

## NOTES

### THE SNAPPED SHUTTER: VIOLATIONS OF THE FIRST AMENDMENT RIGHTS OF PHOTOGRAPHERS ON THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY PATH SYSTEM

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*"They who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety."*<sup>1</sup>

– Benjamin Franklin

#### INTRODUCTION

It may be said that the twentieth and twenty-first centuries created the age of the visual image. What the printing press was to news-seeking Americans five hundred years ago, and the radio in the early to mid-1900s, the television is today. In the modern age, individual visual communication is a part of everyday life: video postings on YouTube have made it the third most popular website globally;<sup>2</sup> the proliferation of cameras on cell phones and BlackBerrys allow for spontaneous photography virtually anywhere;<sup>3</sup> and those photographs can be instantly uploaded onto shared social networks such as Facebook and Twitter.<sup>4</sup> The current ease in taking photographs anywhere, anytime, and with relative surreptitiousness, however, has come up against concerns regarding invasion of individual privacy<sup>5</sup> and issues of national security. As a result, a

1. WILLIAM TEMPLE FRANKLIN & BENJAMIN FRANKLIN, MEMOIRS OF THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN, 270 (London, H. Colburn 1818).

2. *Top Sites*, ALEXA THE WEB INFORMATION COMPANY, <http://www.alexa.com/topsites> (last visited Feb. 25, 2011).

3. The 2009 estimated total of cell phone subscribers in the U.S. is 276,610,580, which is a 200 percent growth in the past ten years. *See Background on CTIA's Semi-Annual Wireless Industry Survey* 5, CTIA-THE WIRELESS ASSOCIATION (2009), [http://files.ctia.org/pdf/CTIA\\_Survey\\_Midyear\\_2009\\_Graphics.pdf](http://files.ctia.org/pdf/CTIA_Survey_Midyear_2009_Graphics.pdf). In a 2008 behavioral survey of consumer camera phone usage, Wirefly.com reported that: 96.3% of adult cell phone owners have a camera device in their phone; 63.8% of adults age 18-30 say that they use their cell phone's camera at least once a week, with 26.3% reporting daily use; one in five cell phone buyers report that their cell phone is their primary camera. *Cell Phones are Growing as Camera of Choice*, WIREFLY, (July 8, 2008), [http://www.wirefly.com/learn/company\\_news/cell-phones-are-growing-as-camera-of-choice-wirefly-survey-shows/?referringdomain=wirefly\\_g](http://www.wirefly.com/learn/company_news/cell-phones-are-growing-as-camera-of-choice-wirefly-survey-shows/?referringdomain=wirefly_g).

4. WIREFLY, *supra* note 3 (reporting fifty-eight percent of adults age eighteen to thirty use their camera phones to document nightlife, and one in five say they have published camera phone pictures to a social website or blog).

5. *See* 18 U.S.C. § 1801 (2006) (prohibiting the photographing or videotaping of a

growing tension exists between artistic freedom and First Amendment protections of expression<sup>6</sup> on the one hand, and United States security and privacy concerns on the other. A major battleground, sitting at the nexus of these boilerplate issues, is that of photography—specifically, images captured in and around the limited public forums of the United States’ public buildings and transportation systems.

Since September 11, 2001, photographers are increasingly being questioned, detained, stripped of their film, and even arrested for photographing government buildings, city infrastructure (e.g., bridges, tunnels, highways), and areas in and around metropolitan public transportation, whether or not there is agency regulation or statutory support to do so. In 2006, Ben Hider, a British citizen with a green card, was working, legally, in the United States as a photographer.<sup>7</sup> On a “photography walk” he decided to take some photos of the American flag whipping in the wind in front of the Westchester County courthouse in White Plains, New York.<sup>8</sup> Court police officers surrounded him; he was detained, interrogated, photographed, lectured on terrorism, and threatened with deportation.<sup>9</sup> After being held for two hours, he was released with no apology (in fact he was told he might be picked up by the “terrorism task force”).<sup>10</sup>

In October 2009, a photographers’ rights advocate and blogger was detained and questioned by Los Angeles Sherriff Deputies for taking two photographs of the turnstiles at the Hollywood/Western stop on the Los Angeles Metro.<sup>11</sup> In what has become a substantiated fear for some amateur photographers,<sup>12</sup> the officers threatened to

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naked person without his or her consent in any place where there can be “a reasonable expectation of privacy”). *But see* Arrington v. New York Times Co., 434 N.E.2d 1319, 1323 (N.Y. 1982) (finding no violation of privacy rights when defendant’s non-consensual image was used on the cover of the *New York Times Magazine*; there is no common law or constitutional right to privacy in a public forum and this is “part of the price every person must be prepared to pay for a society in which information and opinion flow freely”).

6. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

7. Neal Matthews, *The War on Photographers*, POPPHOTO, (Dec. 16, 2008), <http://www.poppphoto.com/Features/The-War-on-Photographers>.

8. *Id.*

9. *Id.*

10. *Id.*

11. David Markland, *Photographer detained for taking photos of the LA subway system*, BLOGGING.LA (Nov. 8, 2009), <http://blogging.la/2009/11/08/photographer-detained-for-taking-photos-of-the-la-subway-system/>.

12. See Suzanne Ito, *You, With the Camera! Stop Acting Suspicious!*, ACLU BLOG

submit his name to the Federal Bureau of Investigation's ("FBI") "hit list."<sup>13</sup> Although photography is prohibited inside a moving train, the Los Angeles County Metropolitan Transit Authority expressly permits photography with hand-held cameras in the public areas of the system with proof of fare payment.<sup>14</sup>

On April 17, 2005, Jim McKinniss of Torrance, California was taking photos for a photography class on a public sidewalk outside an ExxonMobil oil refinery. McKinniss was stopped by four cops, searched while being physically held, ordered to sit cross-legged, and interrogated.<sup>15</sup> His property was searched without permission, and the police took photos of him and inked his right thumbprint.<sup>16</sup> An officer on the scene reportedly incorrectly told McKinniss that since the terror attacks of September 11, it was "illegal to photograph bridges, airports, and refineries."<sup>17</sup> The stories of photographer harassment by law enforcement officers and government employees are boundless, and tend to be found on the "blogosphere" rather than mainstream news media.<sup>18</sup>

The Port Authority of New York & New Jersey was the nation's first bi-state agency, developed with the approval of Congress; it has a board appointed by the Governors of each state and operates under the power of the Port Compact of 1921.<sup>19</sup> "The Port Authority of New York & New Jersey conceives, builds, operates and maintains infrastructure critical to the New York/New Jersey region's trade and

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OF RIGHTS (Apr. 18, 2008, 3:59 PM), <http://www.aclu.org/2008/04/18/you-with-the-camera-stop-acting-suspicious>.

13. *Id.*; see also Matthews, *supra* note 7 ("New York's Metropolitan Transportation Authority reportedly keeps such a secret database of the photographers who have been stopped and questioned by officers on the subways and around bridges.").

14. *Metro Filming & Photograph Guidelines*, METRO, <http://www.metro.net/about/filming-metro/metro-filming-photography-guidelines/> (last updated June 8, 2010).

15. Matthews, *supra* note 7.

16. *Id.*

17. *Id.* (internal quotation marks omitted).

18. See generally Andrew Kantor, *Misinformation about Your Photography Rights Continues to Spread*, USA TODAY (Aug. 11, 2006 10:12 AM), [http://www.usatoday.com/tech/columnist/andrewkantor/2006-08-11-photography-rights\\_x.htm](http://www.usatoday.com/tech/columnist/andrewkantor/2006-08-11-photography-rights_x.htm); *The Harassed Photographer*, FLICKR, <http://www.flickr.com/groups/leavemealone/> (last visited Feb. 25, 2011); *Photography is Legal*, FLICKR, <http://www.flickr.com/groups/photography-is-legal/> (last visited Feb. 25, 2011); *Photography is Not a Crime*, FLICKR, [http://www.flickr.com/groups/photography\\_is\\_not\\_a\\_crime/](http://www.flickr.com/groups/photography_is_not_a_crime/) (last visited Feb. 25, 2011); Aggie Villanueva, *The Criminalization of Photographers*, VISUAL ARTS JUNCTION (Apr. 1, 2009), <http://www.visualartsjunction.com/?p=785>.

19. JAMESON W. DOIG, *EMPIRE ON THE HUDSON: ENTREPRENEURIAL VISION AND POLITICAL POWER AT THE PORT OF NEW YORK AUTHORITY* 99 (2001); see N.J. STAT. ANN. §§ 32:1-1 to -176 (West 1963); *Governance*, THE PORT AUTHORITY OF NEW YORK & NEW JERSEY, <http://www.panynj.gov/corporate-information/governance.html> (last visited Feb. 25, 2011).

transportation network.”<sup>20</sup> These facilities include New York and New Jersey’s main airports (JFK, LaGuardia, Newark), marine terminals and ports, the tunnels and bridges between New York and New Jersey (including the George Washington Bridge), the Port Authority Bus Terminal in Manhattan, and the PATH Rail Transit System connecting Manhattan and New Jersey.<sup>21</sup> The PATH Rail Transit System has thirteen stations on three lines, including the World Trade Center, Newark Penn Station and Harrison stops. The system passes through major metropolitan areas, and the six-mile section connecting Journal Square in Jersey City, NJ, and Newark Penn Station in Newark, NJ, is above ground, giving riders a view of the New York City and Newark skylines, marshes, the Red Bull soccer arena in Harrison, NJ, passing NJ Transit trains, and occupied as well as abandoned factories.

In the Port Authority of New York & New Jersey’s Rules and Regulations, which predate 9/11,<sup>22</sup> section XI outlines the restrictions and prohibitions surrounding photography, and the “taking or making of films, video recordings, and drawings or other visual depictions” of any portion of the PATH system.<sup>23</sup>

No person may take a photograph of any portion of the PATH system unless he or she is accompanied by a representative of PATH. No photograph shall be taken of any specific location, device or structure if such representative advises that such photography is prohibited because it will create an image which could be used to aid in the planning of an attempt to disable, destroy, avoid or circumvent any operational, safety, security, evacuation or emergency response device, structure or procedure, or which could be used in the planning of an attempt to commit an act of violence or intentionally cause disruption of rail service or public panic within the PATH system or part thereof. If possible, a suggestion for alternative photography in PATH which would not have such

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20. *Overview of Facilities and Services*, THE PORT AUTHORITY OF NEW YORK & NEW JERSEY, <http://www.panynj.gov/about/facilities-services.html> (last visited Feb. 25, 2011).

It was the first bistate agency ever created under a clause of the constitution permitting compacts between states with congressional consent. Its area of jurisdiction is called the Port District, a region within a radius of approximately 25 miles of the Statue of Liberty. The Port Authority was created to promote and protect the commerce of the Port District and to undertake port and regional improvements not likely to be financed by private enterprise, or that would not be attempted by either state alone.

*Id.*

21. *Id.*

22. Chuck Bennett, *Photographers Take on Port Authority*, AMNEWYORK, <http://www.railfanwindow.com/path-photo-ban.html>, (last visited Feb. 25, 2011).

23. Rules & Regulations, PORT AUTHORITY OF NEW YORK & NEW JERSEY, <http://www.panynj.gov/path/rules-regs.html>, (last visited Feb. 25, 2011).

an effect shall be made by the PATH representative.<sup>24</sup>

According to the Port Authority Rules & Regulations IX(E)(1)(2) and (3), anyone who wishes to photograph any portion of the PATH system or what can be viewed from a PATH train must apply for a permit, in person, at least thirty-six hours in advance of the time photography is to take place and no earlier than seven days before commencement of the photography. Applications can only be submitted between the hours of 9:00 AM and 10:30 AM and 1:30 PM and 3:30 PM, and only Monday through Friday. The applicant must specify the type, location and duration of activities to be conducted, as well as the name, address, and telephone number of the person making the request. Finally, permits are granted depending on the availability of escorts.<sup>25</sup>

Permits will be granted on a first-come, first serve basis depending on the availability of escorts. An application will be denied in whole or in part only if: (a) the presence of visitors in a requested location would unreasonably interfere with PATH operations, maintenance and construction; (b) if the conduct cannot be performed without creating an image which could be used to aid in the planning of an attempt to disable, destroy, avoid or circumvent any operational, safety, security, evacuation or emergency response device, structure or procedure, or which could be used in the planning of an attempt to commit an act of violence or intentionally cause disruption or rail service or public panic within the PATH system or part thereof.<sup>26</sup>

The regulations go on to give the framework of the appeals process if an application is denied. The appeal must be submitted in person to the PATH Permit Administrator, and the appellate decision is made by the PATH General Manager.<sup>27</sup> Finally, if denial is upheld, a permit seeker may seek review of the final decision “in a proceeding commenced pursuant to Article 78 of the Civil Practice Laws and Rules of the State of New York.”<sup>28</sup>

This Note will explore the constitutionality of the Port Authority of New York & New Jersey’s Rules and Regulations concerning photography, video recordings, and other visual depictions of and on its PATH system. Part I will outline the importance of protecting the taking of photographs and video images, as well as the images themselves, as essential First Amendment expression.

