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Reconsidering the Gathering/Publication Dichotomy: Recording as Speech? What Next?

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Reconsidering the Gathering/Publication Dichotomy: Recording as Speech? What Next?

STEVEN HELLE*

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I. INTRODUCTION

Justice John Paul Stevens seemed to express more than a little vindication when the Court “for the first time” embraced a First Amendment gathering right in a courtroom access case, after ignoring the dissents of himself and others in prior cases involving gathering.¹ But his hallelujah moment was short-lived. Within a few years, he had joined Justice William Rehnquist, who was ever dubious regarding a gathering right, in dissenting when the Court extended the right to cover pre-trial proceedings. Stevens protested, what next? Access to civil courts? Even grand juries?²

A similar uneasiness, even ambivalence, regarding the existence and scope of a gathering right might be expressed after the decision of the Court of Appeals for the Seventh Circuit in *ACLU v. Alvarez*.³ The court, to the relief of every law review author on the subject,⁴ recognized a gathering

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1. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 582-83 (1980).

2. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 26-27 (1986) (Stevens, J., dissenting).

3. *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

4. See Stephanie Claiborne, Comment, *Is it Justice or a Crime to Record the Police? A Look at the Illinois Eavesdropping Statute and its Application*, 45 J. MARSHALL L. REV. 485, 507-09 (2012) (arguing the statute is overbroad as applied to citizen-recording of police); Steven A. Lutt, Note, *Sunlight is Still the Best Disinfectant: The Case for a First Amendment Right to Record the Police*, 51 WASHBURN L.J. 349, 374 (2012) (stating Judge Posner’s privacy objections at oral argument do not justify denying the right to record); Dina Mishra, Comment, *Undermining Excessive Privacy for Police: Citizen Tape Recording to*

right that overturned Illinois law making it a felony to record police officers conducting their public duties without the consent of all parties.⁵ But the reconception of the gathering right in *Alvarez* pushed forward the boundaries of the First Amendment, and one might reasonably ask, what next? Recording any conversation without consent, as long as the person recording is a party to the conversation? Is consent even relevant, for who ever heard of needing permission to exercise a right? Indeed, the logic of the court seemed to equate a right to gather with a right to publish, that is, if you can publish it, you can gather it. If the extension of a gathering right had implications for the long-established publication right, that might give any First Amendment advocate pause.

The *Alvarez* case can be construed as deconstructing the gathering/publication dichotomy,⁶ and that might well be much-needed progress in First Amendment law. The gathering right has always had a questionable pedigree, born of desperation when the Court needed to open courtrooms but had foreclosed use of the Sixth Amendment public trial guarantee, the most sensible means of doing so. The gathering right became an appendage to the venerable right to publish, similar but separate, and not equal.⁷

It has been difficult even to frame whether a case involved gathering or publication, which is not much of a surprise because, as the *Alvarez* court observed, they often are inextricably intertwined.⁸ The Illinois Supreme Court, for example, split on whether gathering or publication was involved when a court ordered a newspaper not to publish a juvenile's name obtained while attending a dispositional hearing.⁹

Check Police Officers' Power, 117 YALE L.J. 1549, 1550 (2008); Dustin F. Robinson, Note, *Bad Footage: Surveillance Laws, Police Misconduct, and the Internet*, 100 GEO. L.J. 1399, 1431 (2012) (arguing Illinois must stop prosecuting the recording of police engaged in misconduct); Robert J. Tomei Jr., Comment, *Watching the Watchmen: The People's Attempt to Hold On-Duty Law Enforcement Officers Accountable for Misconduct and the Illinois Law that Stands in Their Way*, 32 N. ILL. U. L. REV. 385, 409-12 (2012) (contending the Illinois statute can withstand neither strict scrutiny nor intermediate scrutiny); cf. Carly Humphrey, Comment, *Keep Recording: Why On-Duty Police Officers Do Not Have a Protected Expectation of Privacy under Maryland's State Wiretap Act*, 19 GEO. MASON L. REV. 775, 809-10 (2012) (allowing recording of enforcement stops under Maryland Wiretap Act would be in the public interest).

5. See 720 ILL. COMP. STAT. 5/14 (State Bar Edition 2012).

6. See Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1 (advocating reconsideration of the dichotomy).

7. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 20 (1986) (Stevens, J., dissenting) ("But it has always been apparent that the freedom to obtain information that the government has a legitimate interest in not disclosing . . . is far narrower than the freedom to disseminate information, which is 'virtually absolute' in most contexts . . .").

8. See *Alvarez*, 679 F.3d at 596-97.

9. See *In re a Minor*, 595 N.E.2d 1052 (Ill. 1992).

The majority decided that the press had obtained access to the hearing only at the prerogative of the legislature. Therefore, access was the determinative issue, and restraining publication could be considered a condition on access.¹⁰ Chief Justice Miller in dissent saw it more simply as prior restraint of publication: “[T]he constitutional guarantee of a free press prohibits the State from inviting journalists into a courtroom and simultaneously editing or censoring what they report”¹¹

Because the gathering/publication dichotomy can be manipulated by the government to stop gathering when the real concern is publication, the *Alvarez* decision might be a first step in inviting re-examination of the gathering right and demanding honesty in the dichotomy. This Article will attempt to sketch both the history and the future of the gathering right, using *Alvarez* as a focal point. It will begin with a brief survey of the Supreme Court’s law on the subject. Next, it might be illuminating to parse the *Alvarez* majority’s attempt to avoid and even collapse the gathering/publication dichotomy, as it succeeded in framing the issue as publication despite the temptation to write of gathering or merely recording, as if the use of technology controlled the degree of protection. Finally, a few words on the hoped-for demise of the dichotomy and placing the spotlight on the obligation of government to be transparent instead of asking what gathering might contribute to the governmental process.¹²

II. LONG AND DIFFICULT JOURNEY¹³ OF A GATHERING RIGHT

The origin of a First Amendment right to gather is somewhat obscure. Professor Jeffery A. Smith brilliantly detailed an abundance of passages during Colonial times referring to the public’s need to be informed or right to know,¹⁴ which in turn could be interpreted as support for a right to gather as well as a right to publish. James Madison, author of the First Amendment, wrote, “A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both.”¹⁵ The Seventh Circuit in *Alvarez* also attempted to trace the lineage to Colonial times, quoting Whig Thomas Gordon to the effect that it “ought

10. See *id.* at 1057 (“The dissent does not cite a single case that authorizes the media to disclose the identity of a *victim of child abuse* when that information is obtained at a juvenile court proceeding that is *closed to the public.*”) (emphasis in original).

11. *Id.* at 1058 (Miller, C.J., dissenting).

12. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

13. *Branzburg v. Hayes*, 408 U.S. 665, 703 (1972).

14. See Jeffery A. Smith, Recognition of a Right to Know in Eighteenth-Century America, Address at the Annual Meeting of the American Political Science Association (August 30, 2007) (transcript available from author at jsmith@uwm.edu).

