CONSTITUTIONAL LAW — FIRST AMENDMENT — SEVENTH CIRCUIT PRELIMINARILY ENJOINS EAVESDROPPING LAW AS APPLIED TO POLICE MONITORING PROGRAM. — *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, No. 12-318, 2012 WL 4050487 (U.S. Nov. 26, 2012).

The First Amendment protects the right to communicate by ensuring that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[1] Laws that criminalize eavesdropping restrict the ability to record and share speakers' words in order to preserve their conversational privacy. Recently, in *American Civil Liberties Union of Illinois v. Alvarez*,[2] a divided Seventh Circuit panel found one such statute to be an unconstitutional suppression of speech as applied to the public speech of police officers.[3] A strongly worded dissent argued that such bans were necessary to protect individual privacy in public places. Although the court addressed a narrow application of the law and did so at the preliminary injunction stage, the judges did not limit their reasoning to the specific facts of the case, but instead suggested broader rules of conversational privacy. This wider gaze may suggest that, in practice, the same determination of privacy will apply to all speech exposed to the public. The court in *Alvarez* missed an opportunity to adopt a nuanced framework for First Amendment privacy analysis that responds to improved recording technology by recognizing gradations of privacy in public speech.

In Illinois, it is a crime to record any conversation without the consent of all parties,[4] even if the recording occurs openly and the parties have no reasonable expectation of privacy.[5] The Illinois statute is the most stringent in the country.[6] In 2010, the American Civil Liberties Union of Illinois (ACLU) challenged the statute. The ACLU sought to detect and deter police misconduct by openly recording officers performing their official duties in public places.[7] Before implementing this monitoring program, the ACLU sued the Cook County State's Attorney in federal court to enjoin her, both preliminarily and permanently, from prosecuting its members for violations of the law.[8]

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[1] U.S. CONST. amend. I.

[2] 679 F.3d 583 (7th Cir. 2012), *cert. denied*, No. 12-318, 2012 WL 4050487 (U.S. Nov. 26, 2012).

[3] *See id.* at 608.

[4] 720 ILL. COMP. STAT. 5/14-2(a)(1) (2010).

[5] *Id.* 5/14-1(d).

[6] *See* Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian's Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 500 (2011); *see also id.* at 533–45 (collecting eavesdropping laws).

[7] *See Alvarez*, 679 F.3d at 586.

[8] *Id.*

Judge Conlon of the Northern District of Illinois dismissed the suit for lack of standing.[9] The court first ruled that the ACLU had insufficiently alleged a threat of prosecution, a deficiency the ACLU cured in an amended complaint.[10] The court then diagnosed another standing problem, finding that no precedent identified a "First Amendment . . . right to audio record," and thus that the ACLU had "not alleged a cognizable First Amendment injury."[11]

The Seventh Circuit, in a majority opinion by Judge Sykes,[12] reversed and remanded with an instruction to issue the ACLU's requested preliminary injunction.[13] The majority reversed the district court's standing ruling, finding that the lower court had wrongly understood a prior Seventh Circuit determination that "nothing in the Constitution . . . guarantees the right to record a public event" to mean that the Constitution did not protect that right at all.[14] The majority noted that the prior opinion focused on whether the challenged prohibition "constitute[d] a valid time, place, or manner regulation,"[15] and thus indicated that bans on recording "implicate free-speech interests."[16] These interests provided the ACLU with standing to bring its claim.

Turning to the merits of the ACLU's First Amendment claim, Judge Sykes identified audio recordings as expressive media, the legal restriction of which has "obvious effects on speech and press rights."[17] Analogizing the statute at issue to one that would ban taking notes at a public event, the majority reasoned that the First Amendment's guarantee of the right to speak and publish freely would be empty if it did not also bar laws that "operate at different points in the speech process."[18] The ACLU's police accountability program presented a particularly stark challenge to the statute. Open monitoring of police activity would increase the stock of information about the performance of critical public duties and thus would advance "a cardinal First Amendment interest in protecting and promoting the free discussion of governmental affairs."[19] The Founding generation emphasized "the

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[9] Am. Civil Liberties Union of Ill. v. Alvarez, No. 10 C 5235, 2011 WL 66030, at *4 (N.D. Ill. Jan. 10, 2011).

[10] *Id.* at *3.