Part II will offer an historical analysis of changes in civil liberties and censorship of photography and other expression in

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24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

wartime. Also, this Part will catalogue the real and the mythological changes in the law, both statutory and judicial, concerning First Amendment liberties subsequent to September 11, 2001.

Part III will consider actual and proposed restrictions and bans on photography in public mass transit systems of other U.S. jurisdictions, particularly those claiming national security as the justification. This section will also contain the legislative, judicial, and media battles that made an impact on the final regulatory resolutions. Incorporated here will be a segment examining changes to international laws on photography in the wake of terrorist attacks, namely the laws in Madrid, Spain, and London, England, and their impact.

Part IV will be a First Amendment constitutional assessment of the Port Authority of New York & New Jersey's permit and escort regulations on the taking of photographs and other visual images; the permit scheme will be evaluated under both a content-based regulation test and a content-neutral time, place, and manner analysis. Finally, Part V will proffer solutions and alternatives to rectify the unconstitutionality of the current regulations.

#### I. IMPORTANCE OF PHOTOGRAPHY TO THE PURPOSE OF FIRST AMENDMENT GUARANTEES

Courts are in disagreement about the scope and application of First Amendment protection for photographers;<sup>29</sup> however, it is well established that photography is an expression protected under the First Amendment. In an issue of first impression, the United States Supreme Court concluded, in the 1884 case of *Burrow-Giles Lithographic Co. v. Sarony*, that a photograph could be an "original work of art."<sup>30</sup> This was forty-five years after the invention of the daguerreotype, and thirty years after photography had become a regular practice in Western countries.<sup>31</sup> Although the case ultimately involved an issue of copyright protection, the Court found that one

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29. Compare *Bery v. City of New York*, 97 F.3d 689, 698 (2d Cir. 1996) (holding a city ordinance requiring a license to sell photographs on public streets invalid as it impinges on the First Amendment rights of the seller in his expressive purpose), with *State v. Chepilko*, 965 A.2d 190, 192, 198-200 (N.J. Super. Ct. App. Div. 2009) (finding that the taking and selling of photographs of persons on the Atlantic City Boardwalk is not activity serving "predominantly expressive purposes" and therefore "not entitled to protection under the First Amendment"), and *Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3d Cir. 2005) ("More generally, photography or videography that has a communicative or expressive purpose enjoys *some* First Amendment protection." (emphasis added)).

30. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 60 (1884) (holding that original photographs are the products of "intellectual invention" of an author, which should, therefore, be subject to copyright law).

31. MARY WARNER MARIEN, PHOTOGRAPHY: A CULTURAL HISTORY 25, 30 (2d ed. 2006).

aim of the photographer was, by use of a mental conception, to “suggest[] and evok[e] . . . desired expression” by way of a visible form.<sup>32</sup> Photography, along with other visual arts, has been a method of artistic and political expression protected by the First Amendment.<sup>33</sup> This protected expression is not related to the commercial use of the photograph; the actual taking of the photograph *is* the expression, not just the displaying or selling of it.<sup>34</sup> In the Second Circuit, however, there now may be a threshold inquiry to the artistic motivation of photography to determine its protective value. In *Bery v. City of New York*, the Second Circuit proclaimed that photography was entitled to automatic coverage under the First Amendment.<sup>35</sup> However, in the subsequent cases of *State v. Chepilko*<sup>36</sup> and *Porat v. Lincoln Towers*,<sup>37</sup> the art form was found to be subject to an “expressive conduct” analysis: in *Chepilko*, the court found no artistic motivation in the taking of snapshots to sell as merchandise;<sup>38</sup> the *Porat* court concluded that purely private and recreational, “non-communicative” photograph-taking in a private building deserved no First Amendment protection.<sup>39</sup>

Even if just the act of pressing a shutter button on a camera no longer takes on automatic First Amendment protection, the actions of photographers are still subject to constitutional safeguards, and it is certain that photography considered to be expressive conduct is covered by First Amendment assurances. In examining the constitutionality of a regulation that impinges on First Amendment activity, courts will apply a strict scrutiny analysis when the regulation discriminates on the basis of content, and a more lenient

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32. *Burrow-Giles*, 111 U.S. at 60.

33. See *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (“[T]he Constitution looks beyond written or spoken words as mediums of expression.”); *Bery*, 97 F.3d at 696 (“[P]aintings, photographs, prints and sculptures . . . always communicate some idea . . . and as such are entitled to full First Amendment protection.”); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 924 (6th Cir. 2003) (“The protection of the First Amendment is not limited to written or spoken words, but includes other mediums of expression [such as] photographs . . .”).

34. *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) (“[A] speaker is no less a speaker because he or she is paid to speak.”); see also *Chepilko*, 965 A.2d at 198 (“Most human conduct, particularly in the commercial sphere, is not expressive.”). The First Amendment protects both publication of visual art and the *process* that culminates in a piece of visual art. See *Amato v. Wilentz*, 753 F. Supp. 543, 551, 562 (D.N.J. 1990) (holding that state action prohibiting the filming of a movie violated the First Amendment).

35. 97 F.3d at 696.

36. 965 A.2d at 190.

37. *Porat v. Lincoln Towers Cmty. Ass’n*, No. 04 Civ. 3199, 2005 U.S. Dist. LEXIS 4333 (S.D.N.Y. Mar. 17, 2005), *aff’d on other grounds*, 464 F.3d 274 (2d Cir. 2006).

38. 965 A.2d at 198-200.

39. 2005 U.S. Dist. LEXIS 4333, at \*13.



analysis to content-neutral regulations.<sup>40</sup> To survive strict scrutiny, the regulation must be narrowly tailored and necessary to achieve a compelling government interest.<sup>41</sup> If a less restrictive alternative to the directive is available to serve the legitimate and compelling government purpose, that alternative must be used.<sup>42</sup> If the regulation is determined to be content-neutral, the U.S. Supreme Court has interpreted the First Amendment as allowing for “reasonable restrictions on the time, place, or manner [of an expression protected by the First Amendment], provided the restrictions . . . ‘are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’”<sup>43</sup>

There are four core rationales for the free expression guarantee of the First Amendment: self-governance; the search for truth; societal tolerance and self-restraint; and autonomy.<sup>44</sup> Free expression is indispensable to the unfettered exchange of ideas necessary for self-governance; free flow of ideas helps prevent entrenchment of special interests in government, enhances political stability (losers in elections are less likely to contest their loss by violence if they have had a fair chance to be heard), and checks the abuse of power by public officials by providing citizenry the information they need to exercise their veto power.<sup>45</sup> The search-for-truth rationale began with the notion “that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity.”<sup>46</sup> Today, this theory might be better defined as representing “freedom of the mind”; stressing not the ultimate prevailing of “truth” but the inherent worth of “the interchange of ideas.”<sup>47</sup> Free expression autonomy theory derives from the widely accepted premise that the purpose of a human life is the realization of his or her character and potential as a human being; essential to this end is affirmation of self, mental

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40. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

41. *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000).

42. *Id.*

43. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

44. Christina E. Wells, *Eternally Vigilant: Free Speech in the Modern Era*, 101 MICH. L. REV. 1566, 1566 (2003); see also ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM; THE CONSTITUTIONAL POWERS OF THE PEOPLE 24-27 (1960) (self-governance theory); David A.J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) (self-fulfillment theory); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213-18 (1972) (autonomy theory).

45. MEIKLEJOHN, *supra* note 44, at 24-27.

46. William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 GA. L. REV. 1, 1 (1995).

47. *Id.* at 37.

exploration, and development of ideas.<sup>48</sup>

In considering these core principles and the importance freedom of expression has in our society, an image can have power beyond words.<sup>49</sup> Photography and videography, be it amateur, professional, or journalistic, has documented matters of public interest and concern and thereby firmly imbedded its significance in the “marketplace of ideas.”<sup>50</sup> Examples of images that have created political debate are plentiful: Americans have long used Alfred Eisenstaedt’s picture of the sailor kissing the nurse in Times Square<sup>51</sup> in discussions of World War II (“WWII”); the photo of the lone, brave Chinese demonstrator as he stops a column of tanks advancing on Beijing’s Tiananmen Square,<sup>52</sup> to contemplate the role of Communism; the images of protesting African Americans sprayed with hoses in Birmingham, Alabama,<sup>53</sup> to examine government suppression of civil rights; the aerial view of the mushroom cloud over Nagasaki<sup>54</sup> to supplement and effectuate conversations about

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48. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 7-9 (2004).

49. Greg Kelly, *Beyond Words: Photographers of War*, THE DIGITAL JOURNALIST (Apr. 2006), <http://digitaljournalist.org/issue0604/kelly.html>.

50. See generally ALMA DAVENPORT, *THE HISTORY OF PHOTOGRAPHY: AN OVERVIEW* XIII-1 (1991) (arguing that over the past 150 years, photographers and their works have taught, inspired, angered, and spurred several generations toward social and political action). Consider also Robert Frank’s *The Americans*, a masterpiece of street photography. See Anthony Lane, *The Journey of Robert Frank’s “The Americans,”* NEW YORKER, Sept. 14, 2009, [http://www.newyorker.com/reporting/2009/09/14/090914fa\\_fact\\_lane](http://www.newyorker.com/reporting/2009/09/14/090914fa_fact_lane). In 1955, Frank embarked on a year-long, cross-country photographic journey, bankrolled by a Guggenheim scholarship. *Id.* He was arrested for “disturb[ing] the peace” in Arkansas while taking photographs on US-65, and was later asked for his film (he refused). He was funded to photograph the grand civilization that is America, but he photographed the “historic present”—the reality of poverty, racial divides, and hopelessness of pursuing the American dream that he witnessed on his journey. See *id.* While the contemporary critics railed against the photos as “un-American,” Frank’s honest account of American life in the mid-1950s is now seen not only as a historic documentation of political, social, and economic culture of that time, but as even influential in the rise of the Civil Rights Movement. See *id.* Photographs have been known to accelerate the end of wars, armed conflict, and American involvement abroad. See generally Susan Sontag, *Looking at War*, NEW YORKER, Dec. 9, 2002, [http://www.newyorker.com/archive/2002/12/09/021209crat\\_atlarge](http://www.newyorker.com/archive/2002/12/09/021209crat_atlarge). “The color photographs of tormented Vietnamese villagers and wounded American conscripts that Larry Burrows took and *Life* published, starting in 1962, certainly fortified the outcry against the American presence in Vietnam.” *Id.*

51. Alfred Eisenstaedt, *V-J Day: War is Over*, LIFE, Aug. 14, 1945, available at <http://www.life.com/image/53366692/in-gallery/32152/channels/News/print/1>.

52. Jeff Widener, *Beyond Tiananmen*, 1989, available at <http://www.jeffwidener.com/h/> (last visited Mar. 3, 2011).

53. Charles Moore, *Birmingham 1963*, DIGITAL JOURNALIST, 1963, available at <http://digitaljournalist.org/issue0309/lm04.html>.