15. Letter from James Madison to W.T. Barry (Aug. 4, 1822) in 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

to be the Ambition, of all honest Magistrates, to have their Deeds openly examined, and publickly scann'd [sic]."¹⁶

Aware that it was actually interpreting the Fourteenth Amendment and not the First, the Seventh Circuit further called upon Thomas Cooley to explain the understanding of freedom of speech in 1868. The court quoted Cooley who wrote:

The evils to be guarded against were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.¹⁷

The Commission on Freedom of the Press somewhat vaguely recommended in 1947 that the government "inform the public of the facts with respect to its policies and of the purposes underlying those policies."¹⁸ Explicit proposals for a constitutional gathering right date to at least 1952.¹⁹ Theodore Peterson wrote in 1956 that the traditional libertarian view of press freedom, which only guaranteed freedom from government, did nothing to open government doors, to pry "information from recalcitrant government officials."²⁰

The U.S. Supreme Court first considered an asserted right to gather in 1965 in *Zemel v. Rusk*.²¹ A private citizen sued to have his passport validated for travel to Cuba, asserting among other things a right to gather information as a means of better acquainting himself with the effect of government policies abroad. The Court cursorily dismissed the claim, stating the passport ban affected conduct, not speech.²²

16. *ACLU v. Alvarez*, 679 F.3d 583, 599 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012) (quoting Silence Dogood No. 8, *THE NEW-ENGLAND COURANT* (Boston), July 9, 1722, *reprinted in* 1 *THE PAPERS OF BENJAMIN FRANKLIN* 28 (Leonard Labaree et al. eds., 1959)).

17. *Id.* at 600 (quoting THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 421-22 (Boston: Little, Brown, & Co. 1868)).

18. *THE COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS* 88-89 (Robert D. Leigh ed., 1947) (italics omitted).

19. See Note, *Access to Official Information: A Neglected Constitutional Right*, 27 *IND. L.J.* 209, 213 (1952).

20. Theodore Peterson, *The Social Responsibility of the Press*, in *FOUR THEORIES OF THE PRESS* 94 (1956).

21. *Zemel v. Rusk*, 381 U.S. 1 (1965).

22. See *id.* at 16-17 (denoting "few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow").

After noting that the appellant also did not have any right of access to the White House to better inform himself, the Court concluded its one-paragraph analysis with this intriguing tidbit: “The right to speak and publish does not carry with it the unrestrained right to gather information.”²³ In a case that otherwise flatly rejected a right to gather, that sentence might be taken at least as indirect support for a right of some dimension.²⁴

The right to gather met a similar fate, even to the point of being indirectly supported while ostensibly being rejected, in *Branzburg v. Hayes*²⁵ in 1972. The press asserted a right to protect confidential sources from grand jury subpoenas.²⁶ This right, it claimed, was inherent in a right to gather, which was inherent in a right to publish.²⁷

Justice White, however, writing for the five-member majority, said there was no proof that sources would be deterred by subpoenas.²⁸ He thus subtly shifted the burden of proof from the government, in the typical First Amendment case, to the press. In any event, he was having nothing to do with this two-step argument. As Justice White stressed at two different points in his opinion for the majority, nobody was stopping the press from speaking or publishing stories based on confidential sources, and the First Amendment did not protect against “every incidental burdening.”²⁹ In other words, if the government action was not aimed directly at publication, it was not aimed at the First Amendment.

Relying on the oft-quoted Wigmore maxim that the public “has a right to every man’s evidence,”³⁰ Justice White emphasized six times throughout the *Branzburg* opinion the duty of all citizens to appear before a grand jury, which can be summarized simply as a right of the press no greater than that of the public.³¹ The bottom line was there was no privilege to protect sources in the course of news gathering. None.

23. *Id.*

24. *See* *Branzburg v. Hayes*, 408 U.S. 665, 728 n.4 (1972) (Stewart, J., dissenting).

25. *Branzburg*, 408 U.S. 665.

26. *Id.* at 679-80.

27. *Id.*

28. *See id.* at 693.

29. *See* *Branzburg*, 408 U.S. at 681-82, 691.

30. *Id.* at 688 (alteration in original) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192 (John T. McNaughton ed., 1961))). Not only do those quoting the line conveniently seem to overlook the numerous exceptions, but they ignore a subsequent passage in which Wigmore admonished society to “make the duty as little onerous as possible.” 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192 (John T. McNaughton ed., 1961).

31. *See* *Branzburg*, 408 U.S. at 682, 684-86, 688, 690-91, 697, 702. Others have objected to any conclusion “that any governmental restriction on press access to information, so long as it is nondiscriminatory, falls outside the purview of First Amendment concern.” *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 857 (1974) (Powell, J., dissenting) (emphasis omitted).

This hard line had been preceded by a bit of misdirection, though, toward the beginning of Justice White's analysis when he observed: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."³² Indeed, this approving nod toward a gathering right, in an opinion that otherwise distanced itself from any such right, is further ironic in that that line might well be the most oft-quoted passage from *Branzburg*—and the *Alvarez* court proved no exception, citing it toward the beginning of its own First Amendment analysis.³³

The right to gather had tough sledding in the next several cases before the Court. Unlike in *Branzburg*, the right was forthrightly before the Court in the companion cases of *Saxbe v. Washington Post Co.*³⁴ and *Pell v. Procunier*,³⁵ as well as in *Houchins v. KQED, Inc.*³⁶ In *Saxbe* and *Pell*, the press sought access to prisons to interview inmates,³⁷ and in *Houchins* a reporter wanted to obtain access and bring his camera into a high-security area of a county jail.³⁸ The Court framed the issue in all the cases as an asserted special right of the press beyond any right had by the public to gather information.³⁹ Subsequent analysis thus fit easily within the "press right no

32. *Branzburg*, 408 U.S. at 681.

33. See *ACLU v. Alvarez*, 679 F.3d 583, 597-98 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012). The most notable undermining of White's hard line, however, was provided by Justice Powell's concurring opinion that provided the essential fifth vote for a majority in *Branzburg*. See *Branzburg*, 408 U.S. at 710 (Powell, J., concurring). Despite the majority's clear conclusion that absolutely no privilege existed—and in an opinion that dissenting Justice Stewart labeled "enigmatic," *id.* at 725—Powell seemed to say "maybe," just not in this case. He later repeated his endorsement of a case-by-case approach when he wrote that "a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated." *Saxbe*, 417 U.S. at 859-60 (Powell, J., dissenting).

Subsequent to *Branzburg*, a number of lower courts read the case as actually recognizing a First Amendment privilege because Powell's opinion could be added to those of the four dissenters to create a majority, if the press could convince the court that the facts in a given case were different enough that Powell would have been swayed to vote differently in that particular case. See *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998); *United States v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988); *von Bulow ex rel. Auersperg v. von Bulow*, 811 F.2d 136 (2d Cir. 1987). Judge Posner seemed to enjoy throwing cold water on these opinions, suggesting they were surprising, questionable, audacious, and "skating on thin ice" in overlooking the obvious holding of the Court in *Branzburg*. *McKevitt v. Pallasch*, 339 F.3d 530, 532-33 (7th Cir. 2003).

34. *Saxbe*, 417 U.S. 843.

35. *Pell v. Procunier*, 417 U.S. 817 (1974).

36. *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

37. *Saxbe*, 417 U.S. at 844-45; *Pell*, 417 U.S. at 819-20.

38. *Houchins*, 438 U.S. at 3-4 (plurality opinion).

39. See *id.* at 3; *Saxbe*, 417 U.S. at 844-45; *Pell*, 417 U.S. at 833-34.

greater than the public” line of reasoning employed in *Branzburg*, and the gathering right failed in all three cases.⁴⁰

At this point, the gathering right looked dead in the water. The Court was not only overly eager to frame the issue as the press asserting a right greater than the public,⁴¹ but it then substituted an empty maxim regarding the equality of press and public rights for any reasoned analysis. As Ninth Circuit Judge Hufstедler had noted in the *Houchins* case, equating the press right with the right of the public is not “helpful in absence of any description of what the public’s right is or how the right is to be vindicated.”⁴² It defined one unknown in terms of another—unless the supposition was that neither the press nor the public actually had any gathering right.