[11] *Id.*

[12] Judge Sykes was joined by Judge Hamilton.

[13] *Alvarez*, 679 F.3d at 608.

[14] *Id.* at 591 (quoting Potts v. City of Lafayette, 121 F.3d 1106, 1111 (7th Cir. 1997)) (internal quotation mark omitted).

[15] *Id.* (quoting *Potts*, 121 F.3d at 1111) (internal quotation mark omitted).

[16] *Id.* at 591–92.

[17] *Id.* at 595.

[18] *Id.* at 596 (quoting Citizens United v. FEC, 130 S. Ct. 876, 896 (2010)) (internal quotation mark omitted).

[19] *Id.* at 601 (quoting Glik v. Cunniffe, 655 F.3d 78, 82 (1st Cir. 2011)) (internal quotation mark omitted).

necessity and right of the people to be informed of their governors' conduct,"[20] a historical consideration that cast doubt on the constitutionality of the prosecutions the ACLU sought to enjoin.

The majority did not decide whether to apply strict scrutiny, because it held that the statute as applied would likely fail even intermediate scrutiny.[21] This standard distinguishes permissible restrictions on speech, those "narrowly tailored to serve a significant governmental interest,"[22] from unconstitutionally broad restrictions, those "greater than necessary to further the important governmental interest."[23] Although the majority agreed that Illinois's interest in protecting conversational privacy was "easily an important governmental interest" that "serve[d] First Amendment interests" by reducing the possible chilling effect of public disclosure,[24] it concluded that the specific conversations the ACLU sought to record "lack[ed] any 'reasonable expectation of privacy,'"[25] under the Fourth Amendment test from *Katz v. United States*.[26] Police officers' public speech is not the kind of conversation "that carr[ies] privacy expectations even though uttered in public places," so restrictions on recording these communications could not advance conversational privacy.[27] That the statute would nonetheless permit these restrictions was proof that it was not narrowly tailored to an important governmental interest and thus was "likely unconstitutional" under intermediate scrutiny.[28] Because a demonstration of a First Amendment claim's likely success "normally favors granting preliminary injunctive relief,"[29] the majority preliminarily enjoined the State's Attorney from applying the statute to the monitoring program.[30]

Judge Posner dissented.[31] Troubled by the breadth of the majority's invalidation of the eavesdropping statute, he asserted that the opinion transformed Illinois's legal regime from one requiring all-party consent to one that did not require the consent of even one party. He further contended that the underlying logic cast doubt on other states'

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[20] *Id.* at 600 (quoting LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 134 (rev. ed. 2004)).

[21] *Id.* at 604. The majority wrote that the "statute is content neutral on its face," *id.* at 603, and also ruled that strict scrutiny is appropriate "when the government discriminates among *private* speakers, not when it facilitates its own speech," *id.* at 604, by allowing officers to record. Thus, the court held that it was "unlikely that strict scrutiny [would] apply." *Id.*

[22] *Id.* at 605 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[23] *Id.*

[24] *Id.*

[25] *Id.* at 606.

[26] 389 U.S. 347 (1967).

[27] *Alvarez*, 679 F.3d at 606.

[28] *Id.* at 608.

[29] *Id.* at 590.

[30] *Id.* at 608. The order barred prosecuting the open recording of police officers' public performance of their duties or others' speech, if incidentally captured while recording the police. *Id.*

[31] *Id.* (Posner, J., dissenting).

comparable electronic privacy laws.[32] Judge Posner counseled restraint, comparing the "original understanding" of the First Amendment as a prohibition on federal censorship to its modern role in protecting free speech from more than preemptive suppression, and cautioned against "further departures" from a narrower view.[33] He predicted that a right to record the police would threaten public safety because the presence of recorders might distract officers and discourage attempts to speak with witnesses, victims, and suspects.[34]

Moreover, Judge Posner emphasized, the statute served another governmental interest: preserving citizens' conversational privacy. As Justice Harlan stated in dissent in *United States v. White*,[35] a Fourth Amendment case, "[w]ere third-party bugging a prevalent practice, it might well smother that spontaneity — reflected in frivolous, impetuous, sacrilegious, and defiant discourse — that liberates daily life."[36] While the majority "implie[d] that anything said outdoors is *ipso facto* public," Judge Posner disagreed, writing that "private talk in public places is common, indeed ubiquitous."[37] Thus, because "the inhibiting effect of nonconsensual recording . . . on the number and candor of conversations," together with other social costs, outweighed the legitimate social value of increased accuracy, Judge Posner would have found the Illinois statute constitutional under intermediate scrutiny.[38]