54. NUCLEARFILES.ORG, *Images of Nagasaki Following U.S. Atomic Bombing*, <http://www.nuclearfiles.org/menu/library/media-gallery/image/nagasaki/index.htm>

the use of nuclear weapons; and the image of the young woman screaming and falling to her knees over the lifeless body of a student shot at Kent State,<sup>55</sup> to deliberate the use of force on American citizens. Those are only some of the examples of photographs that have arguably changed the world, or at least people's view of the world.<sup>56</sup>

Activity within the PATH rail system and any public mass transit system is of vital public concern. Photographs, whether used to depict news events as they actually happen, to show news that has happened, or to help explain any other aspect of public interest, are essential to keeping the public informed. Photographs taken in the PATH system can help the public better understand any subject in that public sphere, whether from a political, historical, cultural, or esthetic perspective. Therefore, when taking photographs of newsworthy events and matters of public interest on PATH property, a photographer is fulfilling the important constitutional function of informing the public—a basic ideal upon which an open and democratic society is premised.<sup>57</sup>

In addition to fulfilling First Amendment principles, freedom of expression through photography and videography is important to public policy concerns. Many crimes are documented by public camera and video devices.<sup>58</sup> This potential for documentation acts as a deterrence, and also as an important method for law enforcement to identify assailants, victims, and elements of an offense.<sup>59</sup> A piece of videotape, recorded by a man who just happened to be looking out of his apartment window at the time Rodney King was being arrested, became one of the most influential and widely seen images in television history.<sup>60</sup> The PATH enjoys the same deterrent effect and assistance to law enforcement by the existence of photo and video-taking capabilities of the public.

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(last visited Mar. 3, 2011).

55. John Filo, *NEWSWEEK*, May 18, 1970, at cover.

56. See EDITORS OF LIFE MAGAZINE, 100 PHOTOGRAPHS THAT CHANGED THE WORLD (Robert Sullivan ed., 2003).

57. HAROLD D. LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 154 (1950).

58. See, e.g., Christine Hauser & C.J. Hughes, *A Fatal Stabbing on a Busy City Sidewalk*, N.Y. TIMES, Sept. 29, 2009, at A31 (describing an attack in New York City where "investigators were aided by public cameras" when a passerby took a photograph of the assailant with his cell phone).

59. See generally JAMES M. BYRNE & DONALD J. REBOVICH, THE NEW TECHNOLOGY OF CRIME, LAW AND SOCIAL CONTROL (2007).

60. Leslie A. Reis, *The Rodney King Beating — Beyond Fair Use: A Broadcaster's Right to Air Copyrighted Videotape as Part of a Newscast*, 13 J. MARSHALL J. COMPUTER & INFO. L. 269, 284 (1995).

## II. WARTIME TREATMENT OF FREE SPEECH AND PHOTOGRAPHY HISTORICALLY AND TODAY

### A. *Historically*

Since its inception, the United States has reacted to the real and imagined dangers of wartime by limiting the protections of the First Amendment.<sup>61</sup> Historically, legislation curbing First Amendment freedoms during wartime has centered on punishing vocal and written opposition to governmental policies, or “disloyal” speech.<sup>62</sup> The first trial for the freshly ratified First Amendment was during the political turmoil surrounding the Franco-American War (or the “Half War”), an undeclared conflict that arose following the French Revolution.<sup>63</sup> The Federalists, in response to “the power and the danger of public opinion” made apparent by the revolution abroad, enacted The Sedition Act of 1798.<sup>64</sup> The Federalists then accused Republicans who opposed American military involvement in the war of being disloyal and questioned whether they “loved their country.”<sup>65</sup> The constitutionality of the act was much debated within Congress, in state legislatures, and amongst citizenry.<sup>66</sup> The Supreme Court has since declared that the Sedition Act of 1798 was an unconstitutional attack on the First Amendment.<sup>67</sup>

Surprisingly, the Civil War, though wracked with dissent and opposition, did not instigate the Lincoln administration to enact another Sedition Act.<sup>68</sup> Military commanders under Lincoln,

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61. See STONE, *supra* note 48, at 5 (stating that political dissent is only regulated during wartime).

62. See *id.* at 4-5.

63. *Id.* at 15-17; JEFFREY A. SMITH, WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER 75 (1999). The First Amendment was ratified in 1791. SMITH, *supra*, at 34.

64. STONE, *supra* note 48, at 34. The act prohibited any person from writing, publishing, or uttering anything of a “false, scandalous, and malicious” nature against the government of the United States, and established a fine of up to \$2,000 and imprisonment of up to two years as punishment. *Id.* at 36; An Act for the Punishment of Certain Crimes against the United States (Sedition Act), ch. 74, 1 Stat. 596-97 (1798) (expired 1801).

65. STONE, *supra* note 48, at 27-28.

66. *Id.* at 44-45. A Federalist, Congressman Otis argued that the First Amendment permitted the Sedition Act, as freedom of the press “meant nothing more than ‘an exemption from all previous restraints,’” and that Blackstone interpreted English Law to allow punishment for writings that would disturb the “preservation of peace and good order.” *Id.* at 39-40 (quoting Otis from 8 ANNALS OF CONGRESS 1354, 2147-48 (Gales and Seaton 1851)). The act was passed by a Federalist controlled House; the party line vote was forty-four to forty-one. *Id.* at 43. Kentucky and Virginia declared the Sedition Act void as violating the First Amendment. *Id.* at 45.

67. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1964).

68. See HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL

however, used their power to issue orders declaring martial law and prohibiting any criticism of the administration or expression of dissent for the war.<sup>69</sup> Additionally, Secretaries of War Simon Cameron and Edwin Stanton used the rationale of military necessity to suppress free press; newspapers were shut down, reporters were denied access and arrested, and journalists' reports of battles and skirmishes were censored by the government when sent by telegraph.<sup>70</sup> Congress, in the name of safety in the time of crisis, gave the executive branch broad power. Secretary Stanton used this war power to jail journalists without charge, change the content of reports of battles to favor the Union, and ban newspapers seemingly critical of Union leaders from the mail; he believed that the freedom of the press was "subordinate to the national safety."<sup>71</sup>

America's next major conflict began in 1917, when Germany announced it would sink any ship around the coasts of Europe. The Espionage Act of 1917 was enacted only two months after the United States' entrance into World War I ("WWI").<sup>72</sup> Title XII, Section 2 of the Espionage Act stated that "every letter, writing, circular, postal card, picture, print engraving, *photograph*, newspaper, pamphlet, book or other publication . . . containing any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States, is hereby declared to be non-mailable."<sup>73</sup> The Act also prohibited photographing or duplicating in any way "anything connected with the national defence."<sup>74</sup> Section 1(a) detailed what

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WAR AND RECONSTRUCTION ON THE CONSTITUTION 72, 169 (1973) (stating that Lincoln understood that his only way to quiet dissent was through a suspension of habeas corpus or martial law); JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN 152-53 (D. Appleton 1926) (discussing Lincoln's suspension of habeas corpus).

69. *E.g.*, STONE, *supra* note 48, at 95-98 (General Ambrose Burnside, Union Commander of the Department of Ohio, and his issuance of General Order No. 38); *e.g.*, MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" 308-09 (2000) (describing an order similar to General Burnside's General Order No. 38 issued by General Milo Hascall in Indiana).

70. SMITH, *supra* note 63, at 99-100. The censorship was set down in statute by Congress, allowing "the president to take military control of telegraph lines and railroads during the war." When Lincoln took control over the telegraph lines, the rule was instituted that the War Department would have to expressly approve all press telegraphs related to military operations. *Id.* at 100. This decision was not without protest; the Judiciary Committee, finding that telegraphs of political character were being censored to save the War Department and generals from embarrassment, issued a highly critical report on the use of censorship. *Id.* at 101.

71. *Id.* at 102 (internal quotation marks omitted).

72. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 172-73 (1998).

73. *Id.* at 173 (emphasis added).

74. Espionage Act of 1917, ch. 30, § 1(b), 40 Stat. 217, 218 (1917).

qualified as an area or thing connected with the national defense,<sup>75</sup> and section 6 provided that the president may expand the definition and “designate any place other than those set forth” in section 1(a) by proclamation in a time of war or national emergency.<sup>76</sup> The language of section 1(a), 1(b), and section 6, written in 1917, is almost exactly the same as the now existing federal espionage statute.<sup>77</sup>

It was this Act that first gave rise to U.S. Supreme Court applications and interpretations of free speech under the First Amendment.<sup>78</sup> The Court in *Schenck v. United States* upheld a conviction under the Espionage Act where Charles Schenck had distributed leaflets to draftees urging them to oppose the draft.<sup>79</sup> *Schenck* contains some of the most well-known phrases regarding the application of the First Amendment: “The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.”<sup>80</sup> Justice Holmes, writing for the majority, also went on to say that being at war matters to the assessment of the extent to which the First Amendment protects speech.<sup>81</sup> In later opinions, Holmes stated that though “the principle of the right to free speech is always the same,” the government’s right to restrict speech is greater in time of war “because war opens dangers that do not exist at other times.”<sup>82</sup> More than two thousand individuals were prosecuted under the Espionage Act.<sup>83</sup>

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75. *Id.* § 1(a). The list included any “vessel, aircraft, work of defence, navy yard, naval station, submarine base, coaling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, or other place connected with the national defence.” *Id.*

76. *Id.* § 6. The president may designate any place “in which anything for the use of the Army or Navy is being prepared or constructed or stored as a prohibited place for the purpose of this title: *Provided*, That he shall determine that information with respect thereto would be prejudicial to the national defence.” *Id.*

77. 18 U.S.C. §§ 793-98 (2006).

78. REHNQUIST, *supra* note 72, at 174.

79. *Schenck v. United States*, 249 U.S. 47, 48-53 (1919).

80. *Id.* at 52 (emphasis added).

81. *Id.* (“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and no Court could regard them as protected by any constitutional right.”).

82. *Abrams v. United States*, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

83. More precisely, 2,168 individuals were prosecuted and 1,055 were convicted. See HARRY N. SCHEIBER, *THE WILSON ADMINISTRATION AND CIVIL LIBERTIES: 1917-21, 1963* (1960). One such conviction was of a producer of a motion picture that chronicled the American Revolution. The government found that the depiction of British Soldiers killing women and children during a battle, though historically and factually correct, would have the “tendency or effect of sowing . . . animosity or want of confidence between us and our allies.” *United States v. Motion Picture Film “The Spirit of ’76,”*

In most cases under the Espionage Act, it could not be proven that the speech in question had actually caused interference with recruitment or insubordination within the military; therefore, actions of the speaker were usually described as an “attempt” to cause one of the items prohibited in the Act.<sup>84</sup> Consequently, prosecutions under the Act introduced the idea of constructive intent: a defendant’s intent can be inferred from his or her actions.<sup>85</sup> Even if the speaker did not specifically intend to cause insubordination, intent can be presumed as the “natural and probable consequence[]” of the speech;<sup>86</sup> juries could infer specific intent from the mere possibility that the speaker might have had such intent. Judge Learned Hand described the dangers of this doctrine in his opinions and offered a differing test.<sup>87</sup> He reasoned that since there is more incentive to speciously infer specific intent in times of national crisis, the government should have to prove that the defendant expressly advocated unlawful conduct.<sup>88</sup>

Most of the laws surrounding photography during wartime involved restrictions on photographic journalists. In 1917, President Wilson signed Executive Order 2594, creating the Committee on Public Information (“CPI”).<sup>89</sup> The CPI issued self-censorship guidelines, which were reviewed and revised by Wilson.<sup>90</sup> Included within these guidelines was an agreement that still photographs pertaining to the war were “to be submitted to the CPI for approval.”<sup>91</sup> Though officially voluntary, the civilian chairman of the committee ostensibly acted as a censor since he had power to “cut off newsprint supplies and stop film exports.”<sup>92</sup> At the front, however, all photographs were required to be submitted for approval by military General Order.<sup>93</sup>

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252 F. 946, 948 (D. Cal. 1918).

84. STONE, *supra* note 48, at 174.

85. *Id.* at 175.

86. Shaffer v. United States, 255 F. 886, 889 (9th Cir. 1919).

87. *Masses Publ’g Co. v. Patten*, 244 F. 535, 539-40 (S.D.N.Y. 1917) (“I can see no escape from the conclusion that under this section every political agitation which can be shown to be apt to create a seditious temper is illegal.”). Hand wanted an “objective test” that could be “easily understood by the opponents of the war” so “[t]hey could safely engage in discussions of [the war and] its merits . . . so long as they refrained from urging violation of laws.” ZECHARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 49-50 (Harcourt, Brace and Howe 1920).

88. *Masses*, 244 F. 535 at 542.

89. SMITH, *supra* note 63, at 139.

90. *Id.*

91. *Id.*; STEPHEN VAUGHN, *HOLDING FAST THE INNER LINES: DEMOCRACY, NATIONALISM, AND THE COMMITTEE ON PUBLIC INFORMATION* 211 (1980).

