



The Third Circuit joins five other circuit courts in holding that citizens have a First Amendment right to videotape the police in public



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In *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017), the United States Court of Appeals for the Third Circuit was asked to consider whether the public possesses a Constitutional right to record public police activity. The relevant facts are as follows.

In September 2012, Amanda Geraci, a member of the police watchdog group “Up Against the Law,” attended an anti-fracking protest at the Philadelphia Convention Center. Geraci carried her camera and wore a pink bandana that identified her as a legal observer. About a half hour into the protest, the police arrested a protestor. Geraci moved to a better vantage point to record the arrest and did so without interfering with the police. Nevertheless, an officer abruptly pushed Geraci and pinned her against a pillar for one to three minutes. The officer’s actions prevented Geraci from observing or recording the arrest. Geraci was not arrested or cited.

One evening in September 2013, Richard Fields, a sophomore at Temple University, was on a public sidewalk where he observed a number of police officers breaking up a house party across the street. The nearest officer was fifteen (15) feet away from him. Using his iPhone, Fields took a photograph of the scene. An officer noticed Fields taking the photograph and asked him whether he “like[d] taking pictures of grown men” and ordered him to leave. Fields refused, and so, the officer arrested him, confiscated his phone, and detained him. The officer searched Fields’ iPhone and opened several videos and other photos stored on Fields’ iPhone. The officer then released Fields and issued him a citation for “Obstructing Highway and Other Public Passages.” The charges were withdrawn when the officer did not appear at the court hearing.

Subsequently, Fields and Geraci brought claims under 42 U.S.C. § 1983 against the City of Philadelphia and certain police officers. In their Complaint, they alleged that the officers illegally retaliated against them for exercising their First Amendment right to record public police activity and violated their Fourth Amendment right to be free from an unreasonable search or seizure.

Fields and Geraci also pointed out that the City’s Police Department’s official policies recognized their First Amendment right. In 2011, the Department published a memorandum advising officers not to interfere with a private citizen’s recording of police activity because it was protected by the First Amendment. In 2012, the City published an official directive reiterating that this right existed. Both the memorandum and directive were read to police officers during roll call for three straight days. In 2014, the Department instituted a formal training program to ensure that officers ceased retaliating against bystanders who recorded their activities.

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The District Court granted summary judgment in Defendants' favor on Fields and Geraci's First Amendment claims. Notably, Defendants did not argue against the existence of a First Amendment right; rather, Defendants contended that the individual officers were entitled to qualified immunity and that the City could not be vicariously liable for the officers' acts.

Nevertheless, the District Court—on its own—decided that Fields and Geraci's activities were not protected by the First Amendment because they presented no evidence that their conduct could be construed as an expression of a belief of or criticism of police activity. The District Court noted that, when confronted by the police, neither Fields nor Geraci expressed their reasons for recording, and their later deposition testimony showed that Geraci simply wanted to observe and Fields wanted to take a picture of an "interesting" and "cool" scene.

In addition, neither testified of having an intent to share his or her photos or videos. Therefore, the District Court declined to create or to recognize a First Amendment right for citizens to photograph officers when they have no expressive purpose such as challenging police actions.

Finally, the District Court held that it would allow Fields and Geraci's Fourth Amendment claims to proceed to trial. But, by stipulation, Fields and Geraci dismissed their Fourth Amendment claims so that they could immediately appeal the District Court's First Amendment ruling.

The Third Circuit began its Opinion by noting that, ever since the Rodney King incident in Los Angeles, California, in 1991, civilian recording of police officers has been "ubiquitous." The Third Circuit further noted that Fields and Geraci's case was about retaliation and that, contrary to the District Court's conclusion, the case was not about whether Fields or Geraci expressed themselves through conduct. Instead, the issue was whether they possessed a First Amendment right of access to information about how the police operates in public. The Third Circuit joined the "growing consensus" of federal courts (including the First, Fifth, Seventh, Ninth, and Eleventh Circuits) in concluding that the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public. *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017); *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014); *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012); *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995).

The Third Circuit reached this conclusion for several reasons. First, the Third Circuit stated that the First Amendment protects actual photographs, videos, and recordings, and for this protection to have meaning, the First Amendment must also protect the act of creating the material. In other words, the Third Circuit stated that there is no practical difference between allowing the police to prevent people from taking recordings and actually banning the possession or distribution of them.

Second, the Third Circuit opined that the First Amendment protects the public's right of access to information about their officials' public activities and that that right goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw. Access to information regarding public policy activity is particularly important because it leads to citizen discourse on public issues—the highest rung of the hierarchy of First Amendment values—and is entitled to special protection. The Third Circuit stated that such information is the wellspring of society's debates, and the more credible the information, the more credible are the debates. Accordingly, the Third Circuit stated that recording police activity in the public falls squarely within the First Amendment right of access to information.

Third, the Third Circuit held that bystander photographs and videos provide different perspectives and can help fill the gaps left by an officer's body cameras and dashboard cameras. The Third Circuit further noted that a

bystander's photographs and videos complements the role of the new media that is no doubt protected by the First Amendment.

Fourth, the Third Circuit noted that bystander photographs and video has spurred action at all levels of government to address police misconduct and to protect civil rights. They have helped police departments identify and discipline problem officers. They have assisted civil rights investigations. And, perhaps most importantly, they have helped the police carry out their work.

The Third Circuit cautioned, however, that it was not holding that all recording is protected or desirable. Nor is the right absolute. For example, if a person's recording interferes with police activity, that interference might not be protected.

But the important part of the Third Circuit's holding in *Fields* is that, under the First Amendment's right of access to information, the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.

Note: *Court holdings can vary significantly between jurisdictions. As such, it is advisable to seek the advice of a local prosecutor or legal adviser regarding questions on specific cases. This article is not intended to constitute legal advice on a specific case.*