ALL THE WORLD WIDE WEB IS A STAGE: FREE SPEECH, EXPRESSIVE ASSOCIATION, AND THE RIGHT TO CHOOSE YOUR AUDIENCE

Abstract: To determine whether punishing the disclosure of illegally obtained information violates the First Amendment's guarantee of freedom of speech, the Supreme Court currently applies a public concern test. Previously, the primary example of this conflict was the use of state or federal wiretapping statutes to punish television journalists broadcasting wiretapped conversations. Today, the same statutes may punish individuals distributing similar recordings on the Internet. Because of the increasing importance of online communication and the increasing concern about offline conduct being posted online, an appropriate First Amendment framework must balance the rights of the public to obtain information, the rights of the media to disclose information, and the rights of speakers to determine their audience. The public concern test fails in this endeavor. Instead, courts should balance the right to disclose the recording against the recorded speaker's right to freedom of association. This approach rejects a dichotomy between public and private as ill-suited to online communication and instead focuses on protecting the rights of speakers to choose their audience. Grounded in the First Amendment's protection of expressive association and anonymous speech, this Note proposes that the need to protect unpopular or minority viewpoints from unwanted online publicity justifies limits on the dissemination of certain types of recordings.

Introduction

Imagine that someone running for local office calls a friend.[1] They discuss a local union race and mention they want to "blow [the] porches" off the opposition.[2] This phone call is surreptitiously wiretapped, which is against federal law.[3] The next day, the phone call is broadcast on a local radio talk show.[4] Based on the cause of action created by

[1] *See* Bartnicki v. Vopper, 532 U.S. 514, 518–19 (2001) (presenting a similar factual scenario).

[2] *See id.* (quoting plaintiff as saying, "If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . . To blow off their front porches, we'll have to do some work on some of those guys." (alteration in original)).

[3] *See id.* at 517.

[4] *See id.* at 519.

anti-wiretapping statutes—laws that prohibit the creation and distribution of surreptitious recordings—the recorded candidate sues the radio host.[5] The candidate loses.[6]

In *Bartnicki v. Vopper*, decided in 2001, the U.S. Supreme Court held that a media outlet, like the radio host, who receives a recording without knowledge of the illegal activity, cannot be punished consistent with the First Amendment when the subject of the recording is a matter of public concern, such as speech about political issues but not "daily life" or entertainment issues.[7]

Fast forward ten years, and imagine that someone gave the recording to a blogger instead of a talk show host.[8] The case presents the same facts and arises under the same statutes, but would the outcome be the same if the recording at issue is posted on the Internet?[9] What about the woman who fell into a fountain at a mall while sending a text message and recently brought suit against the mall security personnel who posted the misadventure online?[10] Today, the proliferation of camera phone recording and Internet video-sharing technology increases the likelihood of wiretapping suits brought against individual, nonmedia defendants and of constitutional challenge to anti-wiretapping statutes.[11]

When balancing an anti-wiretapping statute's goal of preventing the chilling of private discourse and the First Amendment's goal of limiting tort liability in situations where it might chill public discourse on a

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[5] *See id.*

[6] *See id.* at 518.

[7] *See Bartnicki*, 532 U.S. at 518; Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan. L. Rev. 1049, 1095 (2000) (explaining the scope of the public concern test).

[8] *See* Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. Pa. L. Rev. 335, 337 (2011) (examining when the First Amendment should protect image capture).

[9] *See id.* Although no case has squarely addressed the issue, some scholars have considered the impact of camera phone technology and the Internet on freedom of speech and privacy. *See id.*; Jacqueline D. Lipton, *"We, the Paparazzi": Developing a Privacy Paradigm for Digital Video*, 95 Iowa L. Rev. 919, 926–32 (2010).

[10] *See* Debra Cassens Weiss, *Woman Whose Fountain Fall Is a YouTube Hit Considers Suing over Video Release*, A.B.A. J. (Jan. 21 2011), http://www.abajournal.com/news/article/women_whose_fountain_fall_is_a_youtube_hit_considers_suing_over_video_relea/it_considers_suing_over_video_relea/ (describing why a woman who fell in a mall fountain while texting was considering suing the person who posted the surveillance video of her fall online).

[11] *See generally* Kreimer, *supra* note 8 (examining legal challenges created by the prevalence of digital image capture technology).

particular subject, two First Amendment values inevitably collide.[12] Which values are more important: the public speech or the private speech, the public's right to know and learn through robust public discourse or an individual's rights to associate privately to discuss controversial issues?[13]

Here, determining whether the disclosed matter is of public concern, as the Supreme Court did in *Bartnicki*, is frequently futile.[14] If we want the First Amendment to encourage discourse on a broad range of issues, we presumably want to encourage that information to be discussed both privately and publicly.[15] In his concurring opinion in *Bartnicki*, Justice Stephen Breyer highlighted this intuition—that wiretapping statutes have both speech-enhancing and speech-restricting effects.[16] Although Justice Breyer ultimately used the majority's public concern test, his opinion provides a starting point for a more practical way to balance the right to private conversation, the right of the public to receive information, and the right of the media to disclose information.[17]

This Note argues that the First Amendment's protection of both private and public expressive association and its near absolute protection for the publication of speech on matters of public concern are irreconcilable as applied to online speech and should be replaced with a framework that recognizes the rights of speakers to control their audience.[18] Furthermore, the wide availability of video and audio recording technology, coupled with the ability of individuals to rapidly and widely disseminate information both to their peers and others makes collision between these two values inevitable in the digital age.[19] Thus, develop-

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[12] *See Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring) (observing that anti-wiretapping statutes have both speech-restricting and speech-enhancing effects because privacy can encourage expression); *see also* Paul Gerwirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 140 (criticizing the majority in *Bartnicki* for not giving enough weight to the speech-enhancing effects of privacy in communication).

[13] *See Bartnicki*, 532 U.S. at 554 (Rehnquist, C.J., dissenting) ("By protecting the privacy of individual thought and expression, [wiretapping] statutes further the uninhibited, robust, and wide-open speech of the private parties." (citations and internal quotation marks omitted)).

[14] *See id.*

[15] *See id.*

[16] *See id.* at 536 (Breyer, J., concurring).

[17] *See id.* at 535; *see also* Gerwirtz, *supra* note 12, at 158 (explaining the speech-enhancing effect, speech-restricting effect test proposed by Justice Breyer).

[18] *See infra* notes 193–305 and accompanying text.

[19] *See, e.g.*, Josh Blackman, *Omniveillance, Google, Privacy in Public, and the Right to Your Digital Identity: A Tort for Recording and Disseminating an Individual's Image over the Internet*, 49

ing a coherent constitutional framework to evaluate the validity of wiretap statutes and other laws passed to protect privacy and association rights from online disclosure is extremely important.[20] Currently, states lack a uniform approach to anti-wiretapping laws designed to protect individuals against the intrusive disclosure of sound and video recordings, and in response to online mischief, many states have passed or are considering laws that more aggressively prohibit such disclosures.[21]

Part I of this Note examines how *Bartnicki* immunizes speakers who make certain disclosures from punishment and surveys associational freedom cases and their protection of conversations against disclosure.[22] Part II illustrates advances in Internet video-sharing and social media technology that carry important implications for the analysis of these conflicting rights.[23] Part III then proposes an associational freedom framework for balancing the public's right to know, the media's right to disclose, and the rights of the literal speaker.[24] This Part also argues that this approach would help courts reach different, more desirable results than either the current public concern approach or a more privacy-protective approach.[25]

Santa Clara L. Rev. 313, 314 (2009) (arguing for a right against third-party recording); Kreimer, *supra* note 8, at 339 (advocating for a right to record and photograph).

[20] *See* Lipton, *supra* note 9, at 926–32 (listing recent state law approaches to punishing the dissemination of surreptitious photographing and recording). Although many scholars have critiqued *Bartnicki* from a privacy-protective perspective, scholars have not grounded criticism in the First Amendment's protection of association. *See, e.g.*, Gerwirtz, *supra* note 12, at 140; Lipton, *supra* note 9, at 920; Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 Duke L.J. 967, 976 (2003). Outside the recording context, expanding protection for freedom of association to online speech has been addressed by at least one scholar. *See* Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. Rev. 741, 784 (2008) (arguing that First Amendment protection of freedom of association should regulate how the government monitors Internet traffic data). This scholar, however, focuses on protecting individuals against government surveillance, not against private-party recordings. *See id.*

[21] *See* Lipton, *supra* note 9, at 726–32.

[22] *See infra* notes 26–110 and accompanying text.

[23] *See infra* notes 111–192 and accompanying text.

[24] *See infra* notes 193–305 and accompanying text. This Note uses the term "literal speaker" to distinguish the recorded party from other speakers like the media who relay the information. *See infra* notes 193–305 and accompanying text.

[25] *See infra* notes 193–305 and accompanying text.