92. SMITH, *supra* note 63, at 140.

93. 16 CENTER OF MILITARY HISTORY, *UNITED STATES ARMY IN THE WORLD WAR*

During the years between the first and second World Wars, jurisprudence had recognized and implemented the “clear and present danger test” to First Amendment questions: speech may not be restricted in the absence of “a clear and present danger to a substantial interest of the State.”<sup>94</sup> The Court made it clear that for speech to be censored, the “substantive evil must be extremely serious and the degree of imminence extremely high.”<sup>95</sup> Therefore, there could no longer be a mere inference or possibility of danger for speech to be punishable. The importance of free speech to the continued success of democracy was establishing itself in the public discourse and media as well.<sup>96</sup> Dissident speech, however, began to be secretly documented before and during the outbreak of the war; then FBI director, J. Edgar Hoover, had compiled a list of individuals who, based on possible ties to “subversive” groups, might be “opposed to the American way of life . . . [and pose] ‘a serious handicap [to the] internal security’” of the United States.<sup>97</sup> Following the attack on Pearl Harbor, President Roosevelt called on his Attorney General to “indict the seditionists,”<sup>98</sup> particularly those who accurately portrayed the news of the attack as completely destroying the Pacific fleet when Roosevelt was trying to publicly minimize the scale of the disaster.<sup>99</sup>

As in WWI, photographs at the battle lines of WWII were censored; “visual images were rejected if they showed Americans killed, badly injured, or emotionally distressed.”<sup>100</sup> Images showing American soldiers in a negative light—looting, mistreating the indigenous, or killing innocents—would also be rejected by the

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1917-1919: GENERAL ORDERS, GHQ, AEF, Order No. 36 at 73-74, Order No. 146 at 435-36 (1988).

94. *Cantwell v. Connecticut*, 310 U.S. 296, 310-11 (1940); see Frank R. Strong, *Fifty Years of “Clear and Present Danger”*: From *Schenck to Brandenburg—and Beyond*, 1969 SUP. CT. REV. 41 (1969).

95. *Bridges v. California*, 314 U.S. 252, 263 (1941).

96. In an article published by the *New York Times* less than six months before the United States’ entrance into WWII, the President of Yale University wrote that it is in times of national crisis when unhampered free speech is most essential. In such moments, “the issues which confront government should be settled, for the sake of national safety, not by emotion or by force, but by reason.” Charles Seymour, *How Free Can Speech Be in Time of War?*, N.Y. TIMES MAG., Apr. 12, 1942, at 13.

97. ROBERT J. GOLDSTEIN, *POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO THE PRESENT* 253 (1978) (quoting FBI director, J. Edgar Hoover).

98. STONE, *supra* note 48, at 262-63 (quoting LEO P. RIBUFFO, *THE OLD CHRISTIAN RIGHT: THE PROTESTANT FAR RIGHT FROM THE GREAT DEPRESSION TO THE COLD WAR* 77 (1983)).

99. See MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA* 218 (Oxford 1992).

100. SMITH, *supra* note 63, at 162.



censors.<sup>101</sup> More importantly, involuntary censorship by the War Department forbade reporting of or recording any images of the aftermath of the bombing of Nagasaki and Hiroshima.<sup>102</sup> Film shot by Japanese crews of the cities was seized and kept secret by the government for twenty years.<sup>103</sup> Suppression of the realities of the immediate devastation and the effects of radiation sickness extended beyond “the press to books, [the] mail, and [movies].”<sup>104</sup> As a consequence, “Americans showed little concern about” whether the use of the bombs was necessary.<sup>105</sup>

The Cold War brought more First Amendment cases to the Supreme Court than any other era.<sup>106</sup> The most prominent of these was *Dennis v. United States*,<sup>107</sup> in that the Court qualified the clear and present danger test and added a secondary analysis of the level of danger balanced against the likelihood of its occurrence.<sup>108</sup> As the gravity of the feared harm increases (e.g., violence is more grave than looting; looting is more grave than littering), the level of probability and imminence required to validate a restriction of speech decreases.<sup>109</sup> Though seemingly logical, this balancing test is still vague and open-ended—the inquiry still unstructured and ripe for ideological manipulation.<sup>110</sup> The other prominent historical lesson of the Cold War period was that because of rampant fear of open expression (caused by McCarthyism), attacks on civil liberties went

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101. *Id.* at 163.

102. THEODORE F. KOOP, *WEAPON OF SILENCE* 285 (1946). The War Department announced, “It is the duty of every citizen, in the interest of national safety, to keep all discussion of this subject within the limits of information disclosed in official releases.” *Id.*

103. Erik Barnouw, *The Hiroshima-Nagasaki Footage: A Report*, 2 *HIST. J. OF FILM, RADIO & TELEVISION* 91, 91-100 (1982).

104. SMITH, *supra* note 63, at 167.

105. *Id.* “A poll showed that 35.3 percent thought Japan would have held out less than six months without the atomic bombings, and 53.2 percent said that the war would have lasted for six or more months.” *Id.* at 284 n.242 (citing *The Fortune Survey*, *FORTUNE*, Dec. 1945, at 303, 309).

106. STONE, *supra* note 48, at 395.

107. 341 U.S. 494 (1951). The defendants in *Dennis* were convicted under the Smith Act of teaching the doctrines of Marxism-Leninism, including the necessity of force and violence to overthrow the government when a promising opportunity arises. *Id.* at 497-98.

108. *Id.* at 510. Justice Vinson, writing for the plurality, adopted Judge Hand’s formulation in determining protection of speech, stating courts “must ask whether the gravity of the evil, discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” *Id.* (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950)) (internal quotation marks omitted).

109. *See United States v. Dennis*, 183 F.2d 201, 212-13 (2d Cir. 1950).

110. STONE, *supra* note 48, at 409.

almost unchallenged by the citizenry.<sup>111</sup> As Justice Black observed, “constitutional liberties have a pretty hard time when people get too frightened,”<sup>112</sup> and historian Henry Steele Commager saw the political repression of the 1950s as breeding “conformity” that was manifested in an “uncritical and unquestioning acceptance of America as it is” and “reject[ing] inquiry into . . . the wisdom of our foreign policy.”<sup>113</sup>

The issue of the legality of prior restraint<sup>114</sup> on speech was tested during the Vietnam War with the New York Times’s publication of the Pentagon Papers,<sup>115</sup> a classified study of America’s political-military involvement in Vietnam commissioned by United States Secretary of Defense, Robert S. McNamara.<sup>116</sup> The study, which had concluded in 1968, included evidence that the U.S. government had misled the public, as well as the world, during its war campaign.<sup>117</sup> The Nixon Administration filed a suit under the Espionage Act of 1917 seeking an injunction to prohibit publication of the documents.<sup>118</sup> By the time the case reached the U.S. Supreme Court,<sup>119</sup> the First Amendment doctrine that “[a]ny system of prior restraints of expression comes [with] a heavy presumption against its constitutional validity,” had already been established.<sup>120</sup> The Court held that the government had not met its heavy burden in showing a justification for restraining the press from printing the documents. In rejecting the executive branch’s argument that “publication . . . would endanger the national security,”<sup>121</sup> the Court denied the

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111. For example, when asked to sign a petition in support of the preamble to the Declaration of Independence on July 4, 1951, 99 percent of those approached refused. Drew Pearson, *THE CAPITAL TIMES*, July 30, Aug 2 1951. The reporter lamented that there was “a disease of fear . . . fear of ideas, fear of books, fear of the good old American right to sign a petition.” *Id.*

112. ROGER K. NEWMAN, *HUGO BLACK: A BIOGRAPHY* 401 (1994).

113. GOLDSTEIN, *supra* note 97, at 383-84.

114. Prior restraint is “[a] governmental restriction on speech or publication before its actual expression.” *BLACK’S LAW DICTIONARY* 1212 (7th ed. 1999).

115. The official title of the Pentagon Papers is: *United States–Vietnam Relations, 1945–1967: A Study Prepared by the Department of Defense*.

116. SMITH, *supra* note 63, at 186.

117. See STONE, *supra* note 48, at 500-03.

118. *Id.* at 504.

119. *New York Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam).

120. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963); see also *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (affirming the presumption against prior restraint but noting that “protection [from] previous restraint is not absolutely unlimited”). “[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.” *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-559 (1975).

121. *New York Times*, 403 U.S. at 718 (Black, J., concurring).

injunction.<sup>122</sup> The security threat predicted by the Nixon Administration never came to pass,<sup>123</sup> and historians generally regard the government's protest over the release of the Papers as an attempt to cover up embarrassing government secrets that would cause disfavor politically.<sup>124</sup>

Photojournalists had relative freedom and access to the troops and front lines of the Vietnam War,<sup>125</sup> but due to graphic images of the violence reaching the American public and the "widespread reporting of the government's failures," the Department of Defense ("DOD") resolved to enhance restrictions on the press in later military actions.<sup>126</sup> Starting in 1990, the media could only access zones of conflict by participating in "press pools" created by the DOD; the "ground rules" of the new system included being "escort[ed]" at all times" and having the stories and photographs reviewed.<sup>127</sup> A reporter covering the 1991 Gulf War claimed that the policy made reporters "essentially unpaid employees of the Department of Defense."<sup>128</sup> To rectify these concerns, the DOD worked with the media and reached an agreement effective in 1992 that, for future military operations, "[o]pen and independent" reporting would be the norm and the press pool was supposedly dissolved.<sup>129</sup>

### B. *Today and Recent History*

It is only more recently, in the age of global terrorism, that the tension between the government's need to keep secrets in the interest of national security and the public's interest in free speech and a free press have affected what can and cannot be photographed on American soil. Unlike past conflicts, which usually took place on foreign lands, terrorism creates a vulnerability to United States infrastructure, as it can be used as a weapon against Americans. The question after September 11th is: "In order to be more safe, do we need to be less free" in our everyday lives?<sup>130</sup> In the name of

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122. *Id.* at 714 (per curiam opinion).

123. SMITH, *supra* note 63, at 187.

124. *See id.*; *see also* STONE, *supra* note 48, at 515 (noting that "the Pentagon Papers fostered a greater public awareness of the dangers of governmental secrecy and a deeper . . . skepticism about the candor of national leaders").

125. SMITH, *supra* note 63, at 181.

126. Karen L. Turner, *Convergence of the First Amendment and the Withholding of Information for the Security of the Nation: A Historical Perspective and the Effect of September 11th on Constitutional Freedoms*, 33 MCGEORGE L. REV. 593, 604-05 (2002) ("[D]uring the military conflicts in Grenada and Panama, the press was completely left behind.").

127. *Id.* at 605.

128. David Shaw, *After the Attack*, L.A. TIMES, Sept. 25, 2001, at A1.

129. *Id.*; Turner, *supra* note 126, at 606-07.

130. Ira Glasser, *More Safe, Less Free: A Short History of Wartime Civil Liberties*, in

combating terror, new laws have been enacted that have challenged civil liberty guarantees given by the U.S. Constitution: Americans have experienced heightened security measures in searches at airports,<sup>131</sup> the U.S. Government has detained, without charge, illegal aliens for an indefinite period of time, citing only that they have reason to believe the individual may endanger national security,<sup>132</sup> and Congress has given federal officials the power to use nationwide blanket search warrants for terrorism investigations.<sup>133</sup> There is, however, scarce judicial review of regulations against photographing transportation systems.

Despite some law enforcement officers' assumption,<sup>134</sup> neither the USA Patriot Act of 2001 nor the Homeland Security Act restrain photography of buildings, transportation systems, or infrastructure in any way.<sup>135</sup> In fact, "no statutory or regulatory changes were made" subsequent to the terror attacks on September 11, 2001, that would increase the pre-9/11 restrictions of what is legal to photograph.<sup>136</sup> There is, however, authority that limits photography of certain federal places. The modern version of the Espionage Act of 1917 exists under 18 U.S.C. § 793,<sup>137</sup> and this law makes photographing or copying anything "connected with the national defense," or any place the "President has determined would be prejudicial to the national defense," a crime punishable by up to ten years imprisonment.<sup>138</sup> Under the statute, a person must have "intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation."<sup>139</sup> In *United States v. Rosen*, it was held that the government must prove that the information: (1) relates to the nation's military

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IT'S A FREE COUNTRY: PERSONAL FREEDOM IN AMERICA AFTER SEPTEMBER 11, at 11, 11 (Danny Goldberg, Victor Goldberg & Robert Greenwald eds., 2002).

