

Privacy in Public? A Look at Recent Efforts to Recognize Privacy Protections in Public Spaces

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Photographs and video footage taken in public spaces are an important tool for reporting on the news. Consider the following examples from recent news coverage: photographs of individuals mourning at a public vigil; video of police officers stopping an individual on the street; photographs of protesters outside a campaign rally.

Journalists rely on the right to photograph or record individuals in public—a right that has long been considered well-established.

However, in recent policy debates, privacy advocates have taken aim at this well-established right—advancing proposals that would provide privacy protections for images and data gathered in public spaces. Specifically, in debates over the regulation of drones and access to footage from police body cameras, advocates have argued that privacy considerations should apply to footage gathered or collected in public spaces.

These advocacy efforts, though currently limited in scope, should be monitored and challenged to avoid establishing precedent for expanding general privacy rights in public spaces.

Reasonable Expectations of Privacy in Public Places

The U.S. Supreme Court has long held that there is no reasonable expectation of privacy in “what a person knowingly exposes to the public.”¹

In analyzing the constitutionality of searches under the Fourth

Amendment, courts have routinely found that privacy rights are limited in public spaces, where conduct is “voluntarily conveyed to anyone who want[s] to look”² For example, courts have held that there is no reasonable expectation of privacy implicated in the following circumstances:

- Where garbage left on a public street is searched.³
- When private backyards are observed with the naked eye from a vehicle flying in the public airspace.⁴
- Where movements from one place to another on public thoroughfares are monitored.⁵
- Where tracking devices are placed on objects in public and monitored only while the device is in public view.⁶
- Where data on cell phone locations is obtained from third-parties.⁷
- When images are contained on a mobile device loaned to others.⁸

This case law is based on the reasoning that “[O]ne cannot have a reasonable expectation of privacy concerning an act performed within the visual range of a complete stranger”⁹

Similar reasoning has been applied by federal and state courts to allow the publication of information or images gathered in public.¹⁰ Courts analyzing claims against publishers start with the baseline proposition that if an individual knowingly exposes information to the public, then the media can publish it. As one court has explained:

On the public street, or in any other public place, the plaintiff has no legal right to be alone; and it is no invasion of his privacy to do no more than follow him about and watch him there. Neither is it such an invasion to take his photograph in such a place,

since this amounts to nothing more, than making a record, not differing essentially from a full written description, of a public sight which anyone would be free to see.¹¹

Courts have repeatedly applied this principle to protect images and footage recorded in public places. This reasoning has precluded invasion of privacy claims based on the publication of information or images posted on social media,¹² disclosed in a police report,¹³ filmed at public events or in public view,¹⁴ or filmed in full view of the public.¹⁵

The personal nature or even offensiveness of the image or footage captured does not minimize the protection afforded to the images and footage.¹⁶ In one particularly relevant case, a Southern District of California court explicitly considered whether there was a right to privacy in images of soldiers that had been posted on the Internet. The court said there was not and held that plaintiffs lacked a privacy interest where they photographed themselves capturing or detaining prisoners and then posted the photos on the internet.¹⁷ The court reasoned that: “Plaintiffs can take no refuge in their allegation that they intended that only certain individuals could gain access to the web site. An objectively reasonable person could not expect such photos to remain private under these circumstances.”¹⁸

As these cases demonstrate, individuals do not have privacy rights in what they “knowingly expose to the public.”¹⁹

Advocacy Efforts To Create Privacy Protections in Public Spaces

Yet, despite this body of case law, privacy advocates have taken aim at this well-established right.

