kentucky*, 413 U.S. 496, 497, 504 (1973).

234. See *A Quantity of Copies of Books*, 378 U.S. at 211 (“Their ability to circulate their publications was left to the chance of securing other copies” (quoting *Marcus*, 367 U.S. at 736)).

235. The Court’s reluctance to countenance prior restraints on the publication of news is dramatically chronicled in *New York Times Co. v. United States*, 403 U.S. 713 (1971) (*per curiam*). In *New York Times*, the government sought to enjoin the *Times* and the *Washington Post* from publishing the “contents of a classified study” on American involvement in Vietnam. *Id.* at 714. The government asserted that publication would compromise efforts to end the conflict and secure the return of prisoners of war. Floyd Abrams, *The Pentagon Papers After Four Decades*, 1 WAKE FOREST J.L. & POL’Y 7, 12 (2011). Refusing to grant the injunction, Justice Stewart charged the government with an enormously high burden in his controlling concurrence: “I cannot say that disclosure . . . will surely result in *direct, immediate, and irreparable damage to our Nation* [T]here can under the First Amendment be but one

Quantity of Copies of Books for its somewhat formalistic approach to prior restraints: the challenged Kansas statute provided for a prompt postseizure hearing on obscenity,²³⁶ and perhaps the short delay in the public's access to the seized books made, on the whole, little matter. Even if that reasoning withstands scrutiny with respect to salacious literature, it does not with respect to a video like Gondola's. The New Haven footage depicted a recent event—an arrest that would have been reported as news, filmed or not. The natural and most effective time to disseminate video of an occurrence is in its immediate aftermath, not ten days later,²³⁷ and, though footage of a violent arrest might be newsworthy in its own right whenever published, it doubtless loses punch as the arrest recedes into the past.²³⁸

B. Cell Phone Seizures and Chilling Effects

Zurcher rested in part on empirical rejection of the chilling-effects reasoning underlying decisions like *Marcus*. And so in determining whether *Zurcher*'s broad edict ought to govern the seizure of Gondola's phone, it is appropriate to ask: If police are permitted to seize cell phones in situations like the one in New Haven, is it likely that citizens will decline to record police activity? For four reasons, the answer is almost certainly yes.

First, in some circumstances, the evidentiary seizure of a cell phone could give rise to the owner's criminal liability. A phone capable of recording police can obviously record other activities, too, generally in the form of pictures as well as videos. To retrieve the sought evidence, an officer would have to maneuver through other videos and photos stored in the phone's memory. Any incriminating

judicial resolution" *New York Times*, 403 U.S. at 730 (Stewart, J., concurring) (emphasis added). The Fourth Amendment was conceived in part as a means to secure the freedoms of speech and press. *See supra* note 115 and accompanying text. It is ironic that the government has *more* power to restrain speech, not less, in First Amendment cases that also implicate the Fourth Amendment.

236. *A Quantity of Copies of Books*, 378 U.S. at 213.

237. *See supra* note 11 and accompanying text.

238. In New Haven, Gondola's video was released on June 12, 2012—ten days after it was created—and still precipitated significant public reaction. *See supra* note 11 and accompanying text. But the video itself had become a news item several days earlier on June 4, when it was reported that Gondola had been arrested and her phone seized. *See Bass, supra* note 1. It is impossible to say whether the footage would have sparked any outcry or discipline against Rubino, *see supra* note 228 and accompanying text, had it been quietly released ten days after an arrest occupying no special place in the public memory.

material encountered in the process would become, under the plain view doctrine, evidence usable against the phone's owner.²³⁹