131. See, e.g., 49 U.S.C. § 44901 (2006) (mandating the screening of passengers and property before boarding air carriers); see also U.S. CUSTOMS AND BORDER PROTECTION, CPB DIRECTIVE NO. 3340-049, BORDER SEARCH OF ELECTRONIC DEVICES CONTAINING INFORMATION (Aug. 20, 2009), available at [http://www.dhs.gov/xlibrary/assets/cbp\\_directive\\_3340-049.pdf](http://www.dhs.gov/xlibrary/assets/cbp_directive_3340-049.pdf) (outlining operating procedures for searching computers and other electronic devices of passengers, U.S. citizens or otherwise, when flying into the United States).

132. See *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001*, Pub. L. No. 107-56, § 412, 115 Stat. 272 (2001).

133. *Id.* tit. II, § 220.

134. See *supra* notes 5-18 and accompanying text.

135. BERT KRAGES, *LEGAL HANDBOOK FOR PHOTOGRAPHERS: THE RIGHTS AND LIABILITIES OF MAKING IMAGES* 57 (2d ed. 2007).

136. *Id.*

137. 18 U.S.C. § 793(a) (2006).

138. *Id.*

139. *Id.*

activities; (2) does not exist in the public domain; (3) could cause harm to the nation's security; and (4) that the defendant knew the nature of the information and had reason to believe that exposure could harm the U.S. or give support to a foreign nation.<sup>140</sup>

Also, under federal law, taking a photograph of any place the President declares a vital military installation is illegal, unless prior permission is granted.<sup>141</sup> At this writing, neither former President George W. Bush nor current President Barack Obama has declared any public transportation system as requiring protection under this statute.

For the news media, the advent of the War on Terrorism has resulted in restrictions on the right to photograph and videotape. For a period of three months after the attacks on September 11th, media representatives were not allowed to photograph or film within the World Trade Center grounds and photojournalists were barred from Afghanistan.<sup>142</sup> The rules governing photographing images of the current wars in Iraq and Afghanistan are still instituted by the Department of Defense, but have been relaxed since the initial restrictions following the attacks.<sup>143</sup>

### III. PHOTOGRAPHY REGULATIONS AND BANS ON PUBLIC TRANSPORTATION SYSTEMS NATIONALLY AND INTERNATIONALLY

#### A. *Nationally*

Several U.S. cities have instituted or tried to institute restrictions on the taking of photography in and on their transportation systems: Boston, MA; Atlanta, GA; New York, NY; and, Washington, D.C., to name a few. In addition, the national train system, Amtrak, has struggled with its policies regarding this issue. This subsection will address a few of these public transportation organizations' historical and current policies and procedures.

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140. 445 F. Supp. 2d 602, 639-41 (E.D. Va. 2006).

141. 18 U.S.C. § 795 (2006) ("Whenever, in the interests of national defense, the President defines certain vital military and naval installations or equipment as requiring protection against the general dissemination of information relative thereto, it shall be unlawful to make any photograph, sketch, picture, drawing, map, or graphical representation . . .").

142. Turner, *supra* note 126, at 607; see *Photographers Arrested in Aftermath of the Attacks*, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Sept. 25, 2001), <http://www.rcfp.org/news/2001/0925lawenf.html> (describing members of the media being jailed for photographing near plane crash sites).

143. Josh Gerstein, *New DOD Photo Rules Prompt Outcry*, POLITICO (Oct. 15, 2009, 5:29 PM), <http://www.politico.com/news/stories/1009/28348.html> (reporting that the "[m]edia will [now] not be prohibited from viewing or filming casualties; however, casualty photographs showing recognizable face, nametag or other identifying feature or item will not be published").

## 1. MTBA of Boston, MA

Boston's public transportation system (commonly known as the "T") is governed by the Massachusetts Bay Transportation Authority ("MBTA"). Prior to 2007, the MBTA did not have an official restriction on amateur photography; however, there was an unwritten policy that anyone taking pictures may be stopped and questioned or prohibited from taking photos.<sup>144</sup> In 2006, the ACLU of Massachusetts threatened suit after receiving several complaints from photographers that they had been prohibited from taking photographs of the T trains, both while on public sidewalks or within the system.<sup>145</sup> Critics of the unofficial policy charged that limitations on photography in public places did little to improve security as, among other things, photos of the T were already online, ambiguous policies lead to uncertain application, and that there were already sufficient laws in place that prohibit photographing "sensitive" areas.<sup>146</sup> The ACLUM, while acknowledging that reasonable efforts by the MBTA to combat the threat of terrorism is an accepted practice under the First Amendment, argued that "prohibiting photographs of or on transportation vehicles in full view of the public is neither reasonable nor necessary."<sup>147</sup>

The MBTA changed its photography policy in 2007.<sup>148</sup> Naming security and public relations as its stated interests,<sup>149</sup> the current

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144. Mac Daniel, *ACLU Threatens to Sue over Limits to Photographing the T*, BOSTON GLOBE, June 13, 2006, at B3; Nicholas Casale, *Focusing on T Shutterbugs*, BOSTON GLOBE, June 20, 2006, at A10 ("The MBTA poses problems with its unwritten policy of giving police the choice to let people take pictures on transit property as long as the people are not in 'sensitive' areas.").

145. Daniel, *supra* note 144; *Freedom of Speech, Press, Assembly and Association Access to Information/Freedom to Travel*, ACLU FOUNDATION OF MASSACHUSETTS (Aug. 2006-Sept. 2007), [http://www.aclum.org/legal/legal\\_docket/aclum\\_legal\\_docket\\_06-07.pdf](http://www.aclum.org/legal/legal_docket/aclum_legal_docket_06-07.pdf). The ACLU of Massachusetts ("ACLUM")

contacted the MBTA to object to its policy which prohibited members of the public from photographing MBTA vehicles and facilities which are visible from public sidewalks and streets and from taking any photographs while on MBTA property. [ACLUM] noted that photography is fully protected by the First Amendment and that concerns for security could not justify the restriction where the photographs of MBTA vehicles and facilities are widely available. After initially denouncing the ACLUM request, the MBTA subsequently abandoned the no photography rule.

*Id.* at 6.

146. See Daniel, *supra* note 144; see also Casale, *supra* note 144.

147. Daniel, *supra* note 144 (quoting a letter from John Reinstein, legal director of the ACLUM).

148. MASS. BAY TRANSP. AUTH., SECURITY POLICY/PROCEDURE #2007-1, PHOTOGRAPHY POLICY & PROCEDURE, (July 9, 2007), available at [http://www.mbta.com/uploadedfiles/About\\_the\\_T/Police/Photo%20Policy%201.pdf](http://www.mbta.com/uploadedfiles/About_the_T/Police/Photo%20Policy%201.pdf).

149. The MBTA views its security interest as terrorism prevention. "Although in

policy allows non-commercial photography without requiring a permit, with the caveat that the photographer must produce picture identification “that includes . . . name, address, and date of birth” if asked to do so by an MBTA employee.<sup>150</sup> If the photographer refuses to provide the ID or is taking pictures while in areas restricted to the public, he or she will be ordered to stop “and will be subject to additional law enforcement action.”<sup>151</sup> Even with the less restrictive “no-ban” policy in place, photo hobbyists are still continuously harassed, told that photography on the T is illegal, and informed that they could be arrested for their photographic activity.<sup>152</sup> The current policy is also not posted on the MBTA website or readily available in stations; therefore, the requirements and restrictions are not readily available to the general public.

## 2. MTA of New York City, NY

Under the current section 1050.9(c) of Metropolitan Transit Authority’s (“MTA”) New York City Transit Rules of Conduct, “[p]hotography, filming or video recording in any facility or conveyance is permitted except that ancillary equipment such as lights, reflectors or tripods may not be used. Members of the press holding valid identification issued by the New York City Police Department are hereby authorized to use necessary ancillary equipment.”<sup>153</sup> In November 2004, however, the MTA proposed an outright ban on all photography and videography in the New York City subway system unless the photographer had been pre-approved as press-related.<sup>154</sup> The MTA Board cited concerns related to

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most instances there is no particular harm involved in taking photographic or video images on, in, or of MBTA property . . . intelligence indicates that persons who wish to target particular locations for terrorist purposes are likely to use photography as part of their pre-attack surveillance and planning.” *Id.* at 1.

150. *Id.* at 2.

151. *Id.* at 1.

152. Alana Gomez, *Is Picture Taking Allowed on the MBTA?*, WBZTV (Feb. 12, 2010, 5:46 PM), <http://wbztv.com/local/pictures.on.the.2.1491337.html>; Mike Champion, *MBTA Photography Policy*, GRAYSKY (Aug. 28, 2008), <http://graysky.org/2008/08/mbta-photo-policy/> (on file).

153. N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.9(3) (2005), available at <http://www.mta.info/nyct/rules/rules.htm> (last visited Oct. 25, 2010).

154. DIV. OF ADMIN. RULES, N.Y. DEP’T OF STATE, I.D. NO. NTA-47-04-00002-P, RULE MAKING ACTIVITIES, (Nov. 24, 2004), available at <http://www.dos.state.ny.us/info/register/2004/nov24/pdfs/rules.pdf>; see also Jen Chung, *Threat of Subway Photo Ban Riseth Again*, GOTHAMIST (Nov. 30, 2004), [http://gothamist.com/2004/11/30/threat\\_of\\_subway\\_photo\\_ban\\_riseth\\_again.php](http://gothamist.com/2004/11/30/threat_of_subway_photo_ban_riseth_again.php) (encouraging protest of amendment 1050.9(c): “No photograph, film or video recording shall be made or taken on or in any conveyance or facility by any person, except members of the press holding valid press identification cards issued by the New York City Police Department or by others duly authorized in writing to engage in such activity by the authority.”).

terrorism as the impetus behind the ban.<sup>155</sup> The proposal caused a firestorm of protest from the ACLU,<sup>156</sup> the Straphanger's Campaign,<sup>157</sup> the National Press Photographers Association,<sup>158</sup> New York City Mayor Bloomberg,<sup>159</sup> and the general public.<sup>160</sup> As a result, the MTA rescinded the proposal.<sup>161</sup> Now, casual photography is permitted; however, MTA and New York City police officers reserve the right to investigate if an activity ("photo[graphy] related or not") is deemed suspicious.<sup>162</sup>

Even with the proliferation of the new regulations, many amateur photographers feel there is a "de facto" ban on taking photographs in the subway, and they report that harassment by MTA employees and police continues.<sup>163</sup> In fact, since the ban was retracted, the city has been sued by several photographers who were arrested and had their cameras taken; in each case, the city has settled.<sup>164</sup>

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155. See DIV. OF ADMIN. RULES, *supra* note 154, at 16.

156. Letter from Christopher Dunn, Associate Legal Director, and Lisa Laplace, Contract Attorney, NYCLU, to Hon. Peter Kalikow, Chairman, Metro. Transp. Auth. Bd. and Lawrence G. Reuter, President, N.Y.C. Transit Auth. (Jan. 7, 2005), available at <http://www.nyclu.org/content/letter-mta-re-proposed-ban-photography-new-york-city-subway-system>.

157. Letter from Gene Russianoff, Senior Attorney, and Neysa Pranger, Campaign Coordinator, NYPIRG's Straphangers Campaign, to Hon. Peter Kalikow, Chairman, Metro. Transp. Auth. Bd. and Hon. Ray Kelly, Commissioner, New York Police Dept (Jan. 7, 2005), available at <http://www.straphangers.org/photoban/letter.htm>.

158. *NPPA Opposes Proposed NYC Subway Photography Ban*, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, [http://www.nppa.org/news\\_and\\_events/news/2004/06/nppa\\_opposes\\_nyc\\_subway\\_photo\\_ban.html](http://www.nppa.org/news_and_events/news/2004/06/nppa_opposes_nyc_subway_photo_ban.html) (last visited Mar. 16, 2011).