Drones: In debates over drone regulations,²⁰ privacy advocates—led

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by the Center for Democracy and Technology (“CDT”)—advanced a proposal for voluntary best practices that would have curtailed the use of drones to gather images and data in public.²¹

The initial CDT proposal would have limited the collection, use, and retention of images and data where they contained, “unique biometric data, such as imagery of an individual’s face and voice recordings, that are linked or easily linkable to an identifiable person.”²² This proposal did not distinguish between images and sounds collected in public and those collected in private.²³

While these discussions were ongoing, in a *Columbia Journalism Review* article, one advocate explicitly questioned whether drone technology justified limiting current protections for newsgathering in public spaces:

Balancing the right to gather information with the right to privacy has never been easy. New technologies for image and data gathering and analysis, like drones and facial and voice recognition software, make finding the balance even harder, in part because such innovations change what is realistically possible. In the past, the high cost of, say, loitering in front of someone’s door for weeks at a time and filming video the whole time would have made it effectively impossible for journalists and law enforcement to do what a drone will be able to do very cheaply in the near future.²⁴

Stated more directly, he wrote: “This means that if we want Fourth Amendment protection against police use of drones, we might also have to accept some limits on what other people, including journalists, do with drones.”²⁵

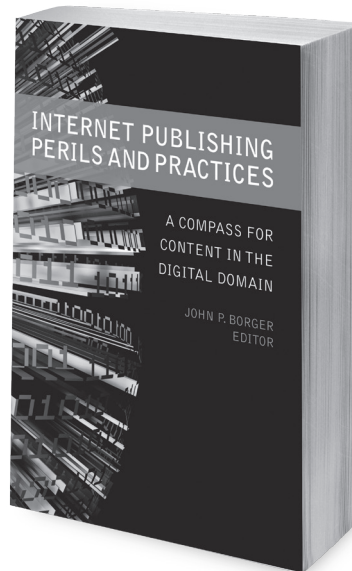
Although the best practices document that resulted from this debate provided significant allowances for the news media to use drones to gather images in public, CDT continues to support voluntary guidelines that would restrict the use of facial images and voices captured by drones.²⁶

Body Cameras: Likewise, in recent public debates about whether footage from police body cameras must be released under state public records laws, some have argued that footage

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gathered in public may be exempt from disclosure because of privacy concerns.

For example, the District of Columbia Deputy Mayor for Public Safety argued that, to protect victim privacy, footage of all assaults—regardless of where they occurred—should be exempt from disclosure under public records law. More specifically, he stated:

With respect to assaults, what the regulations meant to focus on was the ability of a third party, unconnected to that assault, to be able to get that video and do anything they want with it, including putting it on YouTube or the evening news.

By definition, a victim of assault has had their rights, their space, violated, and we don't want to risk further violating that space by allowing someone who is unconnected to the assault to have access to the video.²⁷

Likewise, advocates in Minnesota have argued that privacy considerations justify the state law's substantial limitations on the release of body camera footage:

Body-worn cameras capture incidents up-close, in real time and the data subjects are often people in the midst of traumatic circumstances or embarrassing situations. The data classification in this bill protects the

privacy of crime victims, witnesses to crime and even the average Minnesotan who might ask a police officer for directions or gets ticketed for speeding.²⁸

Consistent with these arguments, the ACLU's white paper on police body-mounted cameras, states its position that public disclosure of these videos should be limited because of privacy issues. For example, it proposes that "Redaction of video records should be used when feasible—blurring or blacking out of portions of video and/or distortion of audio to obscure the identity of subjects."²⁹

While these advocates may be well-intentioned, recognizing privacy rights in public places has the potential to chip away at precedent that journalists rely on to effectively cover the news.