I. Conflicting Speech Rights: Requiring Disclosure on Matters of Public Concern and Prohibiting Disclosures That Chill Association

Usually, the public concern test is used as a defense to a claim brought under an otherwise valid, generally applicable statute that incidentally restricts speech.[26] Effectively, defendants can use the First Amendment as a trump card—even if the defendant did what the statute prohibited, the defendant argues his conviction is unconstitutional because the First Amendment always protects speech on matters of public concern.[27] In the face of laws that punish certain kinds of speech, exempting speech of public concern enhances discourse by encouraging more disclosure.[28]

Associational freedom and anonymity cases, however, enhance speech in a different way.[29] The protection of associational freedom and anonymous speech focuses on the rights of speakers to be free from governmental interference with either their messages or the scope of their audiences based on the assumption that unwanted speech or disclosures might chill the discourse of the group.[30] Thus, in contrast to protecting speakers who disclose information of public concern, associational freedom and anonymity cases establish that the First Amendment can protect speakers from disclosure.[31]

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[26] *See* Eugene Volokh, *Freedom of Speech and Intellectual Property: Some Thoughts After* Eldred, 44 Liquormart, *and* Bartnicki, 40 Hous. L. Rev. 697, 713 (2003).

[27] *See* Erwin Chemerinsky, Constitutional Law: Principles and Policies 1050–62 (2006) (examining the use of the public concern test to limit liability in various contexts, including libel law).

[28] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide open.").

[29] *See, e.g.*, NAACP v. Alabama, 357 U.S. 449, 460 (1958) (prohibiting the court-ordered disclosure of membership lists because "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech" and establishing that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters").

[30] *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 647–48 (2000) (holding that the ability to control membership is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas").

[31] *See* Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 91–92, (1982) (invalidating a campaign finance law requiring disclosure of donations as applied to members of a minority party); *NAACP*, 357 U.S. at 460 (prohibiting court-ordered disclosure of a membership list).

A. *Protecting Disclosures About Matters of Public Concern*

Tort claims that impose liability for speech are generally subject to a public concern balancing test.[32] The public concern test balances the purpose of a statutory provision with the First Amendment's goal of safeguarding expression, which can be chilled or limited by the threat of liability or sanction.[33] In the Supreme Court's 1964 decision *New York Times Co. v. Sullivan*, the Court justified allowing some false speech on matters of public concern to be published with impunity because of the potentially chilling effect of punishing false, defamatory speech on public discourse.[34] All speech—even truthful speech—can be chilled by imposing liability for false speech.[35] Thus, although false speech is not itself valuable, restricting it too much is unconstitutional because of the effect on public discourse as a whole.[36]

Although the Court has never precisely defined either public concern, the category appears to refer primarily to political speech, namely direct political advocacy and speech related to elections.[37] Usually, the phrase refers to issues in which the public has a legitimate concern.[38] In dicta, the Court has referred to political speech as central to the First Amendment.[39] Thus, because the public concern test is grounded in the First Amendment's strong protection of political speech, speakers disclosing information of public concern receive more protection than speakers disclosing other information.[40] Prior to the Supreme Court's 2001 decision in *Bartnicki*, however, the cases protecting public disclosure of information deemed private by state law all involved the press reporting information contained in government records.[41]

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[32] *See* Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988) (using a public concern text for intentional infliction of emotional distress); *Sullivan*, 376 U.S. at 254 (using a public concern text for defamation); CHEMERINKSY, *supra* note 27, at 1044–62. A version of the public concern test is also used to define the scope of a government employee's speech rights. *See* Garcetti v. Ceballos, 547 U.S. 410, 413 (2006).

[33] *See Sullivan*, 376 U.S. at 279.

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] *See id.* at 254; *see also* Gertz v. Welch, 418 U.S. 323, 339–40 (1974) (addressing the scope of the public concern test). In contrast the Court viewed filing a bankruptcy petition as a matter of more personal concern. *See* Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 761 (1984).

[38] *See id.* at 540 (Breyer, J., concurring) (explaining that the public's interest must be legitimate for the public concern test to apply).

[39] *See* Volokh, *supra* note 7, at 1095.

[40] *See Sullivan*, 376 U.S. at 279; CHEMERINSKY, *supra* note 27, at 1045.

[41] *See* CHEMERINKSY, *supra* note 27, at 1060.

Bartnicki extended the public concern test to evaluate anti-wiretapping statutes.[42] In *Bartnicki*, two women who were campaigning for positions on a school board sued a local radio host under such a statute after he aired a surreptiously recorded conversation in which one women said, "If they're not gonna move for three percent, we're gonna have to go to their, their homes . . . . To blow off their front porches, we'll have to do some work on some of those guys."[43] In extending the public concern test to protect the radio host's publication of the recording, the majority emphasized that the result was narrow because the press was not involved in the illegal recording and the tape involved information of public importance.[44] The decision, however, was fractured and left unclear both the scope of the public concern test and the ability of private citizens to sue under anti-wiretapping statutes.[45]

1. What Is the Scope of Content Protected by the Public Concern Test?

Justice John Paul Stevens's majority opinion and Justice Breyer's concurrence in *Bartnicki* reveal that the Court disagrees about how to define a matter of public concern.[46] Because the *Bartnicki* recording dealt with a political matter—a school board election—the majority assumed that protection for matters of public concern applied.[47] Justice Breyer agreed, but he discussed in more depth the potential scope

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[42] *See Bartnicki*, 532 U.S. at 517–18.

[43] *See id.* at 518–19 (alteration in original).

[44] *See id.* at 517. Analysis of public concern in *Bartnicki* relies on several other First Amendment cases involving freedom of the press. *See id.* at 528 (citing Fla. Star v. B.J.F., 491 U.S. 524, 532 (1989); N.Y. Times Co. v. United States, 403 U.S. 713, 716 (1971) (Black, J., concurring)). Many scholars heavily criticize the role of the public concern test in First Amendment jurisprudence, in both the libel law context and the government employment context. *See, e.g.*, Gerwirtz, *supra* note 12, at 167 (criticizing the public concern test applied in *Bartnicki* for failing to protect privacy); Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 Minn. L. Rev. 515, 578–81 (2007) (rejecting the public concern test as a way to determine the scope of reporter's privilege). Commentators criticize the public concern test for leaving private matters vulnerable to disclosure. *See* Gerwirtz, *supra* note 12, at 167.

[45] *See* Gerwirtz, *supra* note 12, at 198.

[46] *See* Volokh, *supra* note 26, at 743 (explaining that the Court in *Bartnicki* was splintered between holding that the speech at issue could be disclosed because it was merely "a matter of public importance" or more narrowly because it was "of unusual public concern"); *see also Bartnicki*, 532 U.S. at 534; *id.* at 536 (Breyer, J., concurring).

[47] *See Bartnicki*, 532 U.S. at 534.

of the protection for matters of public concern.[48] His concurrence drew distinctions between public concern, legitimate public concern, and unusual public concern.[49] Justice Breyer found that the public concern doctrine does not justify disclosing every famous person's conversation.[50] Moreover, Justice Breyer distinguished private conversations on matters of public concern from other issues of "truly private concern," such as a video recording of sexual relations and the disclosure of personal information about a divorce.[51] Ultimately, the concurrence concluded that the disclosure of the recording should be protected because the information is of "unusual public concern," considering that Ms. Bartnicki threatened physical harm to others by saying she would have to "blow off [her opponents'] front porches."[52]

Whether the scope of public concern includes only political speech or encompasses all speech that is not of "truly private concern" is significant because it determines how far the *Bartnicki* decision goes toward protecting the disclosure of illegally obtained recordings.[53] Proponents of expanding the privacy torts, such as defamation and false light, rely on the Supreme Court's 1985 decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* to argue that plaintiffs may constitutionally seek damages for the disclosure of information of purely private concern.[54] If disclosing matters of public concern is of paramount First Amendment importance, then a disclosure on a matter of purely private concern is *less protected* speech, even if the disclosure is factually accurate.[55] Proponents of expanded First Amendment rights, however, counter that *Dun & Bradstreet* represents a limited exception for false speech, rather than an expansion of tort liability to punish truthful information.[56]

Dun & Bradstreet hinted at a more narrow definition of public concern, which would not include all information of interest to the public.[57] There, the Court held that a confidential financial report, which

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[48] *See id.* at 536 (Breyer, J., concurring) ("I write separately to explain why, in my view, the Court's holding does not imply a significantly broader constitutional immunity for the media.").

[49] *See id.* at 536, 540.

[50] *See id.* at 540.

[51] *See id.*

[52] *See id.* at 536.

[53] *See Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring).

[54] *See* 472 U.S. at 753; Gerwirtz, *supra* note 12, at 181 (supporting this view). *But see* Volokh, *supra* note 7, at 1095 (criticizing this view).

[55] *See* Volokh, *supra* note 7, at 1095.

[56] *See id.*

[57] *See Dun & Bradstreet*, 472 U.S. at 762.

mistakenly concluded that a company had filed for bankruptcy, was not a matter of public concern, presumably because speech about financial trouble is not core political speech.[58] Thus, although the company's bankruptcy would be of interest to certain segments of the public (the company's creditors, employees, and customers), that interest in obtaining the information does not justify allowing the disclosure of false information to avoid chilling speech on the subject.[59]

2. How Should Courts Define and Protect the Interests of Recorded Speakers?

All the opinions in *Bartnicki* identified privacy as the right protected by the anti-wiretapping statute.[60] The majority found that public interest outweighed any privacy right that might have protected the conversation.[61] Justice Breyer, however, characterized the privacy interest not only as involving the right to be let alone but also as an interest in fostering private speech.[62] Breyer explained, "That assurance of privacy helps to overcome our natural reluctance to discuss private matters when we fear that our private conversations may become public. And the statutory restrictions consequently encourage conversations that otherwise might not take place."[63] According to Justice Breyer, the interest in fostering private speech is related to the First Amendment's protection of free expression.[64] Thus, Justice Breyer tethered the interest in fostering private expression to First Amendment, rather than privacy.[65]

To protect private expression, Justice Breyer proposed a balancing test which weighs the interests of the speaker, the interests of the media outlet that distributed the speech, and the interests of the public in gaining access to the conversation:

> I would ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing con-

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[58] *See id.*

[59] *See id.*

[60] *See Bartnicki*, 532 U.S. at 534; *see id.* at 537 (Breyer, J., concurring); *id.* at 554 (Rehnquist, C.J., dissenting) ("By protecting the privacy of individual thought and expression, [wiretapping] statutes further the uninhibited, robust, and wide-open speech of the private parties." (citations and internal quotation marks omitted)); Volokh, *supra* note 26, at 743.