159. Pete Donohue, *Click Away, No Ban on Subway Pix*, DAILY NEWS (New York), May 22, 2005, at 25.

160. Bill Egbert, *Fotogs Rail vs. Subway Picture Ban*, DAILY NEWS (New York), June 7, 2004, at 26 (describing photographers' protest on MTA trains). For a snapshot of what New York City subway photography has meant to artists, see Sewell Chan, *Ban on Subway Photography Would Defy a Tradition*, N.Y. TIMES, Jan. 7, 2005, at B1.

161. Donohue, *supra* note 159; *Proposed NYC Subway Photo Ban is Dead; Photo Ban in Hempstead, Long Island, is Rescinded*, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (May 23, 2005), [http://www.nppa.org/news\\_and\\_events/news/2005/05/subway.html](http://www.nppa.org/news_and_events/news/2005/05/subway.html).

162. Donohue, *supra* note 159.

163. Chuck Bennett, *Photographers Take on Port Authority*, AMNEWYORK, Oct. 9, 2006, at 4, available at <http://www.railfanwindow.com/path-photo-ban.html>; *MTA to Remind Cops: Photography is Not Prohibited*, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (Mar. 17, 2006), [http://www.nppa.org/news\\_and\\_events/news/2006/03/mta.html](http://www.nppa.org/news_and_events/news/2006/03/mta.html).

164. Jen Carlson, *Amateur Photographer Sues City, Gets \$30K*, GOTHAMIST (Feb. 10, 2010), [http://gothamist.com/2010/02/10/amateur\\_photographer\\_sues\\_city\\_gets.php](http://gothamist.com/2010/02/10/amateur_photographer_sues_city_gets.php).



### 3. MUNI of San Francisco, CA

The MUNI system in San Francisco “welcomes photography and videography.”<sup>165</sup> It permits use of all hand-held, personal photography equipment on all of its vehicles and publicly-accessible property provided the photography does not “interfere with transit operations.”<sup>166</sup> The San Francisco Municipal Transportation Agency (SFMTA) cites safety concerns for most of its restrictions, such as that escalators and doorways cannot be blocked and prohibiting large cameras, lighting equipment, and tripods.<sup>167</sup> Additionally, photographers would have to comply with any instructions of an SFMTA employee “related to safety concerns.”<sup>168</sup> The SFMTA bars all photographers and videographers from “entering, photographing, or taking video in non-public areas of the SFMTA’s transit system.”<sup>169</sup>

### 4. NJ Transit

NJ Transit, New Jersey’s public transportation system, is similar to the PATH in that it links major points in New York and New Jersey, including a train route from Newark Penn Station to New York Penn Station. In 2005, NJ Transit considered, but after public condemnation, rejected<sup>170</sup> a proposed amendment that would require a permit for any commercial or non-commercial photographic activity and prior notice of intention for press photographers.<sup>171</sup> A group of concerned photographer’s rights associations protested the amendment, arguing that although the inferred interests of safety and national security are valid, the permit requirement would “restrict far more expressive conduct than necessary to serve” those interests, thereby violating the First Amendment.<sup>172</sup> Qualifying the proposed “ban” as a content-neutral regulation on speech, the organizations concluded that it failed constitutional muster as it was

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165. *Photography and Videography Guidelines*, SAN FRANCISCO MUNICIPAL TRANSPORTATION AGENCY (Dec. 31, 2009), <http://www.sfmta.com/cms/rhome/photo/guide.htm>.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. Letter from George D. Warrington, Exec. Dir., N.J. Transit, to Denis E. Connell, Railpace Co. (Dec. 30, 2005) *available at* <http://www.railpace.com/njt-letter.pdf>.

171. 37 N.J. Reg. 1501(a) (May 2, 2005) (proposing amendment to N.J. ADMIN. CODE §§ 16:83–1.1, 16:83–3.1(a)(27)-(28)).

172. Letter from Bruce Sanford, Counsel for the Soc’y of Prof’l Journalists, Baker & Hostetler et al., to George D. Warrington, Exec. Dir., N.J. Transit Corp. 3 (Oct. 31, 2005), *available at* [http://www.nppa.org/news\\_and\\_events/news/2005/11/N\\_Jersey\\_Photo\\_Ban\\_Protest.pdf](http://www.nppa.org/news_and_events/news/2005/11/N_Jersey_Photo_Ban_Protest.pdf).

not narrowly tailored to effectuate the agency's purpose.<sup>173</sup> Subsequently, George Warrington, Executive Director of NJ Transit, decided that NJ Transit would "return to [its] historic practice, which enables hobbyists and other non-commercial photographers to take pictures in public areas throughout the NJ TRANSIT system without obtaining permission or providing prior notice."<sup>174</sup>

### 5. Amtrak

Amtrak was created as a quasi-public corporation—a blend of government funding and oversight with private management and accountability.<sup>175</sup> In its unique capacity as the only national railroad, it is governed and regulated by the Department of Transportation.<sup>176</sup> In reaction to complaints regarding the harassment and arrests of photographers, Amtrak officials worked with the National Press Photographer's Association to create a new set of guidelines.<sup>177</sup> Enacted in March 2009, the new policy allows photography and videography in public access areas on Amtrak property.<sup>178</sup> However, Amtrak stipulates that during emergency situations or extraordinary situations, "for example, declared elevation of Homeland Security Advisory System to High or Severe . . . and where actions are deemed suspicious or inconsistent with this policy by observing/reporting persons, photographers and videographers may be approached and questioned to determine if further investigation or action is necessary."<sup>179</sup> Anyone found taking photographs in one of the many enumerated restricted areas—including train platforms (if ticketless), baggage/delivery areas, commissaries, and track areas—could be investigated, and possibly arrested, as well as have their equipment seized.<sup>180</sup> Investigation can also occur if it is reported to Amtrak by a member of the general public or observed by Amtrak police that the photographic activity is "suspicious in nature;"

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173. *Id.* at 7.

174. Warrington, *supra* note 170, at 1.

175. See BRIAN SOLOMON, AMTRAK, 8 (MBI 2004).

176. See Amtrak Reform and Accountability Act of 1997, Pub. L. No. 105-134 (1997).

177. *Amtrak Responds to NPPA With New Photography Guidelines*, *Police Policy Reviews*, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (Jan. 30, 2009), [http://nppa.org/news\\_and\\_events/news/2009/01/amtrak02.html](http://nppa.org/news_and_events/news/2009/01/amtrak02.html); Ahnalese Rushmann, *Photographers Tangle with Vague Rules in Transit Hubs*, THE NEWS MEDIA & THE LAW, Spring 2009, at 34. The most well-known arrest is that of photography enthusiast Duane Kerzic. He entered Amtrak's annual photography contest but was arrested while taking photographs for the contest in New York City's Penn Station. *Id.*

178. *Amtrak Corporate Guidelines on Photography and Video Recording*, AMTRAK, § 1, available at <http://www.amtrak.com/servlet/ContentServer/Page/1241267362248/1237405732517> (last visited Mar. 16, 2011).

179. *Id.* (parenthesis omitted).

180. *Id.* § I; see generally *id.* § II.

however, “the taking of photographs and/or video may not, in and of itself, rise to the level of reasonable suspicion or probable cause.”<sup>181</sup>

*B. Internationally*

England’s Official Secrets Act of 1911 mirrors the United States’ Espionage Act in making it illegal for any person to sketch or otherwise make a model of any of military installation or “any railway, road, way, or channel . . . which is for the time being declared . . . to be a prohibited place . . . on the ground that information with respect thereto, or the destruction or obstruction thereof, or interference therewith, would be useful to an enemy.”<sup>182</sup> To violate this act, there must be an intention to endanger the safety of the country.<sup>183</sup> As a result of escalating security concerns, England passed the Terrorism Act of 2000, making it illegal to make a record, including a photograph that could be used for an act of terrorism.<sup>184</sup> Part V of the act gives law enforcement officers the authority to stop, search, and arrest an individual they reasonably believe to be a terrorist or conducting terroristic activity.<sup>185</sup> Subsequent to the enactment, many individuals—including members of the media—have been stopped, interrogated, detained and arrested while taking photographs on public property in the United Kingdom, resulting in mass protest.<sup>186</sup>

On July 7, 2005, terrorists attacked London’s underground transportation system (“Tube”) and an above-ground bus, killing fifty-six people, including the four suicide bombers, in a series of coordinated bombings.<sup>187</sup> Currently, the London Underground (“LU”) requires all photographers and videographers, even tourists wanting to take a snapshot, to apply for a permit to film or shoot. The cost for a non-commercial student or “non-professional” permit is £40.<sup>188</sup> LU, run by a private company, heavily restricts the content of what can be filmed or photographed, as well as the days and times when the permit-holder may perform the photography.<sup>189</sup> In addition, LU must

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181. *Id.* § IV.

182. Official Secrets Act, 1911, 1 & 2 Geo. 5, c. 28 § 3(d) (Eng.).

183. *Id.* § 1.

184. Terrorism Act, 2000, c. 11, § 58 (Eng.).

185. *Id.* §§ 40-45.

186. Jonathan Brown, *Photographers Criminalised as Police ‘Abuse’ Anti-Terror Laws*, THE INDEPENDENT, Jan. 6, 2009, at 18; *see generally* I’M A PHOTOGRAPHER NOT A TERRORIST!, <http://photographernotaterrorist.org/> (last visited Mar. 6, 2011).

187. *See* INTELLIGENCE AND SECURITY COMMITTEE, REPORT INTO THE LONDON TERRORIST ATTACKS ON 7 JULY 2005, Cm. 6785, at 2 (U.K.) (2006).

188. *Guide to Filming*, TRANSPORT FOR LONDON, <http://www.tfl.gov.uk/corporate/media/5225.aspx> (last visited Mar. 6, 2011).

189. *Id.*

approve a script or layout before granting a permit, and can refuse a permit application without giving specific basis for doing so.<sup>190</sup> It is confusing or unclear to the public, however, if this quite burdensome policy actually applies to casual picture taking.<sup>191</sup>

Spain's capital city, Madrid, experienced a terrorist attack by Al Qaeda on its RENFE Cercanias commuter train system on March 11, 2004, leaving 192 people dead.<sup>192</sup> The attackers left backpacks full of explosives in ten different cars, which they set off by cellphone devices.<sup>193</sup> It appears that the Consorcio Regional de Transportes de Madrid (CRTM) places no limits on photography in its regulations, which have not been updated since the attacks.<sup>194</sup> CRTM has, however, upgraded its security and emergency response systems by installing more security cameras, placing emergency call buttons on buses, employing passenger scanners in the pre-boarding area of the AVE train, increasing police presence, and implementing structural changes to entrances and platforms.<sup>195</sup> The Metro de Madrid recently held a "Metro from your Mobile" photography contest in its system, inviting passengers to use their camera phones to capture images; "[w]ith this initiative, Metro wishes to draw attention to the Metro space as a fundamental element of urban life . . . ."<sup>196</sup>

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190. *Id.* The LU prohibits the photographing or filming of graffiti and vandalism, begging, or "[a]nything that may negatively affect the interests of the site owner," among other things.

191. See Chris Cheesman, *Photography Crackdown on London Underground*, AMATEUR PHOTOGRAPHER (Apr. 9, 2009), [http://www.amateurphotographer.co.uk/news/photography\\_crackdown\\_on\\_london\\_underground\\_news\\_280480.html](http://www.amateurphotographer.co.uk/news/photography_crackdown_on_london_underground_news_280480.html) (reporting that Transport for London will take a "common sense" approach when dealing with amateur photography").

192. Elaine Sciolino, *10 Bombs Shatter Trains in Madrid, Killing 192*, N.Y. TIMES, Mar. 12, 2004, at A5.

193. *Id.*

194. See *Passenger Regulations of the Ferrocarril Metropolitano de Madrid*, METRO DE MADRID (OCT. 21, 1993), available at <http://www.metromadrid.es/export/sites/metro/comun/documentos/regulations.pdf>.

195. See BRIAN TAYLOR, ROBIN LIGGETT & ELLEN CAVANAGH, DESIGNING AND OPERATING SAFE AND SECURE TRANSIT SYSTEMS: ASSESSING CURRENT PRACTICES IN THE UNITED STATES AND ABROAD 173-75 (Mineta Transportation Institute 2005), available at [http://www.transweb.sjsu.edu/MTIportal/research/publications/documents/04-05/MTI\\_04-05.pdf](http://www.transweb.sjsu.edu/MTIportal/research/publications/documents/04-05/MTI_04-05.pdf).