Such governmental windfall has convicted more than one hapless cell phone user. In *United States v. Yockey*,²⁴⁰ for instance, the defendant was arrested for driving with a suspended license.²⁴¹ When the arresting officer tried to turn off the man's cell phone in compliance with police procedure, he accidentally accessed a photo of a naked teenager. The defendant was convicted on that basis of possessing child pornography.²⁴² Similarly, in *State v. Carroll*,²⁴³ an officer retrieved a cell phone dropped by a fleeing suspect and noticed that the phone's display screen was an image of the suspect smoking marijuana.²⁴⁴ That observation helped procure a search warrant for the defendant's phone,²⁴⁵ and the search uncovered more incriminating evidence.²⁴⁶

Whatever their salutary effect on law-enforcement interests, such occurrences hardly encourage the valuable practice of monitoring police. One expects that the indiscreet of society, knowing the contents of their own photographic libraries, would disincline toward filming an arrest—to the First Amendment's loss.

Second, a police officer retrieving one evidentiary video from a collection of other files might encounter files that are not incriminating, but are intensely private. In *Newhard v. Borders*,²⁴⁷ for example, an officer conducting an inventory search of an arrestee's cell phone happened upon nude photos of the man and his girlfriend in "sexually compromising positions."²⁴⁸ Amused, he shared the images with other officers.²⁴⁹ A 2010 study found that twenty-five percent of Facebook profiles belonging to college students contain

239. See, e.g., *United States v. Yockey*, 654 F. Supp. 2d 945, 957 (N.D. Iowa 2009) ("Police may seize, without a warrant, an item that is 1) in plain view 2) when it is observed from a lawful vantage point, 3) where the incriminating character of the item is immediately apparent." (quoting *United States v. Banks*, 514 F.3d 769, 774 (8th Cir. 2008) (citing *Horton v. California*, 496 U.S. 128, 136–37 (1990))).

240. *United States v. Yockey*, 654 F. Supp. 2d 945 (N.D. Iowa 2009).

241. *Id.* at 949.

242. *Id.* at 948–50.

243. *State v. Carroll*, 778 N.W. 2d 1 (Wis. 2010).

244. *Id.* at 5.

245. *Id.* at 5–6, 30–31.

246. *Id.* at 6–7, 32.

247. *Newhard v. Borders*, 649 F. Supp. 2d 440 (W.D. Va. 2009).

248. *Id.* at 444.

249. *Id.* The court held that the arrestee had no constitutional remedy. *Id.* at 443.

“seminude or sexually provocative photos”²⁵⁰—and such photos are often captured first on a camera phone. Even more discreet forms of communication—say, expressions of endearment from a significant other—are likely not the sort of thing most people prefer to air publicly. In short, it seems reasonable for even the law abiding to desire that cell phone content remain private, and probable few would jeopardize that privacy interest for the sake of watching the watchmen.

Third, the loss of a cell phone for ten days²⁵¹ is enormously inconvenient. In a typical day, an average American cell phone user makes or receives more than thirteen calls on the device; that same person sends or receives forty-one text messages.²⁵² More than half of people who own cell phones—and 77 percent of users between the ages eighteen and twenty-nine—regularly use their phones to access the Internet.²⁵³ Similar numbers use their phones to send email.²⁵⁴ It is unsurprising that nine out of ten cell phone users feel safer and more connected to family and friends because of their phones,²⁵⁵ and that nearly three out of ten “can’t imagine living without” their cell phones.²⁵⁶ It would be a conscientious citizen indeed who offered up ten days of communication and information seeking for the sake of some abstract constitutional value.

Fourth, for citizen-recorders, there is little that counterbalances the disincentives to film. “[T]he press,” wrote the Court in *Zurcher*, “is not easily intimidated.”²⁵⁷ And it is true that the formal press has good reasons not to forgo publication for fear of a later search; a

250. Joy Peluchette & Katherine Karl, *Examining Students’ Intended Image on Facebook: “What Were They Thinking?!”*, 85 J. ED. FOR BUS. 30, 30 (2010).