[61] *See Bartnicki*, 532 U.S. at 517.

[62] *See id.* at 537 (Breyer, J., concurring).

[63] *Id.*

[64] *See id.*

[65] *See id.*

> sequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?[66]

Thus, Justice Breyer suggested that a proper First Amendment analysis would examine the content of the speech, the context in which it occurred, and the asserted interest in disclosing the information.[67]

B. *Associational Freedom, Anonymous Speech, and the Right to Control Your Audience*

Facilitating anonymous expression or private expression meant for a limited group is one speech-enhancing effect of an anti-wiretapping law.[68] The First Amendment recognizes the right to associate and the right to speak anonymously because these protections encourage the expression of minority views and expression of diverse views.[69] To create a viable space for advocacy of controversial viewpoints, the First Amendment protects individuals from the disclosure of their group affiliations or their identities if they choose to speak anonymously.[70] The right to associational freedom also protects the autonomy of expressive associations by protecting a group's right to determine their membership and message.[71] These rights protect groups from both unwanted disclosure and compelled speech.[72]

1. Protection Against Disclosure of Identity

When the government requires the disclosure of a speaker's identity to the public, expression can be chilled.[73] The right to privacy in

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[66] *Id.*

[67] *See Bartnicki*, 532 U.S. at 537 (Breyer, J., concurring).

[68] *See id.*

[69] *See Boy Scouts*, 530 U.S. at 647 ("[I]mplicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.").

[70] *See id.* at 647–48.

[71] *See id.*

[72] *See, e.g.*, Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557, 570 (1995) (protecting a group from compelled speech); *NAACP*, 357 U.S. at 460 (protecting a group from unwanted disclosure).

[73] *See, e.g.*, *Brown*, 459 U.S. at 98 (holding that the disclosure of a speaker's identity chills association); *NAACP*, 357 U.S. at 460 (same).

one's associations is closely tied to the First Amendment right to speak anonymously.[74] Much like the right to expressive association generally, anonymous speech is particularly valuable for marginalized or unpopular groups.[75] In the Revolutionary-era anonymous speech made the publication of *Common Sense* possible, and afterwards it facilitated the central role of the *Federalist Papers* in the ratification of the Constitution.[76] As Justice Hugo Black noted, "[P]ersecuted groups . . . from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[77]

When people speak in groups where they expect the content of their conversations to remain secret, the right to free association and anonymous speech coalesce.[78] The ability to speak freely sometimes rests on the knowledge that your speech will only circulate within a small group.[79] Thus, the harm caused by the unwanted disclosure of information can be just as salient when the information is given to a third party as when it is given to the government.[80] Although the First Amendment only directly prohibits state action, First Amendment rights protect speakers not only against disclosure to the government, but also against government-facilitated disclosures to the public.[81]

For example, the First Amendment protects groups against government-compelled disclosure of membership lists.[82] In 1958 the Supreme Court decided *NAACP v. Alabama*, holding that the NAACP could assert the associational rights of its members by refusing to disclose a list of its members in response to a court order.[83] The Court explained:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by

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[74] *See, e.g.*, *Brown*, 459 U.S. at 98; *NAACP*, 357 U.S. at 460.

[75] *See* Talley v. California, 362 U.S. 60, 64 (1960).

[76] *See id.*; *see also* Matthew Mazzotta, Note, *Balancing Act: Finding Consensus on Standards for Unmasking Anonymous Internet Speakers*, 51 B.C. L. Rev. 833, 836 (2010) (discussing the important role of anonymous speech in American history).

[77] *See Talley*, 362 U.S. at 64.

[78] *See, e.g.*, *Brown*, 459 U.S. at 98; *NAACP*, 357 U.S. at 460.

[79] *See Talley*, 362 U.S. at 64.

[80] *See* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 Duke L.J. 821, 864 (2008) ("The most powerful—though perhaps not the most obvious—speech 'regulations' are social norms and mores, backed by the threat of social ostracism or sanction. Most speakers fear not prosecution nor exclusion from public forums, but approbation and ostracism from friends, family members, employers, and fellow citizens.").

[81] *See id.*

[82] *See NAACP*, 357 U.S. at 460.

[83] *Id.*

> group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.
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> . . . [F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of . . . freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . .[84]

The Court recognized the vital relationship between privacy in one's associations and the freedom to associate.[85] Many forms of governmental action may unintentionally result in abridgement of these rights.[86] Significantly, the state action in *NAACP* that violated associational freedom was a court's contempt order requiring disclosure of membership lists.[87] In this way, *NAACP* is factually similar to *Bartnicki* because both the Alabama court order for production at issue in *NAACP* and the *Bartnicki* Court's holding that the distribution of an illegal recording was lawful have the effect of giving legal sanction to disclosures that abridge associational rights.[88]

Furthermore, associational freedom has become increasingly important online.[89] One area where courts face the compelled disclosure of identity is the unmasking of anonymous online speakers through their Internet service providers (ISPs).[90] In lawsuits involving anonymous Internet speech, a plaintiff's right to seek redress conflicts with a defendant's right to speak anonymously.[91] In order to proceed with his claim, the plaintiff must find a way to discover the anonymous speaker's identity.[92] Usually, plaintiffs serve a discovery subpoena on an ISP or the host of a website.[93] Unmasking anonymous online speakers in this process can conflict with the right to speak anonymously online by forcing speakers to reveal their identity without clear proof that they have done anything illegal.[94] Some courts have expressed concern that law-

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[84] *Id.* at 460 (citations omitted).

[85] *See id.*

[86] *See id.*

[87] *See id.*

[88] *See Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring); *NAACP*, 357 U.S. at 460.

[89] *See infra* notes 90–98 and accompanying text.

[90] *See* Mazzotta, *supra* note 76, at 839.

[91] *See id.* at 840.

[92] *See* Nathaniel Gleicher, *John Doe Subpoenas: Toward a Consistent Legal Standard*, 118 Yale L.J. 320, 329 (2008); Mazzotta, *supra* note 76, at 839.

[93] *See* Mazzotta, *supra* note 76, at 843.

[94] *See id.*; Gleicher, *supra* note 92, at 329.

suits like these could be misused to silence critics and chill anonymous speech online.[95]

Indeed, many states have passed statutes prohibiting "Strategic Lawsuits Against Public Participation" (anti-SLAPP statutes) where companies attempt to use lawsuits to unmask anonymous online speakers in an attempt to silence their speech.[96] These statutes recognize that the disclosure of a speaker's identity—even through private action—can pose a significant threat to free expression.[97] Disclosure to third parties can implicate First Amendment values, even where the state's action is limited to the discovery process.[98]

2. Protection Against Expanded Membership and Compelled Expression

Associations' rights to control their expression are similar to, and nearly as strongly protected as, the rights of groups and individuals against disclosure.[99] Control over membership and message are key to facilitating a group's private expression.[100] They allow the group to control the terms on which they speak to the outside world (by defining their message) and the people with whom they choose to share their message privately (by controlling their membership).[101]

In the 1994 case *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, the Supreme Court held that the government could not compel private parade organizers to include unwanted individuals in

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[95] *See, e.g.*, Doe No. 1 v. Cahill, 884 A.2d 756, 461 (Del. 2005) (rejecting First Amendment balancing); Dendrite Int'l, Inc. v. Doe, No. 3, 775 A.2d 759, 760–61 (N.J. Super. Ct. App. Div. 2001) (balancing the defendant's right of anonymous speech against the plaintiff's prima facie case and the need to disclose the anonymous speaker's identity); *see also* Gleicher, *supra* note 92, at 329 ("A defendant who is exposed could be subject to reprisals or severe social and professional sanctions, making extreme care necessary when exposing potentially innocent defendants.").

[96] *See* Matt C. Sanchez, Note, *The Web Difference: A Legal and Normative Rationale Against Liability for Online Reproduction of Third-Party Defamatory Content*, 22 HARV. J.L. & TECH. 301, 313 (2008).

[97] *See id.*

[98] *See* Gleicher, *supra* note 92, at 329.

[99] *See* Strandburg, *supra* note 20, at 769 (comparing the substance of rights against disclosure of one's membership in an organization to the substance of rights against governmental monitoring).