196. *From Tomorrow, Metro Becomes the Best Photographic Scenario for its Clients*, METRO DE MADRID (Feb. 24, 2010), <http://esplx212.metromadrid.es/en/comunicacion/prensa/2010/noticia284.html> (translated from the original Spanish).

IV. ANALYSIS OF THE PORT AUTHORITY OF NY & NJ'S REGULATIONS  
ON PHOTOGRAPHY ON THE PATH TRAIN UNDER FIRST AMENDMENT  
JURISPRUDENCE

A. *Standing to Challenge the Permit Regulations*

There has not, as of this writing, been a legal challenge to the Port Authority's ban on photography or its permit granting system. Under First Amendment doctrine, actual personal injury is not required to challenge the constitutionality of a regulation if a government official is given "overly broad licensing discretion" in the granting or denial of that license, "whether or not his conduct could be proscribed by a properly drawn statute, and whether or not he applied for a license."<sup>197</sup> The theory behind the departure from the customary standing requirement of "injury in fact"<sup>198</sup> is that speech is easily chilled, and First Amendment interests need special protection.<sup>199</sup> Therefore, a challenge to the Port Authority's effective ban on photography and videography could be filed by any potential permit applicant (i.e., any member of the general public), not just by an individual granted or denied a permit, who is detained or who is otherwise cited as violating the policy.

B. *For Photography Purposes, the PATH System Is a Limited Public Forum*

When a regulation is directly aimed at pure expression, such as photography, the extent to which the government may regulate the expression varies with the character of the forum in which the expression occurs.<sup>200</sup> There are three types of fora, with differing levels of First Amendment protection, under First Amendment analysis: unlimited or traditional public forum, designated or limited public forum, and non-public forum. Government property qualifies as a limited public forum if "the State has opened [it] for use by the public as a place for expressive activity . . . even if was not required to create the forum in the first place."<sup>201</sup> If property is deemed to be a

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197. See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 56 (1965).

198. See generally *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972) (discussing how standing, distinct from freedom of speech, has stricter requirements to demonstrate an injury).

199. See *NAACP v. Button*, 371 U.S. 415, 432-33 (1963) ("These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.").

200. Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1220-21 (1984).

201. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

limited public forum, reasonable time, place, or manner restrictions on speech are permitted, but “a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”<sup>202</sup> The Port Authority has long permitted expressive activity on its property in the form of pamphleteers, leafleteers, street performers, and, historically, photography; it is therefore likely that a court would conclude that the agency has created a limited open forum.

C. *Prior Restraint Analysis: Port Authority’s Permit Scheme Is a Form of Impermissible Prior Restraint on Free Expression*

The Port Authority stands alone in relation to other United States public transportation systems in requiring a permit for *any* amateur, casual, and hobby photography.<sup>203</sup> Any regulatory scheme that subjects expression to advance editorial review and approval flatly constitutes a prior restraint, and, therefore, bears a presumption of unconstitutionality.<sup>204</sup> It is feared that a scheme that vests arbitrary discretion in a licensing official “has the potential for becoming a means of suppressing a particular point of view.”<sup>205</sup> Permit requirements have been found to constitute a prior restraint on speech,<sup>206</sup> and such requirement is particularly egregious if it delegates administrative officers with an overly broad discretion to deny or accept the permit application.<sup>207</sup> The PATH regulations allow denial of a permit when the photographic target specified

could be used to aid in the planning of an attempt to disable, destroy, avoid or circumvent any operational, safety, security, evacuation or emergency response device, structure or procedure, or . . . commit an act of violence or intentionally cause disruption of

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202. *Id.* at 46.

203. *See supra* Part III.A.

204. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963).

205. *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981).

206. Requiring a citizen or a group to obtain the government’s “permission” to speak in public is constitutionally offensive. *See, e.g.*, *Watchtower Bible and Tract Soc’y of New York v. Vill. of Stratton*, 536 U.S. 150, 165-68 (2002) (holding that a permit requirement for door-to-door canvassing is a prior restraint and unconstitutional); *Thomas v. Collins*, 323 U.S. 516, 539 (1945) (“As a matter of principle, a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly.”).

207. The Court has employed this principle repeatedly to strike down statutes that, on their face, vested officials with a dangerously wide and unfettered degree of discretion to regulate speech. *See, e.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153-55 (1969) (invalidating ordinance requiring marchers to seek permission from town mayor); *Cox v. Louisiana*, 379 U.S. 536, 557-58 (1965) (striking down standardless breach-of-the-peace statute); *Kunz v. New York*, 340 U.S. 290, 293-94 (1951) (invalidating ordinance prohibiting public worship without a permit from city police commissioner); *Saia v. New York*, 334 U.S. 558, 560-62 (1948) (invalidating ordinance requiring sound trucks to obtain permission from police chief).

rail service or public panic within the PATH system or a part thereof.<sup>208</sup>

While these are standards of some kind, the language is impermissibly vague. Depending on a reader's interpretation, a photograph of the tracks of the PATH train system, a stairwell to a PATH platform, interior of a PATH car, or the entire PATH train itself may or may not fall under the category of an image that could be used in a plan to destroy or cause disruption to the PATH system. Particularly in an era of general fear of terrorist attack, permit administrators might feel compelled to deny applications for almost any subject the applicant desires to photograph. In addition, the PATH representative required to accompany permit-holding photographers may forbid the photographer from taking any photograph if he or she feels the image would not comply with the permit standards. This creates even more opportunities for the capricious denial of free expression at the discretion of an individual employee. These provisions create a double unfettered license to Port Authority personnel to restrain photographers based on vague and subjective guidelines.

With formless directives on when to deny a permit for expressive conduct, a policy danger also exists; in the interest of security, certain applications might be denied based simply on who is applying, especially since they are required to apply in person and, therefore, physical characteristics can be analyzed. Permit Administrators and PATH representatives escorting photographers and videographers might prohibit more photography based on their perception of the photographer's religion or ethnic background.

There is evidence that such racial profiling of photographers is rampant. In 2007, Arun Wiita, a Columbia graduate student of Indian descent, was handcuffed and detained for taking photographs near a New York subway station, even though he was fully cooperative with the officers and complied with requests for identification.<sup>209</sup> In 2004, Kamran Akhtar, a Pakistani man, was arrested for videotaping "buildings" in Charlotte, NC; the videos turned out to be "similar to what someone might bring home from a vacation" and no terrorist connections were found.<sup>210</sup> Mr. Akhtar,

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208. Rules and Regulations, *supra* note 23.

209. *NYCLU Sues NYPD for Harassing Photographers*, NEW YORK CIVIL LIBERTIES UNION, <http://www.nyclu.org/news/nyclu-sues-nypd-harassing-photographers> (last visited Mar. 7, 2011); Complaint ¶¶ 11, 12, 19-32, *Wiita v. Kelly*, No. 07-CV-11056 (S.D.N.Y. Dec. 6, 2007), *available at* [www.nyclu.org/files/releases/nyclu\\_complaint1.pdf](http://www.nyclu.org/files/releases/nyclu_complaint1.pdf) (last visited Mar. 7, 2011). The lawsuit was settled before it went to trial.

210. Ron Chepesiuk, *Pakistani Man Arrested While Videotaping Buildings May Stand Trial*, THE NEW STANDARD (Sept. 27, 2004), [http://newstandardnews.net/content/?action=show\\_item&itemid=1043](http://newstandardnews.net/content/?action=show_item&itemid=1043).

however, was then charged with immigration violations.<sup>211</sup>

Finally, regulations on the PATH train, by including the permit requirement, effectively intimidate would-be photographers into censoring their own speech, a concern that instigated the prior restraint presumption.<sup>212</sup> “Both the procedural hurdle of filling out and submitting a written application, and the temporal hurdle of waiting for the permit to be granted may discourage potential speakers.”<sup>213</sup> In addition, the insistence that a name, address, and telephone number be supplied with the application might dissuade photographers who wish to remain anonymous. Critically, advance notification requirements eliminate “spontaneous speech.”<sup>214</sup> In the final analysis, the PATH regulations are an impermissible prior restraint; they grant impermissible discretion to only a handful of Port Authority officials to grant or deny photographic expression based on ephemeral standards.

#### D. Time, Place, Manner Analysis

Even if the standards by which photography may be denied were made more specific, the Port Authority’s regulations fail under a content-neutral, “time, place, manner” First Amendment analysis. If a policy does not discriminate between speakers based on the content of the speech or the speaker’s viewpoint, the United States Supreme Court has interpreted the First Amendment as permitting “reasonable restrictions on the time, place, or manner of protected speech, provided th[ose] restrictions ‘. . . are *narrowly tailored* to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”<sup>215</sup> A regulation also may not burden “substantially more speech than is necessary to further the government’s legitimate interests.”<sup>216</sup>

The Port Authority’s regulations on when and how amateur photography can be conducted are unreasonable and, at the same time, they exceedingly burden valuable and legal activity. The length of the mandatory period between a permit application and the allowance of the act being requested is critical to its

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211. *Id.*

212. *See City of Lakewood v. Plain Dealer Publ’g Co.*, 486 U.S. 750, 759 (1988).

213. *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1994).

214. *See Watchtower Bible and Tract Soc’y of New York v. Vill. of Stratton*, 536 U.S. 150, 167 (2002); *see also Grossman*, 33 F.3d at 1206 (noting that “because of the delay caused by complying with the permitting procedures, immediate speech can no longer respond to immediate issues” (internal quotation marks omitted)).

215. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (emphasis added) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

216. *Id.* at 799.



reasonableness.<sup>217</sup> Due to the unique and spontaneous nature of documentary, artistic, and historical photographic expression, requiring a permit application thirty-six hours in advance that specifies what exactly is to be photographed, and will be granted only upon availability of a PATH escort, effectively “chills” legally permissible expression.<sup>218</sup> Tourists, particularly those traveling internationally, cannot be expected to apply for a permit within the narrow timeframe to shoot a view of the Newark or New York City skyline, or the Statue of Liberty, from a PATH car or platform. Furthermore, the window of time in which permit applications are accepted—“during the hours of 9:00 AM to 10:30 AM and 1:30 PM to 3:30 PM, Monday through Friday”—is unreasonably narrow.<sup>219</sup>

The provision that requires permit applicants to apply in person is also unduly burdensome under the time, place, and manner requirements. “In this age of email, express mail, fax, and telephone, requiring, inflexibly,” an in-person presentation of a permit application as a mandatory condition of permit issuance burdens substantially more speech than necessary.<sup>220</sup> Unlike the London Underground, PATH train permits are not available online to fill out, or even print. The regulations give no indication where a permit application may be obtained or submitted. Finally, conditioning permit-holding photographers’ ability to, in fact, take their photographs on the *availability* of an escort, is unreasonable—burdening the permit holder with the prospect of an unpredictable and capricious denial of expression even after a permit has been issued. The impractical nature of the process of successfully obtaining a permit and then taking the desired photographs effectively create a *de facto* ban on all photography within the PATH system.

While the permit structure does serve significant government interests—the safety and security of its public transportation passengers—the Port Authority’s rules fail the two other requirements under time, place, and manner analysis: they are not narrowly tailored to those purposes and, therefore, restrict too substantially the right to take pictures on PATH property. If the Port

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217. *Church of the Am. Knights of the Ku Klux Klan v. City of Gary*, 334 F.3d 676, 682 (7th Cir. 2003).

218. *See Sullivan v. City of Augusta*, 511 F.3d 16, 38-39 (1st Cir. 2007) (holding that a city’s thirty-day notice requirement for a parade permit “restrict[ed] spontaneous free expression . . . rights safeguarded in the First Amendment”); *see also Douglas v. Brownell*, 88 F.3d 1511, 1523-24 (8th Cir. 1996) (finding a city’s goals of safety did not justify a five-day advance filing requirement for any parade containing more than ten people).

219. Rules and Regulations, *supra* note 23.

220. *Sullivan*, 511 F.3d at 41.

Authority's goal is safety from terrorism, banning all unauthorized photography is not narrowly correlated to achieving this end. Modern cameras and other photography equipment are easily concealed from detection in cell phones, clothing, bags, or other items. The banning of unauthorized photography, therefore, is more likely to result in the Port Authority penalizing legitimate photographers for exercising a protected First Amendment right than in prevention of terrorist attacks on the PATH transit system. Furthermore, no tangible evidence exists that the pre-existing non-regulation of photography increased the potential for attacks against PATH infrastructure.<sup>221</sup> The government "is not free to foreclose expressive activity in public areas on mere speculation about danger."<sup>222</sup> Photographs of the infrastructure of the PATH from public areas are already widely available on the internet, and thousands of riders can observe public areas of the PATH every day.