251. See Bass & MacMillan *supra* note 11 (reporting that Gondola’s cell phone was returned after ten days).

252. AARON SMITH, PEW RESEARCH CTR., AMERICANS AND TEXT MESSAGING 3, 6 (2011), available at <http://www.pewinternet.org/~media/Files/Reports/2011/Americans%20and%20Text%20Messaging.pdf>.

253. MAEVE DUGGAN & LEE RAINIE, PEW RESEARCH CTR., CELL PHONE ACTIVITIES 2012, at 6 (2012), available at http://www.pewinternet.org/~media/Files/Reports/2012/PIP_CellActivities_11.25.pdf.

254. *Id.* at 7.

255. AMANDA LENHART, PEW RESEARCH CTR., CELL PHONES AND AMERICAN ADULTS 2 (2010), available at http://pewinternet.org/~media/Files/Reports/2010/PIP_Adults_Cell_phones_Report_2010.pdf.

256. PEW RESEARCH CTR., PEW INTERNET & AMERICAN LIFE PROJECT: SPRING TRACKING SURVEY 22 (2012), available at http://pewinternet.org/~media/Files/Data%20Sets/2012/April_2012_Mobile_Topline.doc.

257. *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978).

compelling one is that news stories sell papers. No comparable incentive moves the citizen-recorder. The benefits of police monitoring distribute throughout society,²⁵⁸ but the costs fall only upon the person whose cell phone is seized as evidence. This calculus suggests a reverse tragedy of the commons—one in which almost no citizens use the public square to record police activity.

In sum, *Zurcher*'s prescription for resolving the tension between the First and Fourth Amendments rested on empirical claims about the Fourth Amendment's capacity to guard against the dangers of prior restraints and chilling effects on speech. Those claims accurately described *Zurcher*'s facts, but they do not hold true with respect to seizures like the one in New Haven. Such seizures allow for the imposition of prior restraints that threaten speech to a more significant extent than the procedures struck down in cases like *Marcus*. Moreover, the facts surrounding cell phone seizures suggest a strong possibility of speech deterrence. Recognizing these two dangers and hearkening to the principle of *Roaden*,²⁵⁹ courts should view cell phone seizures, like obscenity seizures, as good candidates for heightened protection.

IV. A NEW PRESCRIPTION

Like the seizures of alleged obscenity in the *Marcus* line of cases—and unlike the facts in *Zurcher*—the exigent-circumstances seizure of a cell phone used to record a violent arrest presents the risks of prior-restraint and speech-chilling effects. *Marcus* and its progeny guarded against those threats by imposing procedural requirements beyond the normal dictates of the Fourth Amendment, chiefly in the form of mandatory preseizure adversary proceedings on the question of obscenity.²⁶⁰ That dictate, the Court reasoned, would

258. The chief benefit being greater adherence by police to norms of fairness and justice, as a result of the increased accountability that filming occasions. See Claiborne, *supra* note 46, at 505–06 (“By recording the police, officers can be held accountable for their abuse of authority. Allowing citizens to record the police would encourage law enforcement officials to be on their best behavior.”).

259. “A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.” *Roaden v. Kentucky*, 413 U.S. 496, 501 (1973).

260. See, e.g., *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964) (“It is our view that since . . . [the plaintiff] was not afforded a hearing on the question of the obscenity even of the seven novels before the warrant issued, the procedure was . . . constitutionally deficient.”).

adequately protect First Amendment interests while accommodating the state's interest in regulating obscenity.²⁶¹

The trick in the context of cell phone seizures is to determine whether any procedures can guard against First Amendment harms while preserving the state's interest in acquiring crime evidence. Few would argue, for instance, that police should not have authority to obtain a video that captures a shooting and the attendant arrest of the suspect. Society has a weighty interest in catching murderers, and if holding cell phone seizures unreasonable would prevent police from doing that, perhaps the First Amendment harm is worth the candle.