[100] *See id.*

[101] *See* Matthew Lynch, *Closing the Orwellian Loophole: The Present Constitutionality of Big Brother and the Potential for a First Amendment Cure*, 5 FIRST AMENDMENT L. REV. 234, 235 (2007) (examining compelled speech and associational freedom, and arguing in favor of a speaker's right to choose her audience and hence to choose not to speak to the government).

their parade.[102] Central to the Court's decision was the parade organizer's right not to speak.[103] Forced inclusion of an unwanted group in the parade would require the private organizers to convey a message with which they disagreed.[104]

In 2001, the Supreme Court decided *Boy Scouts of America v. Dale* and affirmed the rights of expressive associations to determine their own membership and policies.[105] The court observed,

> "[I]mplicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." This right is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas.[106]

The types of groups protected by the right to free association are cast broadly.[107] Associations do not have to associate for the purpose of disseminating a certain message in order to be entitled to the protections of the First Amendment.[108] An association must merely engage in expressive activity that could be impaired.[109] Significantly, *Boy Scouts* gave great deference to the association's view of what would impair its expression.[110]

II. The Challenges of Online Speech: New Audiences and New Forms of Association

First Amendment scholars have written extensively on the impact of the Internet on freedom of speech.[111] This Part attempts to provide a brief summary of the theories driving legal scholars to conclude that

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[102] *Hurley*, 515 U.S. at 570.

[103] *See id.*

[104] *See id.*

[105] *See Boy Scouts*, 530 U.S. at 648.

[106] *Id.* at 647 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984)).

[107] *Id.* at 648.

[108] *See id.*

[109] *See id.*

[110] *See id.* at 647.

[111] *See generally* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. Rev. 1 (2004) (discussing the impact of the Internet on the First Amendment); James Grimmelmann, *Saving Facebook*, 94 Iowa L. Rev. 1137 (2009) (same); Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. Pa. L. Rev. 11 (2006) (same).

the Internet differs in significant ways from print and broadcast media.[112] This review is not intended to be comprehensive but simply to highlight the major themes at work in the area.[113] Significantly, online communication allows for the rapid dissemination of information in a way that makes it very hard for online speakers to choose or limit their audience as an offline speaker might.[114] At the same time, however, online media facilitate communication between groups of people with similar interests, meaning most online speech is targeted toward a specific type of audience, such as people who like Beanie Babies or people who are interested in computer programming.[115]

A. *Social Media and Circulation*

Some of the first online forums for expression were interactive.[116] Unlike traditional forms of media, bulletin boards, newsgroups, and discussion lists work like online conferences, which allow interested people to seek out a group centered around a particular topic and then to both contribute and consume information.[117] In its infancy, most of the web was not fully interactive.[118] Newsgroups were more like conferences than newswires: users could discuss their ideas but could not widely disseminate them in real time.[119] Moreover, communicating about a topic required meeting in a defined online location dedicated to that issue rather than accessing information aggregated in a single location based on your peer network and interests.[120]

Today, the Internet is more interactive.[121] Social media provide self-publishing and distribution tools for any willing Internet user.[122]

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[112] *See infra* notes 116–192 and accompanying text.

[113] *See infra* notes 116–192 and accompanying text.

[114] *See* Owen Fiss, *In Search of a New Paradigm*, 104 Yale L.J. 1613, 1614–15 (1995).

[115] *See* Balkin, *supra* note 111, at 34 (describing the simultaneously individualistic and collaborative nature of online communication).

[116] *See* Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. Chi. Legal F. 377, 378 ("One of the most significant features of the new media is the interactive electronic conference—bulletin board, newsgroup, discussion list, or the like. People who listen in on these conferences (and most participants spend much more of their time listening than speaking) want speech that's relevant to their interests, readable, reliable, and not rude.").

[117] *See id.* Although anyone can contribute, it is much more common to simply read or "lurk." *See id.*

[118] *See id.*

[119] *See id.* at 382.

[120] *See id.*

[121] *See* Balkin, *supra* note 111, at 34

[122] *See* Lauren Gelman, *Privacy, Free Speech, and "Blurry-Edged" Social Networks*, 50 B.C. L. Rev. 1315, 1323–24 (2009).

Online communication is almost never unilateral.[123] Web-based software allows individuals to easily publish their own blog covering a broad range of subjects—from women's experiences with motherhood to traditional political commentary.[124] In addition to blogs and message boards, which are centered around a certain topic or political ideology, a wave of social networking sites allows users to select a group of friends or followers with whom to share photos, videos, and messages.[125] For example, Facebook is a platform for speakers to share a wide variety of content with many different groups of friends.[126] Twitter is designed to allow users to sift through information quickly to stay informed in their areas of interest in real time.[127] Because Twitter users can pick which news sources to follow, Twitter functions like a newspaper with "headlines you will always find interesting."[128]

Social media websites interact with one another to distribute a variety of content widely and rapidly.[129] Facebook users post links to YouTube videos to share them with their friends.[130] Facebook users can also use applications to make their updates available on Twitter and reach a different audience.[131] Because Facebook profits by selling the information its users share, Facebook has an incentive to encourage its users to disclose as much as possible.[132]

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[123] *See id.*

[124] *See id.*

[125] *See id.*

[126] *See id.* Users share status updates—short comments about anything—photos, videos, links to other websites, and information about themselves. *See id.* This content is shared with "friends" through a "news feed" that aggregates all updates to your friends' pages and displays it on your homepage. *See id.* Users typically add "real-life" acquaintances as their friends or use Facebook as a way to reconnect or stay in touch with friends and family across the country or world. *See id.*

[127] *About*, Twitter, http://twitter.com/about (last visited May 11, 2012) (describing the website as "an easy way to discover the latest news about subjects you care about").

[128] *See id.* Users communicate in messages called "tweets," which must be 140 characters or less. *See id.* Unlike with Facebook, users do not "friend" each other; instead, individual users can nonmutually decide whose tweets to "follow." *See id.*

[129] *See* Strandburg, *supra* note 20, at 748.

[130] Grimmelmann, *supra* note 111, at 1149. Youtube, founded in 2005, is the dominant video-sharing website. *See* Gelman, *supra* note 122, at 1313. YouTube videos are often publicized on other social media sites or even using traditional offline media. *See* Grimmelmann, *supra* note 111, at 125.

[131] *About*, *supra* note 127.

[132] *See* Gelman, *supra* note 122, at 1328.

B. *Characteristics of Online Communication: "Narrowcasting" and Selective Attention*

Because the Internet contains so much information, users select only sources in which they are interested, and not all users are concerned with making their own information public.[133] Contribution and collaboration are key to online expression and distinguish social media from traditional media.[134] Because of the speed at which information travels online and the self-selecting, interactive nature of online communication, online speech is uniquely capable of reaching a targeted group of people nearly instantly.[135]

1. Internet Users Self-Select to Sift Through Data

Unlike other forms of media, like television where there is a scarcity of bandwidth, the tremendous amount of information online leads to a scarcity of attention.[136] As sources of information proliferate, competition for Internet users' limited attention increases, and well-funded commercial interests become more dominant.[137] In 2010, web advertisement reached an all-time high and brought advertisers more than $6.4 billion in revenue.[138] Information on the Internet is so "obese" and overwhelming that surfing through the Internet in the same way we surf channels or select books from the library is impossible.[139] Thus, most information on the Internet, although public, is not *publicized*—it remains hidden, buried beneath mounds of data.[140]

Thus, although Internet users assume that only people they target will view their information, they often make information available to the whole world.[141] Posting information online is based on a cost-benefit calculation.[142] The choice is comparable to the decision whether to list a phone number or to include your information in a voluntary student

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[133] *See* Balkin, *supra* note 111, at 7.

[134] *See id.* at 7, 34.

[135] *See id.*

[136] *See id.* at 7.

[137] *See id.*

[138] *See* Press Release, Internet Adver. Bureau, $6.4 Billion in Q3 2010 Sets New Record for Internet Advertising Revenues (Nov. 17, 2010), *available at* http://www.iab.net/about_the_iab/recent_press_releases/press_release_archive/press_release/pr-111710.

[139] *See* Kevin DeLuca & Jennifer Peeples, *From Public Sphere to Public Screen: Democracy, Activism, and the "Violence" of Seattle*, 10 Critical Stud. Media Comm. 125, 132–33 (2002).

[140] *See id.* at 125–31.

[141] *See* Gelman, *supra* note 122, at 1318.

[142] *See id.*

directory.[143] For many, the benefit of making information available to any interested party outweighs the cost of allowing access to an undefined group of people.[144]

Furthermore, the ability of users to generate their own content and disseminate information within social networks of their own choosing makes Internet expression radically different from mass media expression.[145] Although mass media like television shows and movies are necessarily broadcasted and received passively, Internet communication is often narrowcasted and interactive.[146] Internet users build off other users' expressions in a kind of combination and "bricolage" that makes Internet expression more about self-expression than previous media.[147] There is no need for online content to appeal to more than a small group of people because only those who want to listen are likely to select the content.[148]

Self-selection can be analogized to membership.[149] Savvy Internet users subscribe to email list-servs or to the tweets of other Twitter users.[150] To access the forums on the *New York Times* website or post videos on YouTube, you must be a member.[151] This self-selection is a type of expressive association that mimics and magnifies offline forms of association.[152]

2. By Allowing Information to Flow Rapidly Between Groups, Social Media Break Down Barriers Between Communities

By breaking down the space between offline communities, online communication makes it possible for information to leak from one group to another in a way that makes it difficult for speakers to control their audiences.[153] Unlike offline association, there are no clear boundaries for online expressive groups.[154] One person's tweet can be "re-

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[143] *See id.*

[144] *See id.*

[145] *See* Balkin, *supra* note 111, at 7–10.

[146] *See id.* at 8.

[147] *See id.*

[148] *See id.* at 10.

[149] *See* Strandburg, *supra* note 20, at 752 (comparing subscribing to a list-serv to membership).

[150] *See id.*; *see also About*, *supra* note 127 (describing how to subscribe to a Twitter feed).