Although *Alvarez* presented a specific factual challenge and reached the Seventh Circuit at the early preliminary injunction stage, the majority's use of Fourth Amendment definitions of privacy may regrettably give its opinion a broader scope than it intended. By failing to offer guidance on when these definitions are insufficient to identify a state's interest in conversational privacy, the majority risked broadly endorsing Fourth Amendment standards in First Amendment cases and thus requiring that legislatures permit eavesdropping on all speech that occurs in public. The dissent cast a similarly wide net by predicting a chilling effect despite the order's limited immediate application to conversations the police could already record. Neither opinion fully confronted this case's specific tension between the competing free speech interests of speakers and listeners in a way that preserved the possibility of recognizing different privacy interests in different public conversations. Treating all speech in public according to a single

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[32] *Id.* at 609.

[33] *Id.* at 611.

[34] *Id.* at 611–12.

[35] 401 U.S. 745 (1971).

[36] *Alvarez*, 679 F.3d at 612 (Posner, J., dissenting) (quoting *White*, 401 U.S. at 787 (Harlan, J., dissenting)).

[37] *Id.* at 613.

[38] *Id.* at 614.

standard may have been a feasible and efficient legal rule when individuals could, in practice, speak anonymously. However, as technological developments erase the practical constraints on pervasive private surveillance, this oversimplification will prevent legislatures from crafting flexible rules that subject citizens neither to undue government suppression nor to de facto self-censorship.

The majority uncritically imported the *Katz* "reasonable expectation of privacy" test into this First Amendment challenge and thus risked establishing a broad prohibition on government efforts to preserve the privacy of publicly audible speech. The court was likely correct that the ACLU's program would reach only conversations "that are *not* in fact private,"[39] and may have used *Katz* as a convenient shorthand for privacy given the posture of this case, which required only that they find the law "likely" unconstitutional under intermediate scrutiny.[40] Indeed, the majority did attempt to limit *Katz*'s application by explicitly asserting that Illinois was not "limited to using the Fourth Amendment 'reasonable expectation of privacy' doctrine as a benchmark."[41] Nevertheless, because the majority did not describe how to conduct a privacy analysis rooted in the First Amendment or indicate when, if ever, the *Katz* test would not accurately recognize a valid governmental interest in conversational privacy, it risked fully adopting *Katz*, protests to the contrary notwithstanding. The next court faced with a privacy-enhancing statute motivated by First Amendment concerns about the chilling effect of publicity will note the Seventh Circuit's approving citation of Justice Harlan's argument that "conversations in the open would not be protected against being overheard,"[42] but will find no countervailing insight into the ways that First Amendment privacy differs. This importation of a standard that flatly denies privacy interests in "[w]hat a person knowingly exposes to the public"[43] may cut significantly more broadly than the instant case, effectively invalidating any restrictions on recording speech that is knowingly exposed for purposes of the Fourth Amendment.[44]

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[39] *Id.* at 606 (majority opinion). Concern that the statute was overly broad may have explained Chicago's corporation counsel's pre-*Alvarez* decision not to enforce the law during the 2012 NATO summit. Ryan Haggerty, *Police Can Be Recorded at Protests, City Decides*, CHI. TRIB., Apr. 28, 2012, at 1, *available at* http://articles.chicagotribune.com/2012-04-28/news/ct-met-nato-eavesdropping-20120428_1_nato-summit-summit-protests-eavesdropping-law.

[40] *See Alvarez*, 679 F.3d at 590 ("[D]oes the . . . complaint state a claim for a First Amendment violation; and . . . is that claim likely to succeed?").

[41] *Id.* at 606.

[42] *Id.* (alteration omitted) (quoting Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)) (internal quotation mark omitted).

[43] *Katz*, 389 U.S. at 351 (majority opinion).