A solution, then, must grant the police latitude to investigate crime, but allow Gondola to keep her phone. This Part explores three possible alternatives to physical seizure, concluding that the last—the “seizure” of video files by electronic transmission, not physical confiscation—can accommodate all interested parties.²⁶² Given the existence of at least one less-intrusive, speech-protective alternative,²⁶³ courts should hold physical seizures unreasonable, trusting the

261. *See id.* (“State regulation of obscenity must ‘conform to procedures that will ensure against the curtailment of constitutionally protected expression, which is often separated from obscenity only by a dim and uncertain line.’” (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963))).

262. There is certainly authority for the proposition that the Constitution—or the Court—can impose procedural requirements that seem more legislative than judicial. *Marcus* and its progeny, for instance, held that the First Amendment demanded adversary proceedings in advance of obscenity seizures, *see supra* Part II.A., and *Dickerson v. United States*, 530 U.S. 428 (2000), affirmed the constitutional provenance of *Miranda* warnings. *Id.* at 431–32. But here there is no need. If police officers are simply disallowed to physically seize cell phones that citizens use to film arrests, the political branches—generally responsive to the needs of law enforcement—should have no trouble following the example of the District of Columbia, *see infra* Part IV.C., and prescribing procedures that serve police within constitutional limits.

263. Granted, Fourth Amendment jurisprudence is not generally marked by the weighing of government alternatives in the same manner as, say, equal-protection case law. *See, e.g., City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (“There is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based quota.”). But inquiry into the existence of less-intrusive means is no stranger to the law of search and seizure, particularly when, as here, the *manner* of search or seizure is at issue. In such cases, the Court has often determined “reasonableness” by asking whether a certain level of intrusion was really necessary. *See, e.g., Wilson v. Arkansas*, 514 U.S. 927, 935–36 (1995) (holding that a search of a dwelling may be unreasonable if officers do not first “knock and announce” because unannounced, forcible entry can damage property and cause undue intrusion—but that unannounced entry is reasonable if necessary to preserve officer safety or evidence); *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (explaining that when determining whether an officer used excessive force in violation of the Fourth Amendment, “[t]he calculus of reasonableness . . . [contemplates] the amount of force that is necessary in a particular situation”).

political branches to articulate and implement this new procedural safeguard.²⁶⁴

A. *Judicial Intervention*

The obscenity-seizure cases called for heightened judicial scrutiny in the form of adversary action;²⁶⁵ the *Zurcher* Court avowed its faith in the ability of magistrates to weigh First Amendment interests in crafting warrants for news offices.²⁶⁶ Requiring judicial involvement in cell phone seizures, rather than delegating blanket authority to the officer in the field, would doubtless be a sound starting point for increased protection of speech.

But such a requirement runs headlong into the state's interest in preserving crime evidence: the *raison d'être* of the exigent-circumstances exception is that some evidence tends to disappear. A cell phone, itself mobile and concealable, possessed by an anonymous recorder who captures a video, which could easily be deleted instead of preserved and posted online, doubtless qualifies. In the "now or never"²⁶⁷ circumstances animating the exception, mandatory judicial intervention answers "never," overbalancing toward speech protection while ignoring the interests of law enforcement. It is no solution.

B. *The Proportionality Principle and Crime Severity*

Zurcher fails to adequately protect First Amendment interests in the context of cell phone seizures because the same Fourth Amendment that justifies the legitimate evidentiary seizure of a recording of a shooting, and the shooter's apprehension, also justifies the pretextual seizure of a video of a suspect who is resisting arrest. Professor Christopher Slobogin has argued for the increased use of a proportionality framework in Fourth Amendment doctrine. Under the proportionality principle, "[a] search or seizure is reasonable if the strength of its justification is roughly proportionate to the level of intrusion."²⁶⁸ In a similar vein, Professor Jeffrey Bellin has criticized

264. Or—because this *particular* measure is not constitutionally mandated, *see supra* note 262—implement any other procedure responsive to the concerns described in Part III.

265. *See supra* notes 260–61 and accompanying text.