[151] *See, e.g.*, *Log in*, N.Y. Times, https://myaccount.nytimes.com/auth/login?URI=http:// (last visited May 11, 2012); *1 Billion Subscriptions and Counting*, YouTube Blog (Oct. 28, 2010), http://youtube-global.blogspot.com/2010/10/1-billion-subscriptions-and-counting.html.

[152] *See* Strandburg, *supra* note 20, at 752.

[153] *See* Gelman, *supra* note 122, at 1329 (describing "blurry-edged" social networks).

[154] *See id.*

tweeted" and viewed by millions of people within a matter of hours.[155] Although individuals online can choose the information they seek and where they begin interacting with others, they have much less control over what happens with their speech once it is online.[156]

These properties of online communication change how information circulates.[157] Before the advent of the Internet, print media had a limited circulation—due to the amount of copies that could be printed and the physical distances between publisher and reader.[158] Offline expressive associations often rely on the expectation of limited circulation.[159] For example, colleagues discussing the best way to change their work environment or the poor leadership of their superiors rely on their co-workers' confidence.[160] Otherwise, if the workers are at-will employees, the disclosure of that communication could lead to the loss of their jobs.[161] Even speech eventually intended to be presented in public relies in some settings on a modicum of privacy or the fact of limited circulation.[162] A high school debater might be uncomfortable if every college admission board could access videos of her first debate round, regardless of where the debate took place.[163]

Furthermore, the speed at which information may be loaded on to the Internet makes the Internet an ideal tool for rapidly disseminating information to likeminded people.[164] The ease with which one can e-mail, link to other messages, and publicly post content on forums designed for quick, simple expression make communication not only instant, but as easy to access and process as a bumper sticker.[165] Digital

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[155] *See, e.g.*, *Viral Twitter Meme Makes You Wonder Who Actually Reads Your Tweets*, EDUDEMIC (Jan. 15, 2011, 6:41 PM), http://edudemic.com/2011/01/viral-twitter-meme/ (describing how one tweet got copied and pasted verbatim around 1500 times in an hour).

[156] *See* Balkin, *supra* note 111, at 8.

[157] *See* Lior Jacob Strahilevitz, *A Social Networks Theory of Privacy*, 72 U. CHI. L. REV. 919, 968 (2005) (explaining that the Internet facilitates more rapid dissemination of new information).

[158] *See id.* at 922 (explaining how the structure of social networks affects expectations of privacy about communication).

[159] *See id.*

[160] *See id.*

[161] *See id.*

[162] *See id.*

[163] *See* Strahilevitz, *supra* note 157, at 968.

[164] *See* Strandburg, *supra* note 20, at 750; *see also, e.g.*, Eric Weiner, *Jena 6 Movement Gained Momentum Online*, NAT'L PUB. RADIO (Sept. 24, 2007), http://www.npr.org/templates/story/story.php?storyId=14658077 (explaining how a social justice movement utilized social networking technology to organize protests across the country within a matter of days).

[165] *See* Strandburg, *supra* note 20, at 750.

communication lowers the cost of collective activity and decreases the importance of geographic proximity.[166] People can mobilize in any size or geographic scale and form groups dedicated to specific issues and then dissolve quickly.[167] Online groups can "piggyback" on social networks or organized affiliations to rapidly penetrate a specific target audience; for example, a speaker could use their school's social network to direct a message to all their classmates or mention a famous music artist in a tweet to promote a band to people who like similar music.[168]

C. *Information Leaks and the Problem of Controlling Your Audience*

Many scholars recognize that privacy is difficult to adapt to the Internet because the Internet lacks spatial boundaries.[169] Offline perceptions of seclusion and space are central to how experience privacy because they create barriers between people that can wall off individuals from a speaker.[170] Because offline speech often relies on physical space to define its audience, transferring offline speech online allows the online distributer to radically redefine the audience of the offline speaker.[171] Speakers have "on-stage" and "off-stage" personas—a face for the broad public and a face for people close to them.[172] Speakers wear many masks—one for the classroom, one for their family, and one for their book club, for example.[173] The way in which speakers conceive their acts of communication to each group would be different if speakers had a conception of communicative space that allowed their expression to be disclosed outside of these physical spaces.[174]

The potential for information leaks creates an undefined circulation and distribution for any online content, which makes it difficult for speakers to define their audiences on the Internet.[175] Although speakers are free to target whatever groups they wish, there is no easy way to guarantee that their speech will not leak outside those defined groups.[176] Even when a speaker opts to password protect a video or

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[166] *See id.*

[167] *See id.*

[168] *See id.*

[169] *See* Patricia Sanchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 Harv. J.L. & Tech. 1, 17–25 (2007).

[170] *See id.* at 18.

[171] *See id.* at 17.

[172] *See* Gerwitz, *supra* note 12, at 167.

[173] *See id.*

[174] *See id.*

[175] *See* Gelman, *supra* note 122, at 1329.

[176] *See id.*

make it viewable only to close friends, the digital file can frequently be reposted elsewhere.[177]

Moreover, users posting videos of other people may lack the incentive to carefully guard the speech of others.[178] Speakers do not need any significant resources to become online journalists or entertainers, beyond an iPhone or a Blackberry and an Internet connection.[179] Additionally, the relative anonymity of the Internet means that members of groups that form rapidly around a particular message are difficult to identify and the people who leak individual recordings are hard to find.[180] This anonymity facilitates disclosures that might not otherwise happen.[181]

"Going viral" is the most significant way in which the video format differs from textual media.[182] Offline, spreading information to new people requires time, effort, and substantial connections.[183] In contrast, the Internet allows a single piece of information to be shared with a million people simultaneously.[184] If the information stimulates enough interest, it "goes viral" and spreads throughout many social networks.[185] Viral phenomena are almost exclusive to the Internet because social media allow gossip to hit a tipping point by distributing information to a critical mass of people.[186]

For example, after a woman let her dog defecate in a subway in South Korea without picking it up, an enterprising camera phone owner posted the evidence online.[187] The result was a public shaming of the dog owner on the South Korean blogosphere.[188] The camera man did not know the dog owner, but because the Internet enabled him to post the information for anyone, he could easily reach everyone in the

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[177] *See* Balkin, *supra* note 111, at 10.

[178] *See* Lipton, *supra* note 9, at 966.

[179] *See id.* at 927.

[180] *See id.*

[181] *See id.*

[182] *See* Daniel Solove, The Future of Reputation: Gossip, Rumor, and Privacy on the Internet 124 (2007). Going viral is when a video spreads rapidly to a broader online audience. *See id.*

[183] *See id.*

[184] *See* Lipton, *supra* note 9, at 927.

[185] *See* Solove, *supra* note 182, at 60; Strahilevitz, *supra* note 157, at 957 (explaining how certain people in social networks become "supernodes," thus acting as hubs for transferring and filtering information).

[186] *See* Solove, *supra* note 182, at 60.

[187] Lipton, *supra* note 9, at 921; *see also Dog Poop Girl*, Famous Pictures, http://www.famouspictures.org/index.php?title=Dog_Poop_Girl (last modified Jan. 18, 2012).

[188] *See* Lipton, *supra* note 9, at 921.

dog owner's social networks.[189] Some traditional South Korean news outlets reported that the uproar led the woman to drop out of her university.[190]

This story illustrates how posting offline speech online can function as a kind of outing by exposing the identity of the recorded subject.[191] Using current technology, any willing camera phone journalist can effectively reveal not only the members of a specific organization but also the precise content of their messages—instantly expanding the audience of an offline speaker.[192]

III. Replacing the Public Concern Test with an Associational Freedom Approach

Because the public concern test is a poor fit for First Amendment values, it should not be extended to online speech.[193] The public concern test undervalues both the rights of individuals to receive and disseminate information and the associational rights of offline speakers to control the audience that receives their speech.[194] Using public concern as the touchstone for disclosure fails to account for the fact that the content of a conversation may have differing value for the literal speaker and the listener.[195] These overlapping speech interests cannot be fairly accounted for under a public concern framework.[196]

The proliferation of cell phone cameras and other tiny data recording devices makes the right to choose one's audience elusive.[197] The ability to take a piece of communication out of its original context and subsequently expose it to a much broader audience damages not

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[189] *See id.*

[190] Jonathan Krim, *Subway Fracas Escalates into Test of the Internet's Power to Shame*, Wash. Post, July 7, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/07/06/AR2005070601953.html.

[191] *See* Lipton, *supra* note 9, at 921.

[192] *See id.*

[193] *See, e.g.*, Papandrea, *supra* note 44, at 578–81 (arguing that the public concern test should not be used to define the scope of a reporter's privilege); Volokh, *supra* note 7, at 1097 (arguing that the public concern test has failed to protect First Amendment rights in every context where it has been applied).

[194] *See* Gerwirtz, *supra* note 12, at 153 (arguing that the public concern test allows too much disclosure); Volokh, *supra* note 26, at 743–46 (arguing that the public concern test does not allow enough disclosure).

[195] *See* Strahilevitz, *supra* note 157, at 923 (explaining how private conversations promote "friendship and intimacy" for speakers); Volokh, *supra* note 7, at 1093 (explaining that hearing commentary on "daily life matters" helps listeners form opinions on important topics).

[196] *See* Strahilevitz, *supra* note 157, at 923; Volokh, *supra* note 7, at 1093.