[44] Without a full understanding of the First Amendment's privacy-protecting implications, the Illinois legislature could not know whether a then-pending amendment to the statute exempting those who record police officers publicly performing their public duties would have saved the

The dissent weighed the social value of having more accurate records of conversations against the costs of disrupting law enforcement and chilling "the number and candor of conversations,"[45] but it described costs that seemed to follow from a wholesale invalidation of Illinois's eavesdropping statute rather than from the ACLU's specific challenge. The dissent did begin by tying its criticism to the specific context of police-civilian conversations, but its opposition was founded on the fact that there was no evidence that all individuals always expect their conversations with police to be recorded.[46] This is a broad test indeed, as it suggests that the government can ban memorializing a class of conversations whenever some participants sometimes expect privacy. Furthermore, the dissent's prediction of diminished conversational privacy also indicates a presumption that the majority's rule will apply to all public speech. Conversations with police rarely feature the kind of spontaneous, frivolous discourse "that liberates daily life . . . protected by the very fact of a limited audience."[47] If the logic of the majority's rule does not extend beyond conversations with the police, the ubiquitous "private talk in public places"[48] will remain off-limits to eavesdroppers. Judge Posner's concern that the rule will not remain cabined is consistent with an expectation that courts will apply a single standard to public speech.

The Seventh Circuit issued a narrow preliminary injunction and adhered to principles of judicial minimalism by not reaching beyond the facts of the case to craft a comprehensive theory of First Amendment privacy in public speech. Nevertheless, both opinions should have adopted approaches that would have prompted courts to consider more carefully the nature of the speech the ACLU sought to record. Even if greater attention to the specific details of the speech would not have altered the judgment in either opinion, an approach that focuses on such details rather than categorizing speech as either public or private could provide the foundation for a more flexible standard of pri-

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law's constitutionality or left it still too broad to pass muster. *See* Alissa Groeninger, *Illinois Struggles to Replace Outdated Eavesdropping Law*, CHI. TRIB., June 24, 2012, at 10, *available at* http://articles.chicagotribune.com/2012-06-24/news/ct-met-illinois-eavesdropping-law-20120624_1_eavesdropping-law-noland-law-enforcement.

[45] *Alvarez*, 679 F.3d at 614 (Posner, J., dissenting).

[46] *Id.* at 613. Although *some* people who speak to the police may expect privacy, the lenient standards that allow the police to record their interactions with the public, *see* 720 ILL. COMP. STAT. 5/14-3(g) (2010), and the tendency of police to memorialize and later testify to their conversations, *see* Alderman, *supra* note 6, at 516, strongly suggest that citizens reasonably ought to expect less privacy in speaking with police than they do in conversations with friends.

[47] *Alvarez*, 679 F.3d at 612 (Posner, J., dissenting) (quoting United States v. White, 401 U.S. 745, 787–88 (1971) (Harlan, J., dissenting)); *see also id.* at 611 (describing the potential conversational partners of police as suspects, victims, witnesses, and so forth).

[48] *Id.* at 613.

vacy that responds to technological advancements in recording,[49] identifying,[50] and disseminating[51] information that is admittedly "exposed to the public" in a limited way. The fiction that there is no difference between being heard and being recorded may have proved tolerable only when the vast majority of the public could reliably avoid a wider-than-intended audience. When legislatures seek to preserve more of their constituents' privacy than judicial doctrine already protects, the courts should respond with a careful, nuanced analysis of the constitutional limits on such laws.

In order to more flexibly identify the privacy interests in public conversations, either opinion could have started from the premise that "[p]rivacy is not a discrete commodity, possessed absolutely or not at all."[52] If the court had directly considered gradations of privacy, it could have distinguished speech that is pointedly public, such as a protestor's chant, from speech that is anonymously public, such as a conversation in a crowded bar. Many cases will fall between these paradigmatic examples, but neither opinion here advanced the challenges of line drawing as a reason to lump together all public speech. A more nuanced approach would comply with both the purposivist approach to the First Amendment,[53] by limiting the government's ability to constrain speech about important public events, and the pragmatic approach,[54] by avoiding many of the "significant social costs"[55] of an unrestrained right to eavesdrop.

Although distinguishing pointedly public speech from anonymously public speech would represent a doctrinal development,[56] it could draw support from recent Fourth Amendment cases. In *United States v. Jones*,[57] five Justices (writing across two noncontrolling concurrenc-

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[49] *See, e.g.*, *id.* ("[T]he typical recorder nowadays is a cell phone . . . hidden in plain view.").