Conclusion:

These advocacy efforts are using developing technologies to argue that the parameters of privacy law should be re-shaped. But, advancing technologies—including drones, body cameras, and facial recognition software—should not change this basic tenet of law: there is no reasonable expectation of privacy in "what a person knowingly exposes to the public."³⁰

Endnotes

1. *Katz v. U.S.*, 389 U.S. 347, 351 (1967).
2. *United States v. Knotts*, 460 U.S. 276, 281-82 (1983).
3. *California v. Greenwood*, 486 U.S. 35, 40 (1988).
4. *California v. Ciraolo*, 476 U.S. 207, 213 (1986); *Florida v. Riley*, 488 U.S. 445 (1989).
5. *United States v. Knotts*, 460 U.S. 276, 281-82 (1983).
6. See *United States v. Karo*, 468 U.S. 705 (1984); *United States v. Gbemisola*, 225 F.3d 753, 759 (D.C. Cir. 2000).
7. See *U.S. v. Graham*, No. 12-4659, 2016 WL 3068018, at *3 (4th Cir. May 31, 2016) ("The Fourth Amendment does not protect information voluntarily disclosed to a third party because even a subjective expectation of privacy in such information is "not one that society is prepared to recognize as 'reasonable.'").
8. *Casella v. Borders*, 39 Med. L. Rep.



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1097 (4th Cir. 2010) (plaintiff had no reasonable expectation of privacy to the images on her cell phone after she loaned the phone to her boyfriend).

9. *U.S. v. Gbemisola*, 225 F.3d 753, 759 (D.C. Cir. 2000).

10. *See, e.g., Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 231-32, 955 P.2d 469, 490 (1998) (accident scene along a public highway); *Dempsey v. National Enquirer*, 702 F. Supp. 927 (D. Me. 1988) (public restaurant); *Fogel v. Forbes, Inc.*, 500 F. Supp. 1081 (E.D. Pa. 1980) (municipal airport); *Hornberger v. American Broad. Cos.*, 351 N.J. Super. 577 (App. Div. 2002) (searching car on public street); *Harrison v. Washington Post Co.*, 391 A.2d 781 (D.C. 1978) (bank that had been robbed); *Hartman v. Meredith Corp.*, 638 F. Supp. 1015 (D. Kan. 1986) (courtroom); *Schifano v. Greene County Greyhound Park, Inc.*, 624 So. 2d 178 (Ala. 1993) (public park); *Salupo v. Fox, Inc.*, No. 82761, 2004 WL 64964 at *3 (Ohio Ct. App. Jan. 15, 2004) (moving from house); *Neff v. Time, Inc.*, 406 F. Supp. 858 (W.D. Pa. 1976) (football game); *Creel v. I.C.E. & Assocs., Inc.*, 771 N.E.2d 1276 (Ind. Ct. App. 2002) (church).

11. *Mark v. Seattle Times*, 96 Wash. 2d 473, 497 (1981) (quoting W. Prosser, *Torts* 808 (4th ed. 1971)).

12. *Sandler v. Calcagni*, 565 F. Supp. 2d, 184 (D. Me. 2008) (information that plaintiff put on myspace.com could not be considered a private fact).

13. *Scheetz v. Morning Call, Inc.*, 946 F.2d 202 (3d Cir. 1991) (no cause of action for publication of private facts when newspaper published story that plaintiff had been assaulted by her husband because “[i]n reporting this potential crime to the police, Rosann Scheetz could not reasonably expect the information to remain secret.”).

14. *Barnhart v. Paisano Publications, L.L.C.*, 457 F. Sup. 2d 590 (D. Md. 2006) (holding that there was no intrusion on privacy when magazine published a photo in which the plaintiff “appear[ed] partially nude,” because the photo was taken at a public event with “200 people present.”); *Puckett v. American Broadcasting Companies, Inc.*, 18 Media L. Rep. 1429 (6th Cir. 1990) (granting summary judgment in favor of defendant when defendant broadcasted a news segment “regarding the

illegal activities of several persons associated with a strip bar” because “plaintiff’s activities [as a dancer] were open to the public”); *Gill v. Hearst Pub. Co.*, 40 Cal. 2d 224, 229-31 (1953) (holding no invasion of privacy where magazine published a picture of a couple sitting together in a public market); *Sondik v. Kimmel*, 941 N.Y.S. 2d 541 (N.Y. Sup. Ct. 2011) (holding, in a lawsuit for intrusion of privacy when Jimmy Kimmel broadcast footage of plaintiff, that under California law “there was no intrusion into plaintiff’s private affairs, given that the clip of plaintiff was filmed on a public street.”).