That supposition was lent greater weight in the brief dismissal of a First Amendment gathering right in the subsequent case of *Gannett Co. v. DePasquale*.⁴³ The Court in *Gannett* upheld closure of a pre-trial suppression hearing on a motion of the defendant.⁴⁴ The press argued that the Sixth Amendment public trial right as well as a First Amendment right of access should have mandated openness.⁴⁵

Justice Stewart, who had been assertive in supporting a gathering right on several prior occasions, wrote the majority opinion, which by itself might have given First Amendment advocates hope when opinion day dawned. But his analysis of the First Amendment right was abbreviated, all of two paragraphs, and placed at the end of an otherwise lengthy opinion rejecting the Sixth Amendment argument, seemingly almost an afterthought.

Moreover, Justice Stewart’s analysis left First Amendment advocates not just disappointed, but confused. The Court “need not decide” the existence of any such right, he began.⁴⁶ Need not decide? But assuming “arguendo”⁴⁷ that an access right did exist, the trial court gave it “all appropriate deference.”⁴⁸ Even though “none of the spectators present in the court-

40. *Houchins*, 438 U.S. at 10-11.

41. Although the reporter in *Houchins* clearly was seeking a right not had by the public, the journalists in *Saxbe* and *Pell* actually had attempted to frame their argument as one seeking, not a special right, but the same right as that had by relatives, friends, lawyers, clergymen, and public officials who could visit with the inmates at length. See Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 U. PA. L. REV. 166, 188 n.124 (1975).

42. *KQED, Inc. v. Houchins*, 546 F.2d 284, 295 (9th Cir. 1976) (Hufstедler, J., concurring), *rev'd*, 438 U.S. 1 (1978).

43. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

44. *Id.* at 393.

45. *Id.* at 384-87.

46. *Id.* at 392.

47. *Id.*

48. *Gannett*, 443 U.S. at 392.

room . . . objected when the defendants made the closure motion,” when petitioner’s counsel later objected, the trial court judge did hold a hearing.⁴⁹ The trial judge ultimately found that the defendant’s fair trial right outweighed the constitutional rights of press and public, because of “a reasonable probability of prejudice.”⁵⁰

Putting aside the image of spectators leaping to their feet to make contemporaneous objections in trial courts, this rejection of any putative First Amendment right was based on the most relaxed standard possible. If the trial court exercised “all appropriate deference”⁵¹ to the First Amendment right in finding it was outweighed by a reasonable probability of prejudice, without even considering any alternatives to closure,⁵² then apparently not much deference was owed to whatever First Amendment right existed, and there was no assurance that one did indeed exist.

But it was the darkness before the dawn for the gathering right, which came roaring back the very next Term of the Court to be finally and fully recognized as part of the First Amendment.

Shortly before the opinion in *Gannett* was released, Justice Powell changed his vote, creating a new five-to-four majority in favor of closing a pre-trial hearing.⁵³ Justice Stewart’s dissent then became the majority opinion, and Justice Blackmun’s wonderfully well-reasoned and erudite opinion establishing a Sixth Amendment right on behalf of the public to attend trials became a dissent.

To Justice Stewart, the matter had been solved by a literal reading of the Sixth Amendment. The Sixth Amendment states, in part, that “the accused shall enjoy the right to a speedy and public trial.”⁵⁴ The right obviously belonged to the accused, not the public, he noted,⁵⁵ and in this case, the accused had voluntarily waived it. Moreover, the Sixth Amendment only referred to trials and not pre-trial hearings of the sort involved in the *Gannett* case.⁵⁶

Although Justice Stewart insisted that waiving the public trial right was not the same as mandating a private trial,⁵⁷ it was not at all clear what would preclude private trials if the only right to a public trial belonged to a defendant who preferred closure.

49. *Id.*

50. *See id.* at 392-93.

51. *Id.* at 392.

52. *See id.* at 402 n.4 (Powell, J., concurring).

53. *See* W. WAT HOPKINS, MR. JUSTICE BRENNAN AND FREEDOM OF EXPRESSION 152-53 (1991).

54. U.S. CONST. amend. VI.

55. *See Gannett*, 443 U.S. at 379-80.

56. *See id.* at 385-86.

57. *See id.* at 382.

Given the green light, hundreds of courtrooms closed their doors, citing *Gannett*.⁵⁸ Not wanting to go down as the Court that re-instituted Star Chamber proceedings, the Court could not grant certiorari in another case fast enough. The very next year, a majority minus one, including Justice Stewart, for the first time recognized a First Amendment right of access to trials in *Richmond Newspapers, Inc. v. Virginia*.⁵⁹ Justice Blackmun dourly signed on, writing a concurring opinion in which he wished the Court had used the Sixth Amendment instead, but he would “live with it.”⁶⁰ Justice Stevens was beside himself in another concurring opinion, enthusiastically writing that this was a “watershed case,” in which his losing arguments in *Houchins* regarding a First Amendment gathering right finally bore fruit.⁶¹

In what was actually a plurality opinion, Chief Justice Burger attempted first to distinguish *Gannett*, contending that that case was meant to apply only to pretrial proceedings and *Richmond Newspapers* involved a trial.⁶² Furthermore, *Gannett* had only involved the Sixth Amendment and had not definitively addressed any First Amendment right.⁶³ Not a word about why constitutional analysis might differ so markedly depending on whether trials or pretrial proceedings were at issue, nor why the First Amendment could have been so casually dismissed in *Gannett* but become the cornerstone of the analysis in *Richmond Newspapers*.⁶⁴

Justice Stewart meekly wrote separately to explain that only two Justices in *Gannett* had explicitly addressed the First Amendment and the rest of the Court (apparently including his majority opinion) was “silent” on the matter.⁶⁵ As if he had never taken the contrary view just one year earlier, he insisted, “With us, a trial is by very definition a proceeding open to the

58. See “Court Watch Summary Lists 300 Efforts To Close Court Doors,” 4 NEWS MEDIA & THE LAW 34 (Oct.-Nov. 1980); “Supreme Court Watch—Summary of 109 Efforts To Close Criminal Justice Proceedings Since the *Gannett* Newspapers Decision,” 3 NEWS MEDIA & THE LAW 17 (Nov.-Dec. 1979).

59. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

60. See *id.* at 603 (Blackmun, J., concurring). White wrote separately, agreeing with Blackmun. See *id.* at 581-82 (White, J., concurring).

61. See *id.* at 582-84.

62. See *id.* at 563-64 (Burger, C.J., plurality opinion).

63. See *id.* .

64. See *Richmond Newspapers, Inc.*, 448 U.S. at 558-81.

65. See *id.* at 599 (Stewart, J., concurring in the judgment). It is not even clear why Justice Stewart only concurred in the judgment of the Court, instead of just concurring. He isolated not a single disagreement with Burger’s plurality opinion; indeed, the heart of Stewart’s analysis of the case could have been taken straight from Chief Justice Burger’s last paragraph. He did elaborate that he had written in *Gannett*, see *Gannett Co. v. DePasquale*, 443 U.S. 368, 382 (1979), that waiver of a Sixth Amendment right to a public trial had never amounted to requiring closure, i.e. a right to a private trial. See *Richmond Newspapers, Inc.*, 448 U.S. at 598 n.1 (Stewart, J., concurring in the judgment).

press and to the public.”⁶⁶ Military bases and prisons could be closed to the public, he wrote, but courtrooms should not be.⁶⁷ They should be even more open than streets or parks, although courtrooms do have “finite physical capacity” and might not be able to accommodate all who wish to attend, he added.⁶⁸ It was a surreal case in some ways with the Supreme Court rationalization impulse on hyper-drive.

