

The Art Handler

Privacy and the right to record

If recording is expressive, how does one disentangle a legitimate government interest in protecting privacy from an impermissible government interest in restricting speech? The recordings for *The Art Handler* confront that very question.

To understand the right to record, we must understand the privacy harm. Privacy can be many things. Recording implicates a particular type of privacy interest that is entwined with physical space. In the case of *The Art Handler* the physical space is at the museum. Laws that govern recording enable individuals to dynamically manage their social accessibility in physical space and over time. As an employee of the museum the accessibility to the physical space over time was granted to me.

The right to record is treated differently in different physical spaces because the strength of the privacy interest varies in different physical spaces. In *The Art Handler* the recordings take place in private spaces at the museum as a way to document and to ensure safety. The government's interest in protecting private property is unrelated to the suppression of speech, if it goes to enabling the successful management of social accessibility in a physical location when applied to expressive acts entwined with physical presence.

The right to record suggests that there are physical places where speech disappears. The First Amendment universally covers recording and the right to record contributes to discussions of "invisible speech" that is clearly an expressive activity, in contrast to agreeing to a contract, which is not visible to the First Amendment at all. *The Art Handler* recordings are justified even though the artist worked at the museum under contract.

Is the act of recording covered by the First Amendment if it is recognizable as expressive or entwined with expression? What kind of scrutiny applies to determine whether the First Amendment protects the expressive act? In the recordings for *The Art Handler* the artist suggests there are physical places where speech disappears and the location becomes expressive for First Amendment purposes.

The First Amendment protects the corollary or penumbral rights that are necessary for speech: newsgathering is a particular kind of corollary right. The recordings for *The Art Handler* are clearly expressive documented and newsworthy. If editing a film is expressive then recording a film must also be expressive. Making a video like *The Art Handler* which to be viewed for later recollection is analogous to keeping a private diary for later personal consumption, making the audiovisual recordings from it fully protected as speech in connection to freedom of thought.

My final question about the right to record for *The Art Handler* deals with my recordings verse the museums security camera recordings. If they are right to record me, then I am right to record myself? Shawn Kerns 2021