15. *Solomon v. National Enquirer, Inc.*, 24 Media L. Rep. 2269 (D. Md. 1996) (no publication of private facts tort when magazine published picture of plaintiff that was taken through plaintiff’s second story window because “[s]he was in full view of the public.”).

16. *Salazar v. Golden State Warriors*, No. C-99-4825, 2000 WL 246586 (N.D. Cal. Feb. 29, 2000) (videotape of plaintiff snorting cocaine in a parking lot was not actionable invasion of privacy).

17. *Four Navy Seals & Jane Doe v. AP*, 413 F. Supp. 2d 1136, 1145 (S.D. Cal. 2005).

18. *Id.*

19. *Katz v. U.S.*, 389 U.S. 347, 351 (1967).

20. In early 2015, President Obama issued a Presidential Memorandum that directed the National Telecommunications & Information Administration (“NTIA”), a component of the Department of Commerce, to establish “a multi-stakeholder engagement process to develop and communicate best practices for privacy, accountability, and transparency issues regarding commercial and private UAS use.” *See* Presidential Memorandum: Promoting Economic Competitiveness While Safeguarding Privacy, Civil Rights, and Civil Liberties in Domestic Use of Unmanned Aircraft Systems (Feb. 15, 2015), available at <https://www.whitehouse.gov/the-press-office/2015/02/15/presidential-memorandum-promoting-economic-competitiveness-while-safegua>.

21. *See, e.g.,* Center for Democracy & Technology, Model Privacy Best Practices for Unmanned Aircraft (December 16, 2015), available at <https://cdt.org/insight/model-privacy-best-practices-for>

unmanned-aircraft/

22. *See id.* at p. 3 (defining personal data).

23. *See id.*

24. *See* Konstantin Kakaes, “Drones can photograph almost anything. But should they?” *Columbia Journalism Review* (April 21, 2016), available at http://www.cjr.org/the_feature/drones_can_photograph_almost_anything_but_should_they.php

25. *See id.*

26. *See, e.g.,* Center for Democracy & Technology, Model Privacy Best Practices for Unmanned Aircraft (December 16, 2015); *see also* Marc Jonathan Blitz, James L. Grimsley, Stephen E. Henderson, Joseph T.Thai, *Regulating Drones Under the First and Fourth Amendment*, 57 Wm. & Mary L. Rev. 49 (2015) (arguing that privacy rights should depend on factors, including what type of recording is being made, who is recording, and the government’s reason for regulating).

27. *See* Aaron C. Davis, “D.C. mayor’s plan would limit access to body-camera footage,” *Washington Post* (Sept. 9, 2015), available at https://www.washingtonpost.com/local/dc-politics/dc-mayor-proposes-law-to-keep-police-body-cameras-from-creating-violence-voyeurism/2015/09/09/aecf363a-5728-11e5-b8c9-944725fcd3b9_story.html

28. *See* Letter to Governor Dayton from Minnesota Law Enforcement Coalition (May 25, 2016), available at https://mcpa.memberclicks.net/assets/documents/WEBSITE/Legislative_2016/mn%20le%20coalition_body%20cam%20letter%20052416.pdf. *See also* Sophia Murguia, “More states set privacy restrictions on bodycam video,” Reporters’ Committee for Freedom of the Press (June 29, 2016), available at <https://www.rcfp.org/browse-media-law-resources/news/more-states-set-privacy-restrictions-bodycam-video>

29. Jay Stanley, ACLU Senior Policy Analyst, *Police Body-Mounted Cameras: With Right Policies in Place, a Win For All, Version 2.0* (Last Update March, 2015), available at https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras-v2.pdf

30. *Katz v. U.S.*, 389 U.S. 347, 351 (1967).