Chief Justice Burger wrote that historically trials had been open⁶⁹ and that any number of sound policy reasons supported openness, including a therapeutic effect on the community, more credible testimony, education of the public, increased scrutiny of the work of public officials, and the appearance of justice.⁷⁰ All of these led to a “presumption of openness,”⁷¹ which in turn led to recognition of an implicit First Amendment right of speech, press, and quite possibly assembly, although it did not matter if the right itself was termed a right of access or a right to gather information,⁷² or even a right to receive information and ideas.⁷³

Justice Brennan echoed all of these themes regarding history and policy in his fifteen-page opinion concurring in the judgment, which was joined by Justice Marshall.⁷⁴ Indeed, he did not seem to have any significant disagreement with the rationale of the Chief Justice’s plurality opinion but used his opinion as a vehicle for articulating two complementary models of the First Amendment.⁷⁵ The “pure” speech model is to be invoked when governmental restraint targeted communication outright as in *Nebraska Press Association v. Stuart*,⁷⁶ but the “structural” model included any regulation

66. *Richmond Newspapers, Inc.*, 448 U.S. at 599 (Stewart, J., concurring in the judgment).

67. *Id.* at 599.

68. *See id.* at 599-600.

69. *See id.* at 564-69, 573 n.9 (Burger, C.J., plurality opinion).

70. *See id.* at 569-73.

71. *See Richmond Newspapers, Inc.*, 448 U.S. at 573.

72. *See id.* at 575-78.

73. *See id.* (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)). It is perhaps notable that the Court in *Kleindienst* cited *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), among others, as cases in which it had recognized this right to receive, but the right found little favor with the Court in *Kleindienst*. The denial of a visa for a Belgian journalist and Marxist theorist was upheld over the objections of those in this country who wanted to hear him and asserted a First Amendment right to do so. The Court effectively deferred to the other branches in their exercise of constitutional powers regarding immigration, rejecting the more amorphous right to receive. Interestingly, *Kleindienst* came down the same day as *Branzburg*. The score for that day was, therefore: Government, two, right to receive, zero.

74. *Richmond Newspapers, Inc.*, 448 U.S. at 584-98 (Brennan, J., concurring in the judgment).

75. *See id.*

76. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976).

that even indirectly affected the flow or structure of communications.⁷⁷ Restrictions on courtroom access were within the structural model, Justice Brennan claimed, because the reduced flow of information impeded public understanding of a branch of government and was to the detriment of the judicial mission.⁷⁸

Justice Rehnquist, the lone dissenter, was so disgusted that he was moved to quote the legal authority Gilbert and Sullivan, chastising the fractured majority for assuming that it “embod[ie]d the Law.”⁷⁹ He could find nothing in the text of the First Amendment that authorized the federal courts to create a gathering right. He characterized the majority’s “high-minded . . . impulses” as “unhealthy” and predicted woe when the “indeterminate” guarantees of the Constitution were wielded so liberally to create new rights by an unelected Supreme Court.⁸⁰

But the deed had been done. In *Globe Newspaper Co. v. Superior Court*,⁸¹ the Court reaffirmed the existence of a gathering right two years later in a majority opinion striking a Massachusetts law requiring automatic closure of all cases involving juvenile sex offense victims.⁸² (It wasn’t that a trial or portions of the trials or even every trial thereafter could not be closed, but it had to be done on a case-by-case basis, acknowledging the First Amendment right and articulating an overriding interest in closure in each case.⁸³)

Perhaps the most notable aspect of the *Globe Newspaper* case is that it was the first courtroom access case in which access was really the issue, and not publication. In the preceding cases, the judges were concerned about the potential for prejudice to the defendants’ fair trial rights.⁸⁴ But prejudice is not caused by access, that is, the presence of warm bodies in

77. See *Richmond Newspapers, Inc.*, 448 U.S. at 586-88, 592 (Brennan, J., concurring in the judgment). “The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.” *Id.* at 587-88.

78. See *id.* at 592-97.

79. See *id.* at 604 (Rehnquist, J., dissenting).

80. See *id.* at 604-06.

81. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

82. *Id.* at 610-11.

83. See *id.* at 608.

84. See, e.g., *Gannett Co. v. DePasquale*, 443 U.S. 368, 400 (1979) (Powell, J., concurring):

The question for the trial court, therefore, in considering a motion to close a pretrial suppression hearing is whether a fair trial for the defendant is likely to be jeopardized by publicity, if members of the press and public are present and free to report prejudicial evidence that will not be presented to the jury.

Id.

courtroom seats, whether they are taking notes or not. Rather, prejudice is a consequence of publication. The courts had been trying to stop publication by stopping the gathering. It is this pernicious aspect of the gathering/publication dichotomy that the opinion in *Alvarez* offers hope for deconstructing.⁸⁵

But in *Globe Newspaper*, Massachusetts premised its complete closure on two policy arguments: encouraging juvenile sex offense victims to come forward if they knew they would not have to testify in public and enabling candor when they did testify.⁸⁶ In other words, it really was the presence of warm bodies in the courtroom merely gathering information that was the base concern. The name of the juvenile in the *Globe Newspaper* case was already known, so stopping publication was only relevant to the extent that the State could argue it might further affect the victims' candor or willingness to come forward in such cases.⁸⁷ In other words, publication might not be irrelevant, but the fundamental concern was testifying *in public*.

Again in *Globe Newspaper*, the Court looked at the history of open courtrooms and how openness contributed to the "functioning of the judicial process and the government as a whole."⁸⁸ After underscoring, in *Globe Newspaper*, the need for an overriding interest in closure in each case,⁸⁹ the Court elaborated, in its next two gathering cases, on the rest of its First Amendment gathering test, emphasizing consideration of alternatives to closure⁹⁰ and of narrowing closure to the minimum possible.⁹¹ Indeed, by the time of *Waller v. Georgia*,⁹² the Court had become so comfortable with the First Amendment analysis of closure cases that it employed the identical analysis when it was the defendant asserting a Sixth Amendment violation of his public trial right.⁹³ *Waller* was asserting a violation of his Sixth

85. See *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

86. See *Globe Newspaper Co.*, 457 U.S. at 607.

87. *Id.* at 606-08.

88. *Id.* at 605-06.

89. See *id.* at 608-09.

90. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

91. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

92. *Waller v. Georgia*, 467 U.S. 39 (1984).

93. See *id.* at 48. In its only other case involving a constitutional right of access to courtrooms, the Court more recently acknowledged in *Presley v. Georgia*, 130 S. Ct. 721 (2010), that:

[t]he *Waller* Court relied heavily upon *Press-Enterprise I* in finding that the Sixth Amendment right to a public trial extends beyond the actual proof at trial. It ruled that the pretrial suppression hearing must be open to the public because "there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public."

Amendment right because his pre-trial suppression hearing had been closed to the public upon motion of the State.

However, all of the First Amendment closure cases on which the *Waller* Court relied had involved trials, not pre-trial hearings, and the Court had asserted that that distinction maintained the viability of *Gannett Co. v. DePasquale*, which involved closure of a pre-trial hearing that the Court had upheld. So the *Waller* Court had a bit of a dilemma—trying to apply the Sixth Amendment to a pre-trial hearing to which it had already said in *Gannett* that the Sixth Amendment was inapplicable, while borrowing a First Amendment analysis it had only used in trial settings.

The solution was bold—rehabilitate *Gannett*. The case now actually stood for the proposition that there *was* a constitutional right to open pre-trial hearings. Five Justices in *Gannett* had acknowledged that the Constitution applied to pre-trial hearings, the *Waller* Court noted.⁹⁴ Four had used the Sixth Amendment in Justice Blackmun’s dissent, and Justice Powell had concurred with the majority on closure but had also written that he would have held “explicitly” that the public had a First Amendment right of access to pre-trial hearings⁹⁵ but that closure was justified in this particular case.⁹⁶ So, even if no majority in *Gannett* could agree on the precise constitutional right and the party in *Gannett* seeking access lost the case, by the time of *Waller*, it could be read as actually supporting access.