266. *Zurcher v. Stanford Daily*, 436 U.S. 547, 567 (1978).

267. *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973).

268. Christopher Slobogin, *Let's Not Bury Terry: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053, 1054 (1998). Assuming the strength of a

the transsubstantive nature of Fourth Amendment doctrine, calling for the consideration of crime-severity distinctions in determining what searches and seizures are “reasonable.”²⁶⁹ It is tempting to posit a crime-severity framework as a means to protect First Amendment interests. Such a framework could permit the seizure of cell phone video for some crimes (like murder) but not for others (like resisting arrest).

But crime-severity analysis is ill-suited to the task. As an initial matter, any effective doctrinal response to the problem of citizen-recording must alleviate the chilling effect of seizures upon speech. If the authority of police to seize video depended on the categorization of the recorded crime, only citizens familiar with the system of categorization could safely predict whether they could record without fear of seizure. Such uncertainty would merely encourage citizens to “steer far wider of the forbidden zone than they otherwise would,”²⁷⁰ and serve to chill the behavior that categorization was designed to promote.

Moreover, to effectively guard against First Amendment harms, a crime-severity framework would have to classify a crime like resisting arrest as nonserious. That crime, after all, provides the Fourth Amendment hook for the paradigmatic seizure in *New Haven*.²⁷¹ As a normative matter, the law should not characterize behavior that endangers a police officer as insufficiently serious to warrant robust investigation. As a practical matter, the line between resisting arrest and assaulting a police officer—surely a crime of high gravity—can be uncertain.²⁷² Because classification of the crime at

seizure’s justification increases with the magnitude of the underlying crime, the proportionality principle provides a theoretical basis for defining reasonableness by reference to crime severity.

269. Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1, 4–5 (2011). The “transsubstantive” Fourth Amendment, he writes, “generally treats all crimes alike. . . . [T]he legal standard for evaluating a search (or seizure) is the same whether a police officer suspects that a person jaywalked or is the Green River Killer.” *Id.*

270. *Maryland v. Macon*, 472 U.S. 463, 476 (1985) (Brennan, J., dissenting).

271. *See supra* note 34 and accompanying text.

272. Under Connecticut General Statutes § 53a-167a, a person is guilty of the class A misdemeanor of interfering with an officer when he “obstructs, resists, hinders or endangers any peace officer” in the performance of the peace officer’s duties. CONN. GEN. STAT. § 53a-167a (2010). Under § 53a-167c, a person is guilty of the class C felony of assaulting an officer when, “with intent to prevent a reasonably identifiable peace officer . . . from performing his or her duties,” he “causes physical injury to such peace officer.” *Id.* § 53a-167c. For a suspect who violently resists arrest—like the suspect detained by Sergeant Rubino—the only element separating the misdemeanor from the felony is physical injury to the officer.

issue would fall to the officer in the field, this approach would merely re-vest that officer with sufficient discretion to suppress a recording by seizure. It would thus scarcely avoid the danger of prior restraint that plagues the present doctrine.

Finally, the facts of the New Haven seizure confound resolution by reference to crime severity because Gondola's video recorded two wrongful acts: the suspect interfering with officers and Rubino employing excessive force in the arrest. Defining footage as subject to seizure strictly according to crime severity would create a doctrinal oddity in which the more egregiously an officer behaved on camera, the more likely police would be justified in effecting a seizure—a somewhat perverse result. That is not to say that police may not occasionally have a legitimate interest in preserving evidence of potential official misconduct, but it surely indicates that a crime-severity framework, standing alone, is not the answer to the New Haven problem.

C. *A Technological Problem, a Technological Solution*

In the obscenity cases, the Court quieted First Amendment threats by mandating pre-seizure adversary proceedings to parse obscenity from protected speech. *Zurcher* presented a different issue because the seized materials were concededly protected, but the Court expressed faith that magistrates could tailor warrants to avoid the imposition of prior restraints on publication and the sort of unduly intrusive seizures that might chill press activity. Cell phone seizures seem to present an intractable problem: the sought material is First Amendment material, as in *Zurcher*, but here, Fourth Amendment doctrine can only deliver that material to the state if it countenances the risks of prior restraint and chilling effects.