[197] *See* Lipton, *supra* note 9, at 927.

only the boundaries between public and private, but also the boundaries between different social groups.[198] Speech intended for the classroom will be received differently in a church or on a Facebook page.[199] Social media technology makes it possible for an online video to give information about an expressive association to an entire social network and potentially the whole world.[200]

Thus, at least as conventionally understood the dichotomy between speech of public concern and speech of private concern is no longer useful.[201] Online and offline speakers often understand their audiences as subjectively defined, semi-private communities.[202] Thus, courts should abandon the fiction that speech concerning a homogeneous, politically defined public is the most valuable speech and instead should consider the particular communities or "publics" within which speakers and listeners are situated.[203] For yoga enthusiasts, the most valuable speech might concern the safety of their yoga practice, yet for a gradu-

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[198] *See* Gelman, *supra* note 122, at 1329 (explaining how information leaks online through "blurry-edged social networks"); Lipton, *supra* note 9, at 927 (arguing that the ability of third parties to post information about someone else online decreases the control individuals have over their personal information); Strahilevitz, *supra* note 157, at 969 (explaining the social norms that keep information from leaking outside a given group are weaker online).

[199] *See* Strahilevitz, *supra* note 160, at 969 (explaining the importance of context to the expectations of privacy that facilitate communication). In fact, the reactions of Internet viral video stars to their often overnight fame can depend on the context in which their videos were made and distributed: those who created the videos to share with their online friends react more positively than those who created the recordings for personal use. *Compare Star Wars Kid Files Lawsuit*, WIRED.COM, July 24, 2003, http://www.wired.com/print/culture/lifestyle/news/2003/07/59757 (describing how the star of a video not intended for public consumption filed a lawsuit and was transferred to a children's psychiatric ward after the video was posted online), *and Star Wars Kid*, YOUTUBE (Jan. 16, 2006), http://www.youtube.com/watch?v=HPPj6viIBmU, *with* NUMA NETWORK, http://www.xeornx.com/numanetwork/about.htm (last visited May 15, 2012) (explaining how the star of a video who deliberately posted a sing-along video online to share with his friends has embraced his fame and made cameo appearances on television shows and music videos), *and Numa Numa*, YOUTUBE (Dec. 11, 2006), http://www.youtube.com/watch?v=KmtzQCSh6xk.

[200] *See* Gelman, *supra* note 122, at 1329 (explaining how social media encourage users to share information with friends and in the process make data more broadly available).

[201] *See id.* at 1328, 1329, 1336.

[202] *See id.* at 1326 (arguing online social networking tools allow users to define their "blurry-edged social networks"); Strahilevitz, *supra* note 157, at 969 (arguing that speakers' expectations of privacy depend on the group of people with which they are communicating).

[203] *See* Strahilevitz, *supra* note 157, at 923 (arguing that courts should use social network analysis to determine when to punish disclosure); Volokh, *supra* note 7, at 1092–93. The court assumes that the word public refers to an objective, political community such as the American public. In reality, however, our subjectively defined communities are also publics.

ate student, the most valuable speech might concern the method of determining financial aid at her school.[204]

Limiting the dissemination of some "public" conversations may be vital to protecting freedom of speech and association.[205] Statutes that prohibit surreptitious recordings seek to protect communication from disclosure to private parties and the government.[206] Thus, expressive association also protects individuals against governmental disclosures to the public, not just the government's collection of information for criminal investigations.[207] A lack of effective, private association would decrease the anonymity and candor of certain groups and thus free expression.[208] Peer groups, employers, and communities can be effective censors.[209]

Initially, Section A discusses how the public concern test fails to allow enough disclosure and is thus under-inclusive, because it is designed to capture the interests of broadcast media and geographically organized publics.[210] It thus fails to accurately capture the interests of online "publics" which may be interested in receiving the information and communication with the publisher.[211] Section B examines how the public concern approach allows too much disclosure and is thus over-inclusive because it does not recognize the right of speakers to speak privately on matters of public concern.[212] It thus fails to protect literal speakers against surreptitious recordings.[213] Finally, Section C argues

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[204] *See* Strahilevitz, *supra* note 157, at 923.

[205] *See* Brown v. Socialist Workers '74 Campaign Comm. (Ohio), 459 U.S. 87, 98 (1982) (prohibiting campaign finance law's disclosure of donations as applied to members of a minority party); *see* NAACP v. Alabama, 357 U.S. 449, 460 (1958) (prohibiting court-ordered disclosure of a membership list).

[206] *See* Bartnicki v. Vopper, 532 U.S. 514, 553–54 (2001) (Rehnquist, C.J., dissenting) ("By protecting the privacy of individual thought and expression, [wiretapping] statutes further the uninhibited, robust, and wide-open speech of the private parties." (citations and internal quotations omitted)).

[207] *See NAACP*, 357 U.S. at 460 (holding that the privacy of the NAACP's membership lists facilitated the group's expressive association); Strandburg, *supra* note 20, at 744 (arguing the amount of information available online threatens to chill the expressive association).

[208] *See NAACP*, 357 U.S. at 460; Strandburg, *supra* note 20, at 744.

[209] *See* Blocher, *supra* note 80, at 864 ("The most powerful—though perhaps not the most obvious—speech 'regulations' are social norms and mores, backed by the threat of social ostracism or sanction. Most speakers fear not prosecution nor exclusion from public forums, but approbation and ostracism from friends, family members, employers, and fellow citizens.").

[210] *See infra* notes 215–242 and accompanying text.

[211] *See infra* notes 215–242 and accompanying text.

[212] *See infra* notes 243–280 and accompanying text.

[213] *See infra* notes 243–280 and accompanying text.

that because someone's interest in discussing even a controversial issue with a limited group of people is central to freedom of association, an expressive association approach that protects conversations regardless of subject-matter would be more consistent with First Amendment values than the public concern test.[214]

A. *Many Online Publics: The Public Concern Test Is Under-Inclusive*

The public concern test is under-inclusive because online speakers often select multiple "publics" with which to communicate and these "publics" are not necessarily defined by an interest in core political speech.[215] Because broadcast media communicate with audiences defined primarily by geography—a local television or radio station broadcasts to a particular city and a national station to a particular country—it is possible to imagine that broadcast media can communicate about political issues relevant to a given area, such as school board candidates or a national congressional candidate.[216] In contrast, online videos are likely to be relevant to a segment of the public defined by a specific interest or set of interests.[217] Thus, someone disclosing information online may wish to speak to a particular "public," which is not organized around a geographic political unit.[218] Both the speaker and the "public" nonetheless have legitimate expressive interests in receiving or communicating information.[219] Furthermore, the speech interests of an individual who shares information is considerably harder to define than the interest of a broadcast media outlet.[220]

The problem of interlocking publics and the individualistic, interactive nature of online speech make the public concern test a poor method for determining whether a recording can be disseminated with impunity.[221] Because the public concern test is applied in the same way regardless of whether the entity disclosing the information is a member of the broadcast media or an Internet user, determining whether something posted online is of "legitimate public concern" is no longer teth-

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[214] *See infra* notes 281–305 and accompanying text.

[215] *See* Gelman, *supra* note 122, at 1329; Volokh, *supra* note 7, at 1092–93.

[216] *See* Balkin, *supra* note 111, at 3–4 (contrasting broadcast media with the Internet).

[217] *See id.* For example, an online speaker might communicate with his or her group of friends from college or Star Wars fans or both at the same time. *See id.*

[218] *See id.* For example, in *Bartnicki* the "public" was organized around a local school board election. *See Bartnicki*, 532 U.S. at 519.

[219] *See* Balkin, *supra* note 111, at 3–4.

[220] *See* Volokh, *supra* note 26, at 747.

[221] *See* Balkin, *supra* note 111, at 3 (discussing the interactive, personal nature of online expression); Gelman, *supra* note 122, at 1329.

ered to the original purposes of the test: assessing whether the audience has a legitimate interest in receiving the disclosure.[222] Unlike traditional media that are broadcast to the public at large, social media capitalize on narrowcasting to interlocking social groups to disseminate information.[223]

Most courts fail to acknowledge that nongeographically organized groups with similar interests can be legitimate online publics when evaluating whether a disclosure is a matter of public concern.[224] For example, in the 2003 case *DVD Copy Control Ass'n v. Bunner*, the Supreme Court of California held that the publication of a computer source code was expressive conduct because it was a means for exchanging information and ideas about computer programming.[225] The court concluded that publication of the code could be enjoined because the source code was not posted to "comment on any public issue or to participate in any public debate" and "only computer encryption enthusiasts are likely to have an interest in the expressive content" rather than the use of the source code.[226] Because the disclosure of this "highly technical information" added nothing to the public debate, the source code publisher's expressive conduct did not "substantially relate to a legitimate matter of public concern."[227]

The *Bunner* court, however, did not justify why highly technical information cannot be of legitimate public concern or add to the public debate.[228] The court acknowledged that the First Amendment protects speech about science in addition to political speech.[229] The court also acknowledged that the source code could be of interest to a small section of the public— "computer encryption enthusiasts" like engineers and academics.[230] This small segment of the population, although not defined with reference to a political unit, potentially represents a large online public.[231] Entire online publications and communities are de-

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[222] *See* Chemerinksy, *supra* note 27, at 1044–45 (explaining the origins of the public concern test); Volokh, *supra* note 26, at 747 (arguing that as currently applied, the public concern test does not help courts determine the actual value of speech to the public).

[223] *See* Balkin, *supra* note 111, at 3–4.