III. NOT GATHERING, BUT SPEECH

Perhaps the most important footnote in the ill-fated *Gannett* decision was the last one in the majority opinion. In footnote twenty-five, Justice Stewart asserted that the Court’s precedents regarding publication will be “of no assistance” in resolving *Gannett*.⁹⁷ *Nebraska Press Ass’n. v. Stuart*,⁹⁸ for example,

Id. at 723 (per curiam) (quoting *Waller*, 467 U.S. at 46). The *Presley* Court held it was a violation of the Sixth Amendment to exclude the public from the voir dire portion of the trial, at least in the absence of consideration of alternatives. *Presley*, 130 S. Ct. at 723-25. The *Presley* Court as well relied on First Amendment precedent, but added, “[t]he extent to which the First and Sixth Amendment public trial rights are coextensive is an open question, and it is not necessary here to speculate whether or in what circumstances the reach or protections of one might be greater than the other.” *Id.* at 724.

94. See *Waller*, 467 U.S. at 44; *Gannett Co. v. DePasquale*, 443 U.S. 368, 398 n.2 (1979) (Powell, J., dissenting).

95. See *Gannett*, 443 U.S. at 397 (Powell, J., dissenting).

96. See *id.* at 402-03.

97. *Id.*

98. *Nebraska Press Ass’n. v. Stuart*, 427 U.S. 539 (1976).

involved a direct prior restraint imposed by a trial judge on the members of the press, prohibiting them from disseminating information about a criminal trial. . . . The exclusion order in the present case, by contrast, did not prevent the petitioner from publishing any information in its possession. The proper inquiry, therefore, is whether the petitioner was denied any constitutional right of access. . . .⁹⁹

But, consider the case of a television journalist broadcasting live from the scene of a news event. Is it gathering or publication, both, or something else entirely that does not fit neatly into a typology more suited to a pre-electronic age?

The cases involving recording have struggled with the gathering/publication dichotomy. Some recount the Supreme Court's attempts to protect gathering and try to fit recording into that mold.¹⁰⁰ Some have called restriction of recording, when combined with the seizure of recording equipment, a prior restraint,¹⁰¹ apparently seeing more in common with the *Nebraska Press* line of publication cases. Some just briefly declare recording protected, perhaps with a few citations, and leave it at that.¹⁰² Indeed, one court in surveying the cases described the "terseness" of the discussion in many cases as evidence of the general acceptance of a right to record.¹⁰³ However, it could just as easily be evidence that judges are at sea when it comes to characterizing recording within the confines of established free speech doctrine.

As long as the recording is not paired with instantaneous transmission, the law of gathering would seem the most appropriate pigeonhole. Indeed, the ACLU brief in the *Alvarez* case devoted a section to First Amendment gathering law.¹⁰⁴ But the genius of the ACLU argument was that it did not stop with an asserted right to gather, or even a recitation of other cases recognizing a right to record, but attempted to cast its argument as fundamentally involving expression.

99. *Gannett*, 443 U.S. at 393 n.25.

100. *See Glik v. Cunniffe*, 655 F.3d 78, 82-83 (1st Cir. 2011).

101. *See Robinson v. Fetterman*, 378 F. Supp. 534, 541 (E.D. Pa. 2005) (holding that to the extent law enforcement officials restrained plaintiff from making future videotapes or distributing them, it constituted prior restraint); *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 638 (D. Minn. 1972). Of course, *Gunnarson* preceded the Supreme Court's recognition of a gathering right in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

102. *See Maryland v. Graber*, No. 12-K-10-647, 2010 Md. Cir. Ct. LEXIS 7, at *34 (3d Cir. Sept. 27, 2010) (noting that many courts have held video taping to be protected).

103. *See Glik v. Cunniffe*, 655 F.3d 78, 84 (1st Cir. 2011).

104. *See Brief of Plaintiff-Appellant the American Civil Liberties Union of Illinois at 17-19, ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (No. 11-1286), *cert. denied*, 2012 LEXIS 8990 (U.S., Nov. 26, 2012).

The right to record, according to the ACLU, implicated “the First Amendment’s strong protection of speech about government officials and matters of public concern, speech in public forums, and gathering information necessary for one’s own effective expression.”¹⁰⁵ Moreover, the evolving and ubiquitous technology¹⁰⁶ had become a vital tool of communication, enabling people, whether in the streets of Chicago or the Middle East, not only to gather information regarding their government but also to share it instantaneously without relying on traditional media.¹⁰⁷

In other words, the traditional gathering/publication dichotomy was broken. It did not contemplate the scale and variety of expressive activity, the new technologies and their ease of use, nor the quantitatively insignificant contribution of the press to this global marketplace of ideas.

The Seventh Circuit embraced these themes. In a sense, the court almost had no choice, given the relative merits of the parties’ arguments. The State argued that recording, even in public places, was wholly unprotected by the First Amendment.¹⁰⁸ Any right to record was a corollary of a right to receive information, which was dependent on a willing speaker, the State argued. The district court had accepted this argument,¹⁰⁹ and it certainly fit

105. *Id.* at 20.

106. *See* Claiborne, *supra* note 4, at 493 (noting that the number of people walking around with an “eavesdropping device,” as defined by the Illinois law, is constantly growing); Robinson, *supra* note 4, at 1413 (noting that technology has made monitoring of police far easier, and rapid advances in recording have revolutionized information gathering and sharing); *cf.* Carol Bast, *What’s Bugging You? Inconsistencies and Irrationalities of the Law of Eavesdropping*, 47 DEPAUL L. REV. 837, 914 (1998) (“People’s idea of morality is changing. Surreptitious taping is not perceived by many to be wrong. This is the electronic age.”). Robinson approached the issue philosophically. He drew on Jeremy Bentham’s notion of a “Panopticon,” a circular prison with a watchtower in the center that enabled constant surveillance of prisoners, presumably cowing them into submission. *See* Robinson, *supra* note 4, at 1417. In modern society with government and corporate cameras everywhere, a surveillance state is produced that “effectively produces a Panopticon, and a populace conforms and cowers as a result.” *Id.* at 1418. Robinson’s proposal was to enable and encourage surveillance by the populace subject to surveillance:

The opposite of surveillance from above is surveillance from below, or sousveillance. . . . While a person cannot destroy the cameras or eyes that constantly watch him, he can return the gaze. If those being watched become the watchers of the watchers, then the cowing effect of surveillance, at the least, can be minimized.

Id.

107. *See* Brief of Plaintiff-Appellant the American Civil Liberties Union of Illinois at 22-24, *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (No. 11-1286), *cert. denied*, 2012 LEXIS 8990 (U.S., Nov. 26, 2012).

108. *See* *ACLU v. Alvarez*, 679 F.3d 583, 594 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

109. *See* *ACLU v. Alvarez*, No. 10 C 5235, 2011 U.S. Dist. LEXIS 2088, at *13 (N.D. Ill., Jan. 10, 2011), *rev’d*, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

the tenor of the Illinois Eavesdropping Act at issue in the case, requiring the consent of all parties to any recorded conversation.¹¹⁰

But, asking if the speaker was willing had a distinctly 20th Century tone to it, reminiscent of an age when one might be expected to look away when confronted with disquieting conduct—instead of whipping out the cellphone camera. The Seventh Circuit found the State’s argument for no protection whatsoever “extreme,”¹¹¹ and when it had to choose between that and the ACLU’s argument harmonizing protection for expression on matters of public concern with the potential of modern technology, it adopted the latter approach with gusto.