[50] *See, e.g.*, Note, *In the Face of Danger: Facial Recognition and the Limits of Privacy Law*, 120 HARV. L. REV. 1870, 1874 (2007) (describing the rise of facial recognition search engines).

[51] *See, e.g.*, Jonathan Zittrain, *Privacy 2.0*, 2008 U. CHI. LEGAL F. 65, 83 (describing the online spread of a Canadian teenager's embarrassing "Star Wars Kid" video).

[52] Smith v. Maryland, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting).

[53] *See generally* Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767 (2001) (advancing a theory of First Amendment jurisprudence in which the state's purposes in passing a specific law are dispositive of that law's constitutionality).

[54] *See generally* Richard A. Posner, Comment, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737 (2002) (describing First Amendment law as primarily "a product of . . . trying to reach results that are reasonable in light of their consequences," *id.* at 739).

[55] *Alvarez*, 679 F.3d at 614 (Posner, J., dissenting).

[56] Fourth Amendment and tort definitions of privacy generally embrace the bright-line rule that what is exposed to any member of the public is flatly not private. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977) (denying "liability for giving further publicity to what the plaintiff himself leaves open to the public eye"). *Contra Alvarez*, 679 F.3d at 611 (Posner, J., dissenting) ("In some instances such publicity would violate the tort right of privacy.").

[57] 132 S. Ct. 945 (2012).

es) chipped away at the bright-line rule that exposure to the public erases all Fourth Amendment privacy rights, finding that installing a GPS device on a car was a search, although it revealed no more than the location of the vehicle on public roads.[58] Concurring opinions by Justices Sotomayor and Alito[59] acknowledged a privacy interest in the location of a vehicle on public roads, despite the fact that the car's travel was exposed to public view.[60] Justice Sotomayor explicitly distinguished gathering the location evidence via a GPS device from doing the same "through lawful conventional surveillance techniques,"[61] thus highlighting the ability of technology to change the privacy calculus.

To be sure, the concurring opinions in *Jones* are not controlling precedent for First Amendment challenges to eavesdropping statutes enforceable against the public. If the Supreme Court has in fact signaled a willingness to recognize privacy interests enforceable against law enforcement officers in information exposed to the public only in a limited, likely-to-be-forgotten way, it does not follow that such information is unambiguously private. It would be facile to posit a general right to anonymity, such that the Illinois eavesdropping statute was constitutionally *required*; both opinions understood the First Amendment as primarily a source of negative liberty, the right to be free from certain government prohibitions.[62] Nevertheless, even if the Constitution does not mandate that states protect citizens' rights to speak anonymously in public, "it need not be hostile to legislative attempts to achieve positive liberty."[63] Analyzing privacy protections of speech that occurs in public according to a sharper standard would help ensure that the judiciary does not overuse its exclusive First Amendment means, invalidation of suppressive laws, at the expense of the First Amendment's ends, free speech.

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[58] *See id.* at 957 (Sotomayor, J., concurring) ("[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."); *id.* at 964 (Alito, J., concurring in the judgment) ("[T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy."); *see also* United States v. Maynard, 615 F.3d 544, 562–65 (D.C. Cir. 2010) (using a "mosaic theory," *id.* at 562, in which the whole is greater than the sum of its parts, to define a search).

[59] Justice Alito was joined by Justices Ginsburg, Breyer, and Kagan.

[60] *See Jones*, 132 S. Ct. at 948 (describing the trial court's denial of a motion to suppress information gathered while the vehicle was "on public thoroughfares") (quoting United States v. Jones, 451 F. Supp. 2d 71, 88 (D.D.C. 2006)).

[61] *Id.* at 956 (Sotomayor, J., concurring).

[62] *See Alvarez*, 679 F.3d at 597, 605–06 (describing the statute as a limit on the information available to the public and thus prohibited unless narrowly tailored); *id.* at 610 (Posner, J., dissenting) ("[T]he First Amendment merely forbids Congress to abridge free speech."). For a comparison between this liberty conception of free speech and an alternative equality conception, see Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143 (2010).

[63] Daniel J. Solove, *The Virtues of Knowing Less: Justifying Privacy Protections Against Disclosure*, 53 DUKE L.J. 967, 997 (2003).