Finally, to be constitutional, a time, place, or manner regulation must leave open adequate alternative channels of communication that permit the same type of communication regulated by the rule.<sup>223</sup> Though the rules and regulations state that, upon denying the photographer the right to photograph a certain subject, "a suggestion for alternative photography in PATH . . . shall be made by the PATH representative,"<sup>224</sup> this is an impossible task. PATH cannot offer an alternative to such unique subject matters as the Statue of Liberty, artwork in a station, or even the PATH train itself. Additionally, the photography ban applies to *all* PATH property, whether used for direct public transportation services or not, thus leaving no means, let alone alternative means, for an unauthorized photographer to take pictures or film in or on PATH property. Since the PATH permit requirement fails the second and third prongs of the intermediate scrutiny analysis of time, place, or manner restrictions, it should be held unconstitutional.

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221. See *McCullen v. Coakley*, 571 F.3d 167, 179 (1st Cir. 2009) (finding a fixed buffer zone around reproductive health care facilities constitutional when law enforcement and workers testified that pre-existing law was ineffective in protecting public safety); see also *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1227 (9th Cir. 1990) (finding that a seventy-five yard security zone around the viewing stands and ships during a naval parade was not narrowly tailored to the significant government purpose in protecting naval officials when "there is no tangible evidence that a 75 yard security zone is necessary to protect that interest. In prior years, the Coast Guard has demonstrated ample ability to operate safely without" the security zone).

222. *Bay Area Peace Navy*, 914 F.2d at 1228.

223. *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

224. Rules and Regulations, *supra* note 23.

*E. Content-Based Analysis*

Though seemingly a restriction on the time, place, or manner in which a photographer is allowed to take photographs, on closer analysis the restrictions are, in fact, content-based and, therefore, subject to strict scrutiny. Under the rules, the Permit Administrator does not deny based on the time of day, or the size of the equipment being used, but on what the would-be photographer wishes to take a photograph of. The applicant who requests to photograph the construction area of a new track or station may be denied, while the applicant who would like to videotape her child with the New York skyline in the background might be permitted to do so. Content-based approaches to speech regulations are presumptively invalid, and the government must show that “its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”<sup>225</sup> Furthermore, if a less restrictive alternative to the directive is available to serve the legitimate and compelling government purpose, that alternative must be used.<sup>226</sup>

The level of scrutiny on content-based regulations may be lessened depending on whether the restricted speech has “low” First Amendment value,<sup>227</sup> or whether the speech is tied to the purposes of the protections.<sup>228</sup> Documenting activity within the PATH system unquestionably is of paramount public concern, and access to record any possible mismanagement within this government agency directly relates to the rationale that First Amendment protection is crucial to self-governance.<sup>229</sup> The taking of a photograph is also often tied to current and newsworthy events, so spur-of-the-moment documentation of images would inform the public of news events as they actually happen. Therefore, the speech being regulated by the Port Authority deserves utmost First Amendment protections.

National security is certainly a compelling government interest under strict scrutiny analysis.<sup>230</sup> The Supreme Court has nonetheless required a strong showing of imminent danger before permitting First Amendment freedoms to be sacrificed.<sup>231</sup> As Justice Black

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225. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987).

226. *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000).

227. The Supreme Court has held “that several classes of speech have low first amendment value, including express incitement, false statements of fact, obscenity, commercial speech, fighting words, and child pornography.” Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV 189, 194-95 (1983).

228. *Id.* at 194.

229. *See supra* Part I.

230. Decisions in the First Amendment area have taken special note of the paramount importance of national security interests. *See, e.g.*, *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

231. *See, e.g.*, *New York Times Co. v. United States*, 403 U.S. 713, 726-727 (1971)

stated in *New York Times v. United States*, the “word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”<sup>232</sup> Therefore, the courts should be careful that a licensing scheme imposed for the asserted purpose of promoting national security is not promulgated for an entirely different purpose, such as covering up embarrassing information or fostering a false sense of security. Under strict scrutiny, the fit between the regulation and the governmental goal is the key factor. Here, the Port Authority must first prove that banning all unapproved photography and videography is *necessary* to protect the PATH from terrorist threat. Evidence that regulations are not narrowly drawn can be found in whether the policy either burdens more speech than necessary or does not go far enough to effectuate its purpose.<sup>233</sup> The ban on photography on the PATH is both over-inclusive, in that it includes every person with a camera and not just would-be terrorists, and under-inclusive since it does not include would-be terrorists who might use photos available on the internet for their plans, or who can view areas of the PATH by riding the train. Therefore, the scheme only tenuously relates to the stated interest. Finally, the regulation could be altered to not restrict any more speech than necessary; for instance, permits could be required for only those seeking to photograph areas of the PATH pre-determined to be sensitive. The permit scheme would not survive the second prong of strict scrutiny analysis and, therefore, is unconstitutional.

*F. Port Authority’s Policy Regarding Videotaping and Photography by the Press Is Unconstitutional*

Though this Note focuses on the permit policies for the non-journalist photographer, the Port Authority’s policy for press photography and videography stipulates that no media “can go beyond the fare gates at any PATH station without a Port Authority-provided escort.”<sup>234</sup> The agency not only “reserves the right to restrict videotaping and photography in and directly outside PATH stations,” but also requires the press to seek approval in advance from the Port

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(Brennan, J., concurring); *see also* *Schenck v. United States*, 249 U.S. 47, 52 (1919).

232. *New York Times*, 403 U.S. at 717 (1971) (Black, J., concurring).

233. *See* *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 793 (1978) (explaining that the challenged statute failed strict scrutiny because it was both overinclusive and underinclusive); *see also* Spencer Overton, *Restraint and Responsibility: Judicial Review of Campaign Reform*, 61 WASH. & LEE L. REV. 663, 676 (2004) (“[T]he narrow tailoring test can invalidate not only overinclusive statutes but also those that are underinclusive.”).

234. *Media Access: Press Center Guide*, THE PORT AUTHORITY OF NEW YORK & NEW JERSEY, <http://www.panynj.gov/press-room/media-access.html> (last visited Mar. 8, 2011).

Authority Media Relations Unit to gain access to PATH.<sup>235</sup> These policies are in direct violation of the First Amendment's freedom-of-the-press component.<sup>236</sup>

It is well established that a free and vigorous press is vital to a healthy democratic society.<sup>237</sup> Photojournalism and videography are essential to facilitating the media's effective reporting of newsworthy events and thus play critical roles in the proper functioning of our social order. The Supreme Court has recognized that newsgathering is entitled to constitutional protection.<sup>238</sup> The ban on photography by journalists absent approval from the Port Authority impermissibly interferes with this right. First, news photographers cannot foresee when breaking news will occur and, when news does break, may be unable to seek approval in time to be permitted to visually document the news event on PATH property. Conditioning even approved access on the availability of an escort compounds the problem of delay. Therefore, any photography permitted by the rule would be restricted to non-breaking stories that are potentially of less public importance.

Second, requiring approval to gain access to the PATH and reserving the right to restrict videotaping and photography within and outside the PATH, constitutes a standardless prior restraint that creates the opportunity for any PATH official to deny permission if he or she disapproves of a story, media outlet, or an individual photojournalist with no obvious mechanism for appeal.<sup>239</sup> Prior restraint is accompanied by a presumption of invalidity, but this presumption may be overcome if the official charged with authorizing the protected activity is sufficiently limited by "narrow, objective, and definite standards."<sup>240</sup> Here, there appear to be no standards whatsoever to guide PATH officials, creating an unjustifiable encroachment on valuable First Amendment activity.

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235. *Id.*

236. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . ." U.S. CONST. amend. I (emphasis added).

237. See *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("We do not question the significance of free . . . press . . . to the country's welfare."); *Mills v. Alabama* 384 U.S. 214, 219 (1966) ("Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.").

238. See *Branzburg*, 408 U.S. at 681, 707.

239. Standardless licensing systems unavoidably create the unconstitutional potential for abuse. See *Gannett Satellite Info. Network, Inc. v. Berger*, 894 F.2d 61, 66 (3d Cir. 1990).

240. See *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969).

## V. SUGGESTIONS FOR AN ALTERNATE, CONSTITUTIONAL POLICY

The restriction imposed by the Port Authority of New York and New Jersey on the taking of casual photographs on the PATH train and within public transportation systems is an impermissible impingement on free expression protected by the First Amendment. This policy strikes a blow against the photographic documentation of transit operations—vital in “educating” the public and building community support for transit—while at the same time alienating and intimidating the very segment of the transit-using public that is probably best equipped and motivated to be vigilant against actual terrorists. Any argument that the regulations are not widely enforced only highlights the arbitrariness and unlawfulness of such a policy. As all public transportation systems in the U.S. are vulnerable to attack,<sup>241</sup> the security of the PATH system is certainly an important government interest. Law enforcement should, therefore, not have to waste precious time penalizing violators of a blanket ban on unauthorized photography—a strategy that creates enormous enforcement issues.<sup>242</sup>

A policy that would pass constitutional muster and be more effective in its application would be based on the MUNI system of San Francisco:<sup>243</sup> to allow the general public to use personal, handheld photography and videography equipment on all PATH transit vehicles and publicly accessible PATH property and to prohibit all photographers and videographers from entering, photographing, or taking video of non-public areas of the PATH system. The city and agency law enforcement branches would still have the right under law to investigate suspicious behavior, which would include behavior of individuals using their cameras.

The question then becomes: what is “suspicious” behavior sufficient to warrant investigation? In *Scheier v. City of Snohomish*, the plaintiff’s suit against the city alleged First and Fourth Amendment violations arising from her stop, search, and detention as a result of taking photographs of the Bonneville Power Administration substation (“BPA”).<sup>244</sup> The district court found that evasive behavior—the plaintiff allegedly “ran to her vehicle, and quickly left” when a security officer attempted to speak to her—combined with Homeland Security’s designation of the area in question as a potential terrorist target, are factors in an officer’s

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241. See generally TAYLOR, *supra* note 195.

242. See *supra* Introduction and note 18.

243. See *supra* Part III.A.3.

244. No. C07-1925-JCC, 2008 U.S. Dist. LEXIS 90919, at \*2-7 (W.D. Wash. Nov. 4, 2008).

“determination of reasonable suspicion.”<sup>245</sup> Neither the presence in a sensitive area nor the taking of photographs, in isolation, would give rise to a reasonable suspicion; however, the totality of circumstances can combine to warrant investigatory steps.<sup>246</sup> Though Homeland Security has designated U.S. mass transportation systems as potential targets of terrorism, mere presence at the PATH station, which has a daily ridership of approximately 250,000 people,<sup>247</sup> should not be a factor in determining whether photographic activity is suspicious.

The terrorist attacks of September 11, 2001, as well as the subsequent attacks in London and Madrid, create a justifiable public demand for government response. That response, however, must not be a knee-jerk reaction as to what might deter terrorism, and must not interfere with Americans’ access to information or free speech guarantees, both stalwarts of the civil liberties that define our democracy. If the war on terror is indefinite,<sup>248</sup> that is all the more reason to be rigorous in scrutinizing restrictions of civil liberties. The Port Authority should look to the legal and policy-driven scrutiny that caused its sister mass transit systems (MTA and NJ Transit) to consider, but then abandon, policies that would ban all unauthorized photography,<sup>249</sup> and rescind the Rules and Regulations IX on Photography and similar activity.

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245. *Id.* at 6-7.

246. *Id.* at 7. The court held, however, that the absence of evidence that the plaintiff established a risk to the officer’s safety, the “intrusive actions in removing Scheier from the car, frisking her, handcuffing her, and detaining her in a patrol car were not reasonably necessary to effectuate the investigative stop.” *Id.* at 11.

247. Matt Dowling, *PATH Ridership Hits Record 75 Million*, STAR-LEDGER, Jan. 28, 2009, at 17.

248. See Michael Elliott et al., *Why the War on Terror Will Never End*, TIME, May 26, 2003, at 26.

249. See *supra* Part III.A.2 and Part III.A.4.