The court did note the Supreme Court’s cases involving a right to gather. It discussed *Branzburg v. Hayes*, quoting the passage regarding freedom of the press being “eviscerated” without some protection for seeking out the news. But the cases actually recognizing a right to gather were relegated to a footnote.¹¹² In its eagerness to put any discussion of gathering aside, it wrote simply, “Access is assumed here”¹¹³ Because the activity to be recorded was in public fora and the ACLU only sought to record where there was no expectation of privacy, the court looked instead to precedents involving expression—and the battle was over almost before it had begun. By equating recording with “access,” and access to public fora a given, the analysis only became easier from that point.

Thus, the court’s conclusion early in its opinion that “[a]udio recording is entitled to First Amendment protection” could rely on speech cases having nothing to do with recording or gathering.¹¹⁴ Indeed, the court even called upon reasoning in the Supreme Court’s campaign finance cases. Professor Seth Kreimer’s article on the right to record images,¹¹⁵ which was

110. See 720 ILL. COMP. STAT. 5/14-2(a)(1) (2006).

111. See *Alvarez*, 679 F.3d at 594. The State did not help itself when it characterized the proposed ACLU program of taping police at public demonstrations as “advocacy under the guise of First Amendment infringement.” *Id.* at 593 (internal quotations omitted). Indeed, the State’s argument seemed to be exactly what the ACLU was alleging. “We confess we do not understand the point,” the court wrote. *Id.*

112. See *id.* at 598 n.7.

113. *Id.* To be sure, the Supreme Court cases recognizing a gathering right involved access to governmental proceedings, which the *Alvarez* court stated was not at issue. See *id.* But the right has been asserted in other contexts as a bar to government regulation. See *supra* notes 21-27 and accompanying text. In any event, it would not seem to take too much imagination either to construe an “enforcement stop” as a governmental proceeding or simply to apply the Court’s history and policy analysis to recordings of on-duty police officers in much the same way as it was applied to governmental proceedings. See *supra* notes 69-78, 86-87 and accompanying text.

114. *ACLU v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

115. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335 (2011).

cited in both the ACLU brief and the Seventh Circuit opinion, was the first to make a connection between campaign finance cases and the right to record.

Kreimer perceptively noted that the Supreme Court's campaign finance cases depended on the premise that the First Amendment protects the communication process and not just the actual speech.¹¹⁶ "Laws enacted to control or suppress speech may operate at different points in the speech process," the Court wrote in *Citizens United v. FEC*.¹¹⁷ Justice Scalia might not have realized that he was endorsing protection for recording or image capture while writing of campaign finance, but Kreimer contended that is the plain import of Scalia's observation that controlling any cog in the communications machine "can halt the whole apparatus."¹¹⁸

"So too with laws that restrict audio recording," wrote the Seventh Circuit in *Alvarez*.¹¹⁹ Any other conclusion would mean the State could effectively stop speech by simply restricting speech early in the process rather than the speech itself, the court wrote. "We have no trouble rejecting that premise."¹²⁰

Once the court had concluded that the Eavesdropping Act affected "a medium of expression—the use of a common instrument of communication—and thus an integral step in the speech process,"¹²¹ little was left to do but choose the First Amendment test by which to gauge the statute's constitutionality. Statutes that target expressive content invoke strict scrutiny, that is, whether the statute advances a compelling government interest and is narrowly tailored to that end.¹²² Strict scrutiny was the test preferred by the ACLU, but the Seventh Circuit was not so sure.

The ACLU thought the statute triggered strict scrutiny¹²³ because recording some content was protected under the statute, specifically recordings by police of civilians—but not recordings by civilians of police¹²⁴—

116. *See id.* at 381-83.

117. *Citizens United v. FEC*, 130 S. Ct. 876, 896 (2010).

118. *McConnell v. FEC*, 540 U.S. 93, 251-52 (2003) (Scalia, J., concurring in part and dissenting in part), *overruled by* *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (quoted in Kreimer, *supra* note 115, at 383).

119. *ACLU v. Alvarez*, 679 F.3d 583, 597 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012).

120. *Id.*

121. *Id.* at 600; *see id.* at 602 (statute's effect far from incidental; it specifically targets "a medium of expression").

122. *See Brown v. Entertainment Merchants Ass'n.*, 131 S. Ct. 2729, 2738 (2011); *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002).

123. *See* Brief of Plaintiff-Appellant the American Civil Liberties Union of Illinois at 24-26, *Alvarez v. ACLU*, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 2012 LEXIS 8999 (U.S. Nov. 26, 2012).

124. *See* 720 ILL. COMP. STAT. 5/14-3(h) (State Bar Edition 2012) (on-duty police may record conversations with civilians during any "enforcement stop").

and because penalties were exacerbated if the content involved civilians taping police and not civilians taping civilians.¹²⁵

The Seventh Circuit, however, thought the first allegation was analogous to government allowing taping of its own meetings by government but not by the public.¹²⁶ That amounted to government merely “facilitat[ing] its own speech,” and not discriminating among private speakers, the court wrote.¹²⁷ The court might have wanted to preserve some discretion in allowing recording specifically of court proceedings. If recording of court proceedings by the judiciary meant the public and press then had a constitutional right to record as well, the Seventh Circuit might have balked because such an argument might find a cool reception at the Supreme Court.¹²⁸

But, frankly, the court seemed to have lost track of the thread in its own logic at this point. If recording truly is expression protected by the First Amendment, then it seemed more than a little curious to suggest that the government had a greater speech right than the public. The exception allowing police recording benefitted government.¹²⁹ Police could tape whatever they chose, and they could erase whatever they thought cast them in a negative light. But citizens could not record “enforcement stops” even if it would put themselves in a positive light. As such, the exception not only discriminated among speakers but veered dangerously close to viewpoint discrimination.¹³⁰

The Seventh Circuit dismissed the ACLU argument that the eavesdropping statute regulated content because different penalties applied to different content. The argument was “off point,” the court wrote, because penalty enhancement was not something the ACLU was contesting.¹³¹ So, the court thought it “unlikely that strict scrutiny” would apply but did not specifically rule on the matter because the statute would be vulnerable to lesser scrutiny in any event.¹³²

125. Compare *id.* at 5/14-4(b) (recording police, prosecutors, or judges is a class 1 felony) with *id.* at 5/14-4(a) (taping of others is a class 4 felony).

126. See *Alvarez*, 679 F.3d at 604.

127. See *id.*

128. See *Chandler v. Florida*, 449 U.S. 560 (1981) (cameras in courtrooms do not pose an automatic Sixth Amendment violation, but neither is there a First Amendment right to record).

129. “Officials engage in virtually unchecked surveillance of public encounters. A rule that bars citizens from capturing images gives unbalanced authority to official framing.” Kreimer, *supra* note 115, at 386.

130. See Tomei, *supra* note 4, at 409-10; Brief of Plaintiff-Appellant the American Civil Liberties Union of Illinois at 25, *Alvarez v. ACLU*, 679 F.3d 583 (7th Cir. 2012), *cert. denied*, 2012 LEXIS 8999 (U.S. Nov. 26, 2012).

131. See *Alvarez*, 679 F.3d at 604 n.11.

132. See *id.* at 604.

Still treading gingerly on this new ground, the court surveyed three different tests that it characterized as “variations” of intermediate scrutiny. It looked at tests from campaign finance, commercial speech, and time, place, or manner regulation in public fora and concluded that they all shared three elements: content neutrality, an important governmental interest, and a reasonably close fit between the regulation and the governmental interest.¹³³ While a court would not even be applying intermediate scrutiny if it had not already decided the regulation was content-neutral, the Seventh Circuit wrote that the eavesdropping statute failed the second and third parts of this hybrid test.

The court considered protection of private, personal conversations to be important—but not the conversations of “police officers performing their duties in public places and speaking at a volume audible to bystanders.”¹³⁴ Recording police officers under such circumstances transgressed no privacy interests as commonly understood under either tort law or the Fourth Amendment.¹³⁵ A statute intended to protect personal privacy swept far too broadly by banning recording of all conversations, including those where no privacy interests whatsoever existed.