[224] *See* DVD Copy Control Ass'n v. Bunner, 75 P.3d 1, 10 (Cal. 2003); *see also* Volokh, *supra* note 26, at 745–46 (commenting on *Bunner*).

[225] *See Bunner*, 75 P.3d at 10.

[226] *Id.* at 16.

[227] *Id.*

[228] *Id.* at 10.

[229] *See id.*

[230] *See id.* at 16.

[231] *See infra* notes 235–236 and accompanying text.

voted to discussing material relevant to programmers.[232] The government estimates that there are 680,000 self-described computer programmers in the United States as of 2010.[233] It is not a stretch to imagine that more people could be interested in source code than the statements of someone running for a local school board.[234]

Choosing to speak on an issue of narrow, technical appeal rather than one of broad, general appeal should not affect the quantum of constitutional protection afforded to speech because it should not be up to courts to decide what is merely entertainment and what is of true substance, just as it is not the judiciary's business to distinguish between lyrics and vulgarity.[235] Social networking technology and the rise of specialized forums for expression on certain subjects are evidence of how people use the Internet to communicate with a group of people handpicked to hear a particular message.[236] Although limiting mass media news outlets to disclosing information that is of interest to their broadcast audience may be a fair way to characterize the speech interests of the broadcast media, online speakers' interests are different than those of news outlets speaking to a broadcast audience.[237] Because online speech is so diverse and individualized and because online communication choices are more personal than those of media corporations and journalists, judgments about what constitutes a legitimate public concern are inappropriate.[238]

Thus, using the public concern test to identify the speech interests of literal speakers, online speech distributers, and potential online listeners fails to adequately protect the speech interests of both online speakers and listeners as well as offline literal speakers.[239] Both those

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[232] *See, e.g.*, *About*, Source Forge, http://sourceforge.net/about (last visited May 11, 2012) (describing a network for sharing source code with 2.7 million software developers); Computer World, http://www.computerworld.com (last visited May 11, 2012) (providing news for computer programmers).

[233] *See* Bureau of Labor Statistics, Occupational Employment Projections to 2010, at 65 (2001), *available at* http://www.bls.gov/opub/mlr/2001/11/art4full.pdf.

[234] *Compare About*, *supra* note 232 (describing a network for sharing source code with 2.7 million software developers), *with* Press Release, U.S. Census Bureau, U.S. Census Bureau Delivers Illinois' 2010 Census Population Totals, Including First Look at Race and Hispanic Origin Data for Legislative Redistricting (Feb. 15, 2001), *available at* http://2010.census.gov/news/releases/operations/cb11-cn31.html (stating that the population of Chicago is roughly 2.7 million).

[235] Volokh, *supra* note 26, at 747.

[236] *See* Balkin, *supra* note 111, at 3.

[237] *See id.*

[238] *See id.*; Volokh, *supra* note 26, at 747.

[239] *See, e.g.*, Gelman, *supra* note 122, at 1328 (arguing that currently, online information leaks make literal offline speakers unprotected); Volokh, *supra* note 26, at 747.

who wish to discuss something and those who wish to disseminate that discussion have First Amendment interests, which may not have anything to do with participating in a public debate.[240] The interests of these speakers do not suddenly become more or less relevant because the group interested in a piece of expression is not organized around a political or geographic unit.[241] Frequently, the motivation of an individual to post something on the Internet has little to do with participating in public debate.[242]

B. *Associational Rights Against Disclosure: The Public Concern Test Is Overinclusive*

The right to choose one's audience and mode of communication is an expressive choice.[243] Choosing the context in which one speaks is an important element of the First Amendment's freedom of association.[244] If a speaker or association expects anonymity or confidentiality or attempts to create a safe space for the discussion of controversial ideas, the core of the right to free association is implicated and disclosure should be punishable.[245] Unfortunately, the public concern test immunizes disclosures from punishment whenever the expression is on a matter of public concern, regardless of any counterveiling rights of the recorded literal speaker.[246] Some groups, however, rely on confidentiality or anonymity as a way to encourage openness and facilitate in-group expression.[247] Limited circulation of information can encourage disclosure on sensitive, personal issues as well as facilitate minority expression.[248] To explore situations where the rights to control one's audience is challenged by the disclosure of communications of expressive associations, this Section examines two different types of groups

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[240] *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 647 (1999) ("[I]mplicit in the right to engage in activities protected by the First Amendment is a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."); Volokh, *supra* note 26, at 747.

[241] *See Boy Scouts*, 530 U.S. at 647.

[242] *See id.*; Volokh, *supra* note 26, at 747.

[243] *See* Strandburg, *supra* note 20, at 744.

[244] *See Boy Scouts*, 530 U.S. at 647–48.

[245] *See id.*; *NAACP*, 357 U.S. at 460.

[246] *See Bartnicki*, 532 U.S. at 519.

[247] *See Boy Scouts*, 530 U.S. at 647–48 (holding that the ability to control membership is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas"); Strahilevitz, *supra* note 157, at 969.

[248] *See Boy Scouts*, 530 U.S. at 647–48; Strahilevitz, *supra* note 157, at 969; Strandburg, *supra* note 20, at 752.

and the damage unwanted disclosures cause.[249] The first group relies on limited circulation to facilitate personal disclosure and the second group to facilitate the expression of minority political views.[250]

The first group relies on confidentiality to encourage openness and personal disclosure.[251] Alcoholics Anonymous, for example, relies on anonymity and norms of mutual nondisclosure in order to encourage participants to self-disclose to other members of the group.[252] Groups like these may not seek to advance ideas of either public concern or purely private concern, but nonetheless deserve protection against disclosure.[253] Even if the individuals involved are famous or if the incidents they discuss are matters of public concern, disclosure can undermine the expressive purpose of the group.[254] For example, if a public official went to an Alcoholics Anonymous meeting and admitted to drunk driving, an anti-wiretapping statute should be able to prevent publication of a recording of the confession.[255] Such a recording could be a serious violation of the group's culture.[256] Some privacy scholars theorize that disclosing the contents of such a group's communication would violate a reasonable expectation of privacy, although state law is inconsistent on this point.[257]

Associational freedom ought to affirmatively protect the communications of such groups against disclosure.[258] Hearing the stories of other members could be considered an important incident of membership.[259] In this sense, the individual's right to control his or her audience is the right to choose to communicate only with the group as defined by its own membership.[260] In the case of Alcoholics Anonymous, for example, members have chosen only to share their stories with other people who struggle with addiction.[261] Disclosing the contents of

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[249] *See infra* notes 251–280 and accompanying text.

[250] *See infra* notes 251–280 and accompanying text. These two examples are not the only situations where the public concern test would interfere with expressive association, rather the illustrations are intended to show two relatively clear cases for protection against disclosure. *See infra* notes 255–265 and accompanying text.

[251] *See infra* notes 252–257 and accompanying text.

[252] *See* Strahilevitz, *supra* note 157, at 969 (discussing privacy and Alcoholics Anonymous meetings).

[253] *See id.*

[254] *See id.*

[255] *See id.*

[256] *See id.*

[257] *See id.* at 969 & n.198.

[258] *See Boy Scouts*, 530 U.S. at 647.

[259] *See id.* at 648.

[260] *See id.*

[261] *See* Strahilevitz, *supra* note 157, at 969.

such communication could be even more harmful than disclosing membership lists because of the detail of the information revealed—listeners would learn not merely someone's chosen affiliation but the exact substance of his or her expression.[262] Moreover, the right to speak encompasses a right not to speak.[263] Clearly when "anonymous" is in the name of the group, it is clear that members do not intend to speak to the world at large.[264]

Second, some groups rely on confidentiality and anonymity to facilitate wide-open debate on controversial issues.[265] Extending First Amendment protection against disclosure to the communications of unpopular or controversial groups would serve the same purpose as protecting membership lists from disclosure: protecting minority expression.[266] A classic example of speech that occurs in a secluded place but is on a matter of public concern is the speech of secret societies like the Freemasons.[267] These groups associate for the purpose of expressing often controversial opinions.[268] Indeed, the nation's founders likely participated in similar groups and would have likely imagined that the activities of such groups would be protected by the freedom of assembly.[269] Many less infamous organizations, such as high school and college debating groups, also rely on remaining hidden from public view to create laboratories for controversial ideas.[270] Such groups are also analogous to an NAACP chapter in Alabama during the civil rights movement; keeping their memberships and the contents of their meeting secret protects unpopular groups not only from the government,

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[262] *See Boy Scouts*, 530 U.S. at 647–48; *NAACP*, 357 U.S. at 460.

[263] *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995).

[264] *See* Strahilevitz, *supra* note 160, at 969.

[265] *See infra* notes 269–275 and accompanying text.

[266] *See Boy Scouts*, 530 U.S. at 647–48; *NAACP*, 357 U.S. at 460.

[267] *See* Jodi Dean, *Publicity's Secret*, 29 Pol. Theory 625, 632–33 (2001); Joshua Gunn, *Death by Publicity: U.S., Freemasonry and the Public Drama of Secrecy*, 11 Rhetoric & Pub. Aff. 243, 246 (2008).

[268] *See* Gunn, *supra* note 267, at 268 (explaining that Masonic groups are an example of deliberative democracy).

[269] *See* Dean, *supra* note 267, at 633 (explaining that the concept of "freedom in secret" presented by Thomas Hobbes and John Locke was made concrete by Freemasonry).