Advances in technology created Gondola's problem; fittingly, they can solve it, too. If police "seize" cell phone video by obtaining an electronic duplicate of the sought file, instead of physically seizing the phone itself, First Amendment concerns dissipate without offense to law-enforcement needs. Courts, recognizing the viability of this speech-protective alternative,²⁷³ need do no more than hold physical seizures unreasonable, leaving the procedural particulars to the political branches.²⁷⁴

273. See *supra* note 263.

274. As explained above, the Court in some cases invalidated seizures of obscenity because the seizures violated the First Amendment, in other cases because the seizures were

This proposed framework derives from a general order promulgated by the District of Columbia Police Department in July of 2012. The order “recognizes that members of the general public have a First Amendment right to video record . . . [police officers] . . . acting in an official capacity in any public space.”²⁷⁵ It prescribes that so long as recording does not interfere with an officer’s safety, officers may not order citizens to stop recording or even obstruct filming.²⁷⁶ Finally, the order addresses recordings reasonably thought to contain evidence of a crime:

If [an officer] has probable cause to believe that a . . . recording device contains . . . evidence of criminal acts, the [officer] shall request that the person . . . voluntarily transmit the images or sound via text message or electronic mail to the [officer’s] official government electronic mail account.²⁷⁷

By constructively imposing this procedural requirement on police departments,²⁷⁸ courts could at a stroke solve every First Amendment problem raised by cell phone seizures. Following electronic transmission, the citizen-recorder retains and is free to disseminate a video recording, obviating the threat of prior restraint. The citizen likewise retains the phone itself, and so is spared the inconvenience that occurs when a phone is seized. Moreover, because the phone user, not the officer, retrieves and sends the video, the procedure implicates no privacy concerns. There seems little chance, then, that seizures-by-transmission will chill protected speech.

What is more, the procedure protects law-enforcement interests almost as well as would blanket authority to physically seize cell phones: in a seizure like the one in New Haven, the law’s legitimate interest in preserving evidence attaches entirely to the video, not to

unreasonable under the Fourth. *See supra* note 143. Convinced of the notion of “constitutional reasonableness” underlying *Roaden* and espoused by Professor Amar, *see Amar, supra* note 53, at 805, this Note adopts the latter position.

275. D.C. POLICE DEP’T, GENERAL ORDER NO. 304-19, VIDEO RECORDING, PHOTOGRAPHING, AND AUDIO RECORDING OF METROPOLITAN POLICE DEPARTMENT MEMBERS BY THE PUBLIC 1 (2012), available at https://go.mpdconline.com/GO/GO_304_19.pdf.

276. *Id.* at 2.

277. *Id.* at 3. If a person refuses either to give the recording device to police or to transmit the file electronically, the officer must call his or her supervisor, explain the justification for the seizure, and, if justified, retain the device for only as long as it takes to secure a warrant. *Id.* at 4-5.

278. That is, by simply holding a physical seizure is unreasonable, leaving the political branches to implement the suggested procedure (or a similarly effective one). *See supra* note 262.

the recording device.²⁷⁹ The one plausible drawback that comes to mind is delay. In most cases, it would probably take longer to arrange electronic transmission than to physically seize a phone.

That should rarely matter. Time is often of the essence when police act, but an officer trying to obtain evidence of a crime has shifted from crime response to crime investigation. It seems doubtful that many officers would begin to actively gather evidence from bystanders until the scene had been secured and safety restored, and in the vast bulk of cases, those circumstances should allow time for electronic transmission. In New Haven, for instance, officers had ably subdued the suspect by the time Rubino demanded Gondola's phone.