Thus, no important governmental interest supported criminalizing recording of on-duty police officers in public, and the “fit” was poor between the terms of the statute and its goal of protecting privacy. Judge Posner in dissent parted ways with the majority on this point, declaring that the legislature might well have intended to protect the privacy interests not of the police but of the persons being questioned or arrested.¹³⁶

The majority, however, stoutly defended its position: “But the Illinois eavesdropping statute obliterates the distinction between private and nonprivate by criminalizing *all* nonconsensual audio recording *regardless* of whether the communication is private *in any sense*.”¹³⁷ It is worth noting that the Illinois legislature had amended the law in 1994, making recording

133. *See id.* at 605.

134. *Id.* at 605-06. “But surreptitiously accessing the private communications of another by way of trespass or nontrespassory wiretapping or use of an electronic listening device clearly implicates recognized privacy expectations.” *Id.* at 605; *but see id.* at 607 n.13 (“We are not suggesting that the First Amendment protects only *open* recording.”).

135. *See id.* at 605. By finding privacy not to be at issue, the court also avoided a potential conflict with the Illinois Constitution protecting the right of the people “to be secure . . . against unreasonable searches, seizures, invasions of privacy or interceptions of communications by eavesdropping devices or other means.” ILL. CONST. art. I, § 6.

136. *Alvarez*, 679 F.3d at 611 (Posner, J., dissenting).

137. *Id.* at 608. “Moreover, the ACLU plans to record *openly*, thus giving the police and others notice that they are being recorded.” *Id.* at 607.

illegal even if none of the parties to the conversation intended their conversation to be private or if circumstances justified that expectation.¹³⁸

Judge Posner plainly thought the majority was moved to excess in its “novel ‘interpretations’ of the First Amendment,”¹³⁹ and he seemed to prefer a First Amendment that protected only against prior restraint of publication.¹⁴⁰ But it was the Illinois statute that was excessive, according to the majority, an “outlier” among state eavesdropping statutes in its scope and harshness.¹⁴¹ The Seventh Circuit’s response *was* ambitious. The court exhibited willpower and resourcefulness in maintaining the vitality of the First Amendment, taking fully into account the rapidly evolving nature of expression. But the court’s embrace of a vigorous First Amendment perhaps also says something about the zealotry of the regulation in this case.

IV. THE GATHERING/PUBLICATION DICHOTOMY RECONSIDERED

One author noted that the recording of police does not end when the camera is turned off. Posting the video on the Internet is often an organic part of the communication process.¹⁴² With webcams, “smart” phones, and augmented reality head-mounted displays,¹⁴³ gathering and publication are becoming more antiquated as discrete concepts by the nanosecond. Indeed, they might never have made much sense as discrete concepts because communication has always been a process.

Isolating elements of that process—or tying protection to the timing of the restriction (prior restraints prohibited, but not subsequent punishments), as Judge Posner seemed to prefer—have always had a sense of arbitrariness. Solely protecting against prior restraint of publication might have made sense in John Milton’s day when he was trying to eke out some small measure of protection in a regime of total regulation and a Crown with ab-

138. Ill. Laws Pub. Act. 88-677, § 20, *amending* 720 ILL. COMP. STAT. 5/14-1 (1994) (defining conversation); *see* Celia Guzaldo Gamrath, *A Lawyer’s Guide to Eavesdropping in Illinois*, 87 ILL. B.J. 362, 363 (1999) (detailing history of statute).

139. *Alvarez*, 679 F.3d at 610 (Posner, J., dissenting).

140. Judge Posner’s disquisition on the colonial understanding of free speech as limited to freedom from prior restraint seemingly left him yearning for a simpler time when citizens could be prosecuted for criticizing government. Juries, not constitutional amendments, were all citizens needed for protection, he wrote. *See id.* He feared judges today wanted to make First Amendment protection “complete,” and he provided a long list of speech that he preferred remain regulated. *See id.* at 611.

141. *See id.* at 607. “As best we can tell, the Illinois statute is the broadest of its kind; no other wiretapping or eavesdropping statute prohibits the open recording of police officers lacking any expectation of privacy.” *Id.* at 595 n.4.

142. *See* Robinson, *supra* note 4, at 1420.

143. *See Project Glass*, WIKIPEDIA.ORG, http://en.wikipedia.org/wiki/Project_Glass (last visited Apr. 18, 2013) (“eyeglasses” that can live-stream images, as well as interface with the Internet and display information).

solute authority.¹⁴⁴ But with the creation of a democratic republic and the adoption of the First Amendment in 1791, such a narrow view of freedom was already outmoded. Seditious libel laws punishing speech critical of government would not constitute prior restraints, but they only protected incumbents, a practice utterly inconsistent with the premise of democracy.¹⁴⁵

Likewise, it might be time to move on with regard to a gathering/publication dichotomy. The concept of a First Amendment gathering right had its historical work to do, opening up courtrooms when the Court saw itself as having no other alternative, except to overrule itself. But gathering was always about publication. Gathering, by itself, did not cause the prejudice that worried the courts, but publication might. Stopping the gathering stopped the publication.

Restraints on gathering were never analyzed as prior restraints, but they could be even more effective than a prior restraint on publication. Once the information is available, it can be impossible to stop further dissemination. The Court in *Nebraska Press Association v. Stuart* noted that it was doubtful the prior restraint in that case could even be enforced because it was impractical to stop all the citizens of Sutherland, Nebraska, population 850, from discussing what some of them might hear in the preliminary hearing.¹⁴⁶ But cutting off the flow of information at the source is the ultimate prior restraint of speech.

Even the one gathering case from which the *Alvarez* court quoted at length, *Branzburg v. Hayes*, was really about speech. As illustrated in recent cases involving subpoenas, not to the press but to Internet service providers regarding anonymous posters, the courts understand the issue more clearly and seem more willing to offer protection when the issue is framed as anonymous speech and not the evidentiary privilege of the press or some intermediary.¹⁴⁷

144. See JOHN MILTON, *AREOPAGITICA* (1st ed. n.p. 1644).

145. See James Madison, *The Virginia Report of 1799 Concerning the Alien and Sedition-Laws*, CONSTITUTION.ORG, (April 9, 2013, at 4:25PM C.S.T.), http://www.constitution.org/rf/vr_1799.htm (last visited Apr. 18, 2013).

146. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 567 (1976).

147. See, e.g., *Doe v. 2TheMart, Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite International v. John Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001); *Lassa v. Rongstad*, 294 Wis. 2d 187 (2006); but see *Maxon v. Ottawa Pub. Co.*, 929 N.E. 2d 666, 676 (3d Dist. 2010) (Illinois is a fact-pleading jurisdiction, thus obviating the need for a motion for particularity in pleading in notice-pleading jurisdictions as a means of protecting anonymous speech and providing a defense to frivolous claims in *Dendrite*); see generally Victoria Smith Ekstrand, *Unmasking Jane and John Doe: Online Anonymity and the First Amendment*, 8 COMM. L. & POL'Y 405 (2003); Lyriisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855 (2000).

The option of a gathering rubric tempts some courts to head in a direction opposite that of the *Alvarez* court. Instead of seeing gathering as expression, they might seem to think of gathering as expending more calories than publication, adopt the *Zemel* approach,¹⁴⁸ and characterize the issue as involving action or conduct,¹⁴⁹ thus sidestepping the First Amendment altogether.