[270] *See* Gunn, *supra* note 267, at 246 (arguing that secrecy can foster civic and political engagement). The practices of college debate organizations have recently come under fire as a result of a YouTube video of a debate coach shouting during a heated argument about racism during a debate tournament. *See* Jeffery R. Young, *Colleges Call Debate Contests Out of Order*, Chron. Higher Educ. (Oct. 3, 2008), http://chronicle.com/article/Colleges-Call-Debate-Contests/6808; *see also Angry Professors*, YouTube (Aug. 3, 2009), http://www.youtube.com/watch?v=OhnaInxAiI8.

but also from a hostile general public.[271] Because the disclosure of a recording not only reveals the identity of speakers but also the exact content of their communications, it is maximally intrusive to associational and expressive rights.[272]

Thus, expressive associations should be safeguarded from disclosures that radically expand the audience of the in-group communication by acknowledging a right not to speak outside the context of a group's membership.[273] Protecting this right facilitates minority expression.[274] Some groups are meant to function as safe spaces not for personal disclosure but for the discussion of controversial ideas.[275] For instance, political debating societies can function as important laboratories for ideas.[276] In these situations, assigning a statutory responsibility to keep the communication of the group secret through an anti-wiretapping statute furthers free speech values by protecting subordinated social groups which are often pushed to the margins of mainstream discourse, from public exclusion or ridicule.[277] Applying the public concern test in these situations could lead to bizarre results.[278] For example, if political advocacy is a matter of public concern, an anti-wiretapping statute could not constitutionally punish someone who disclosed an illegally recorded video of an NAACP or Socialist Worker's party meeting to the public.[279] Even though a court would be constitutionally prohibited from requiring a group to produce a membership list during civil discovery, a state could not punish an individual who illegally disclosed a video of a group meeting to the whole world.[280]

C. *Associational Freedom Offers a More Appropriate Framework to Evaluate Whether an Online Disclosure Should Be Prohibited*

Litigants using anti-wiretapping statutes or similar causes of action to sue an entity who discloses their conversations can avoid constitutional bars on their claims by arguing that the statute as applied serves

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[271] *See NAACP*, 357 U.S. at 460.

[272] *See id.*; Lipton, *supra* note 9, at 927.

[273] *See* Strandburg, *supra* note 20, at 786.

[274] *See Boy Scouts*, 530 U.S. at 647–48.

[275] *See* Dean, *supra* note 267, at 633.

[276] *See* Gunn, *supra* note 267, at 246.

[277] *See id.*

[278] *See infra* notes 279–280 and accompanying text.

[279] *See Bartnicki*, 532 U.S. at 519; *NAACP*, 357 U.S. at 460 (holding that the NAACP's right to free association prevented disclosure of their membership lists).

[280] *See Bartnicki*, 532 U.S. at 519.

a compelling state purpose—protecting expressive association.[281] An associational freedom framework has the distinct advantage of being able to distinguish based on context and audience rather than relying on distinctions between private and public location or between private and public concern.[282] The associational freedom framework can operate where privacy does not, cannot, and should not reach.[283] Moreover, this approach can categorically refuse to protect nonexpressive conduct from disclosure.[284]

This Note proposes a two-part test.[285] As a threshold inquiry, courts should determine if the disclosed recording contains expressive activity.[286] If so, courts should weigh the value of the disclosure against two important values of associational freedom: (1) the extent to which disclosure of the speech tends to chill speech similar to the speech at issue and (2) the extent to which speech designed for a limited audience could be properly understood by a broader audience.[287] These are associational rights to the extent that individuals have a right not to disclose their associations to the world at large and to the extent that associational freedom protects the ability of organizations to control their membership.[288]

Relying on First Amendment cases about membership and nondisclosure gives courts a solid constitutional framework to balance the right of speakers to control their audience, the right of media outlets and individuals to disclose recordings, and the right of interested parties to view the recordings.[289] Although using associational freedom cases would not give clear results in every case, it does provide courts with a body of case law that defines a recognized right—free association.[290] Because privacy values are not only politically controversial but

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[281] *See* Strandburg, *supra* note 20, at 744.

[282] *See id.*

[283] *See* Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 Miss. L.J. 213, 253 (2002) (arguing that the First Amendment should be implicated by camera surveillance of public expressive conduct because of the potentially chilling effect on speech).

[284] *See id.*

[285] *See infra* notes 289–294 and accompanying text.

[286] *See Bartnicki*, 532 U.S. at 535 (Breyer, J., concurring) (describing his approach to balancing two constitutionally protected speech interests); *Brown*, 459 U.S. at 98.

[287] *See Bartnicki*, 532 U.S. at 535 (Breyer, J., concurring); *Boy Scouts*, 530 U.S. at 647–48; *NAACP*, 357 U.S. at 460.

[288] *See Boy Scouts*, 530 U.S. at 647–48; *Brown*, 459 U.S. at 98.

[289] *See* Strandburg, *supra* note 20, at 786.

[290] *See id.*

their extent varies widely on the state level, they are a less stable foundation on which to decide these cases.[291]

Furthermore, protecting only expressive conduct is a distinct benefit of an expressive association approach to evaluating the constitutionality of laws that punish the dissemination of surreptitious recordings.[292] Initially, the reach of this approach is not overly broad and does not restrict the dissemination of nonexpressive conduct that is of interest to the public.[293] If conduct occurs in public but is otherwise nonexpressive, the information may be readily disclosed.[294] This approach keeps two important types of recordings within the public domain: videos of official misconduct and "blooper" videos.[295] There is high demand for both these kinds of recordings, suggesting that listeners may have a strong interest in the consumption of such videos.[296] The expressive association approach would allow a significant amount of recordings to be disclosed because it does not protect nonexpressive activity, making it a considerable departure from the public concern test.[297]

Many videos that go viral online do so because of their entertainment value.[298] This "blooper" category of video can be freely distributed online because it contains no expressive conduct.[299] For example, the woman in the aforementioned dog defecation scenario did not engage in any expressive activity because she neither spoke nor created the recording.[300] There is, however, a free speech value to people discussing codes of conduct among dog owners.[301] Her public shaming expressed

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[291] *See* Lipton, *supra* note 9, at 942.

[292] *See* Volokh, *supra* note 7, at 1088 (arguing that one drawback of using privacy torts to limit speech is the potential slippery slope caused by imposing significant restrictions on speech).

[293] *See id.*

[294] *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (holding that finding an expressive value is a threshold inquiry to First Amendment claims). Additionally, if a jurisdiction is interested in protecting nonexpressive conduct, it could potentially expand its privacy torts. *See generally* Lipton, *supra* note 9 (arguing for this result).

[295] *See* Kreimer, *supra* note 9, at 337 (examining when the First Amendment should protect "image capture").

[296] *See id.*; Brian Dakss, *"Boom Goes the Dynamite,"* CBS News, Feb. 11, 2009, http://www.cbsnews.com/2100-500185_162-701289.html (reporting how an online video of a bad college sports reporter became so popular that the reporter appeared on David Letterman); *see also Boom Goes the Dynamite*, YouTube (Dec. 23, 2005), http://www.youtube.com/watch?v=W45DRy7M1no.

[297] *See Bartnicki*, 532 U.S. at 519 (almost categorically rejecting protection for material that is not public concern).

[298] *See* Solove, *supra* note 182, at 5; *see also, e.g., Boom Goes the Dynamite*, *supra* note 296.

[299] *See* Slobogin, *supra* note 286, at 253.

[300] *See* Solove, *supra* note 182, at 5 (discussing the media uproar over "dog poop lady").

[301] *See id.*

a moral conviction that owners should clean up after their dogs and thus plays an important role in developing social obligations.[302]

Moreover, the same logic that applies to "bloopers" would apply to public officials engaged in nonexpressive conduct in public.[303] In the 2001 case *Commonwealth v. Hyde*, the Supreme Judicial Court of Massachusetts held a state statute could constitutionally be used to punish a Massachusetts resident who secretly recorded a brutal encounter with police.[304] Under this Note's two-part test, however, the wiretapping statute would be unconstitutional as applied to such a situation: because carrying out one's job as a police officer is not expressive conduct, the police officers would not have any First Amendment claim to counterbalance the First Amendment right of someone else to distribute the video.[305]

Conclusion

The First Amendment's protection for public discourse sharply contrasts with the First Amendment's protection of private expressive association. Furthermore, the wide availability of video and audio recording technology, coupled with the ability of individuals to rapidly and widely disseminate information to both their peers and others makes collision between these two values inevitable in the digital age. The best way to resolve this conflict is to abandon the public concern test and focus instead on the associational rights of recorded speakers. Because the Internet has forever changed not only how people communicate, but also how many people they can communicate with instantly, the First Amendment must provide sufficient breathing space between private expression and instant online disclosure to effectively promote the robust, wide-open discourse at the heart of free expression.

Meredith Regan

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[302] *See id.*

[303] *See* Lisa A. Skehill, *Cloaking Police Misconduct in Privacy: Why the Massachusetts Anti-Wiretapping Statute Should Allow for the Surreptitious Recording of Police Officers*, 42 Suffolk U. L. Rev. 981, 985–86 (2009) (discussing the rise in popularity of online videos of police misconduct).

[304] *See* Commonwealth v. Hyde, 750 N.E.2d 963, 964–65 (Mass. 2001).

[305] *See* Jean v. Mass. State Police, 492 F.3d 24, 25 (1st Cir. 2007) (enjoining the Massachusetts State Police from using a state anti-wiretapping statute to prevent someone from posting a video of police misconduct online).