In the rare cases when police believe they *must* physically seize a phone to preserve evidence, an exception may be appropriate. Such seizures work First Amendment harms, so it is sensible to turn to First Amendment doctrine and subject them to strict scrutiny,²⁸⁰ permitting only those physical seizures necessary to serve a compelling government interest.²⁸¹ The government doubtless has a compelling interest in preventing crime,²⁸² but most physical seizures would fail for tailoring: if the video would be needlessly cumulative evidence, or the officer could have delayed seizure until the scene was secure, or another officer could have effected a seizure-by-transmission, then the physical seizure would have been unnecessary. The state's low success rate in physical-seizure cases,²⁸³ and the rarity

279. Indeed, there is a good argument that this arrangement serves law enforcement *better* than a blanket authority to seize. Insofar as the present regime deters citizens from recording, it prevents evidence from coming into existence in the first place. The Court has adopted this reasoning to justify the creation of evidentiary privileges: if a person knows that the words he or she utters in a psychotherapy session can later be used as evidence, the words will never be uttered. The government is similarly situated under the privilege regime and the no-privilege regime—it has no usable evidence in either case—so the no-privilege regime should be rejected as denying a benefit to the privileged party without conferring a complimentary advantage on the government. *See Jaffe v. Redmond*, 518 U.S. 1, 11–12 (1996) (“Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access—for example, admissions against interest by a party—is unlikely to come into being.”).

280. A species of balancing test that is, as described above, not entirely foreign to Fourth Amendment jurisprudence. *See supra* note 263.

281. *See United States v. Alvarez*, 132 S. Ct. 2537, 2549 (2012) (describing strict scrutiny's interest and tailoring requirements).

282. *United States v. Salerno*, 481 U.S. 739, 749 (1987).

283. These would nearly all be civil rights actions brought by citizen-recorders. The criminal defendants captured on video would play little role in vindicating the rights of their filmers, because only a party whose own Fourth Amendment rights have been violated may assert them. *Rakas v. Illinois*, 439 U.S. 128, 133–34 (1978).

with which officers will feel the need to resort to them, should result in few physical seizures—and a citizenry free to guard the guards.

CONCLUSION

In recent years, citizens like Jennifer Gondola have exploited new technology to capture footage of police misconduct and disseminate it to a wide audience. By monitoring and criticizing the administration of government, citizen recorders act in the First Amendment's greatest tradition. Their conduct is protected by its guarantees. But Fourth Amendment doctrine, as enunciated in *Zurcher v. Stanford Daily*, permits in many cases on-the-ground evidentiary seizure of cell phones used to record arrests. Such seizures can function as particularly dangerous prior restraints on speech, and they also chill important First Amendment behavior.

Zurcher held that Fourth Amendment procedure is generally sufficient to protect First Amendment interests when expressive materials are seized, but courts should be hesitant to apply that holding to cases like Gondola's. When *Zurcher* limited speech protection to the Fourth Amendment's strictures, it relied on two critical conclusions: the facts before the Court carried neither a danger of prior restraint nor the risk of chilling protected speech. Cell phone seizures present both threats. With respect to Gondola's case, *Zurcher's* thesis fails.

Courts should therefore look beyond *Zurcher* to cases like *Marcus v. Search Warrant*, in which the Court found that the seizure of alleged obscenity functioned as a prior restraint and would chill protected speech. In *Marcus* and its progeny, the Court held that those dangers rendered otherwise unobjectionable seizures unreasonable, justifying the imposition of heightened procedural requirements crafted to protect expressive interests.

Cell phone seizures deserve heightened protection in the tradition of *Marcus*. The best solution is for courts to simply hold such seizures unreasonable, permitting the political branches to prescribe electronic transmission as the proper means of "seizure." Such a regime would serve law enforcement as well as the one in place today, if not better. And it would guarantee to the people a powerful new tool to vindicate an interest more ancient than the First Amendment itself.