Of course, on occasion, “gathering” or the mere presence of spectators can be the issue, as in the *Globe Newspaper* case. If the real concern is protecting a juvenile sex offense victim from having to testify before an audience, then expression is not the issue. Likewise, a “gathering” crowd at an accident or crime scene should not be dispersed solely because they might be recording,¹⁵⁰ but safety, order, preservation of evidence, and a variety of other concerns can legitimately motivate law enforcement officials to order gawkers to move along.¹⁵¹

The line between mere gathering and the gathering that constitutes expression will not always be bright,¹⁵² but if the regulation is aimed at gathering as a means of stopping expression, then the burden, as in *Alvarez* or any First Amendment case, must be on the State to justify the infringement.¹⁵³

148. See *supra* note 22 and accompanying text.

149. See *Jones v. Lakeview Sch. Dist.*, 2007 U.S. Dist. LEXIS 52353, at *18 (No. 4:06cv630) (N.D. Ohio, July 19, 2007) (taking photographs of school property does not implicate freedom of speech and is “conduct pure and simple”) (quoting *S.H.A.R.K. v. Metro Parks Serving Summit Co.*, 2006 U.S. Dist. LEXIS 40027, at *10 (N.D. Ohio 2006)); *D’Amario v. Providence Civic Ctr. Auth.*, 639 F. Supp. 1538, 1541 (D.R.I. 1986); Mishra, *supra* note 4, at 1550 (stating the First Amendment protects distribution, but probably not actual recording). See also *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (“[D]elivery of a tape recording might be regarded as conduct, but given that the purpose of such a delivery is to provide the recipient with the text of recorded statements, it is like the delivery of a handbill or a pamphlet, and as such, it is the kind of ‘speech’ that the First Amendment protects.”); *Tunick v. Safir*, 209 F.3d 67, 82 (2d Cir. 2000) (“While there may be classroom hypotheticals that explore the hazy line between nude photography as unprotected conduct and nude photography as artistic expression, this is not such a case.”).

150. See *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000) (holding a videotaper on public property and in no way interfering with police had a right to record).

151. See *Colten v. Kentucky*, 407 U.S. 104 (1972) (no First Amendment right to “observe” issuance of traffic ticket).

152. *Edwards v. South Carolina*, 372 U.S. 229 (1963). Gathering as an exercise of the right of peaceably assembling must also be protected. *Id.*

153. Before the courts had articulated any gathering right, Professor Randall Bezanson wrote that the act of publication

is inseparable from the means of obtaining the information in the first instance. To conclude, as do many of the Supreme Court’s prior restraint cases, that once obtained, any information may be published, but that the custodian may be controlled so as to prevent disclosure, is to rest the system of legal protection not only on imperfectly logical but also on impractical, unrealistic, and unresponsive assumptions. In the end, the

Anytime a new conception of the First Amendment is advanced, no matter how appealing on its face, a caveat should be included of the sort that characterized unexplored areas of medieval maps: Here be Dragons.

Thinking of speech as a process risks losing some of the protection for the “pure” speech in Justice Brennan’s two tiers of the First Amendment.¹⁵⁴ His articulation of a lesser protected structural model, which came into play anytime government regulation affected the flow or structure of communication, always had the potential for overlapping “pure” speech it seems.¹⁵⁵ Any prior restraint certainly affected the flow of communication.

If protecting the communications process becomes a dominant theme in First Amendment analysis, and cases that would have merited strict scrutiny before now end up subject to intermediate scrutiny, then for all the ground that this reconception of the First Amendment gained, it would lose even more. Courts cannot exhibit the same hesitancy as the Seventh Circuit to characterize restrictions as content-related.

The reason the Illinois Eavesdropping Act should have triggered strict scrutiny had to do with its exceptions for the expression by or regarding different public officials. Recording by police of citizens during enforcement stops was allowed, but not reciprocal recording by the citizens. But if such recording is plainly seen to involve First Amendment expression, then legislators might be tempted to pass absolute bans as a means of bringing their statutes within intermediate scrutiny. As the *Alvarez* court’s analysis demonstrated, that does not mean the regulation will pass constitutional muster, but it would be ironic if greater protection spawned greater regulation.

Protection of the communications process, bringing within it cases that heretofore might have been characterized as involving gathering, would seem to raise questions about secret legislative hearings, cameras in the courtroom, and the closed Friday conferences of the Justices when they discuss pending cases, not to mention an entire system of government record classification.

Part of the solution might be to include within the analysis the new and evolving government speech doctrine.¹⁵⁶ The Supreme Court seems intent

same issues must be faced, the same analytical framework must be applied, and the same balanced judgment must be reached.

Randall Bezanson, *Public Disclosures as News: Injunctive Relief and Newsworthiness in Privacy Actions Involving the Press*, 64 IOWA L. REV. 1061, 1109 (1979).

154. See *supra* notes 75-78 and accompanying text.

155. “The structural model . . . entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.” *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 587-88 (1980) (Brennan, J., concurring in the judgment).

156. See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550 (2005); *Bd. of*

on fashioning a doctrine whereby government can speak¹⁵⁷ or refrain from speaking.¹⁵⁸ The doctrine is still in its nascent stage, though, so courts could easily craft an obligation on behalf of government to speak, open its doors, disclose its records, and expose the public conversations of arresting officers. Actually, this is precisely where the onus ought to be. There should be a presumption of openness regarding a democratic government. Secrecy is a form of regulation,¹⁵⁹ just as much as prior restraint. Keeping the public in ignorance is manipulation by government of its people.¹⁶⁰

A right to gather supposedly created a presumption of openness, if the right applied at all. But then the courts would analyze that right in terms of its benefits to the proceedings at issue or, even worse, in terms of the technology used by the gatherer. Such a skewed focus was a consequence of framing the issue as gathering instead of speaking and of asking whether history and policy supported recognition of a right to gather instead of asking what could possibly justify government shutting itself off from those to whom it was accountable.

V. CONCLUSION

There are perils in departing from established doctrine. If nothing else, the established doctrine built up a body of precedent as to what was covered and what was not. People knew what to expect and were familiar with the arguments to be crafted in various scenarios. If the invitation issued by the

Regents v. Southworth, 529 U.S. 217 (2000); Nat'l Endowment for Arts v. Finley, 524 U.S. 569 (1998); Rosenberger v. Rector, 515 U.S. 819 (1995); Rust v. Sullivan, 500 U.S. 173 (1991).

157. See *Pleasant Grove City*, 555 U.S. 460 (holding a historical monument in a city park displaying the Ten Commandments is protected government speech).

158. See *Rust*, 500 U.S. 173 (stating family-planning clinics become government speakers upon receipt of a government subsidy and can be compelled not to speak regarding abortions as a condition of receiving the subsidy).

159. See DANIEL PATRICK MOYNIHAN, *SECRECY: THE AMERICAN EXPERIENCE* (1999).

160. Justice Blackmun was writing of a ban on commercial speech, but his words have just as much resonance in this context: "[O]n close inspection it is seen that the State's protectiveness of its citizens rests in large measure on the advantages of their being kept in ignorance." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 769 (1976).

There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

Id. at 770.

Seventh Circuit is accepted to think of communication as a process and not as discrete stages, then much of that body of precedent might have to be relitigated—and parties on both sides might be displeased with the outcomes.

But that is the challenge as well as the appeal of the First Amendment. It is not a static law trapped in the narrow confines of Sir William Blackstone's imagination, as Judge Posner might have us believe.¹⁶¹ Instead, the history of the First Amendment has been one of numerous interpretations, all dependent on the tenor of the times, the philosophy of the writer, and a willingness to adapt to changed circumstances. With any luck, we'll never stop asking, "What next?"

161. See *ACLU v. Alvarez*, 679 F.3d 583, 610 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 651 (2012) (Posner, J., dissenting) (citing 4 William Blackstone, *COMMENTARIES ON THE LAWS OF ENGLAND* 150-53 (1769)).