

# Court's Decision on Recording Police Erodes First Amendment Rights and Transparency While Inviting Violence

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A federal district court in Pennsylvania recently issued a terrible joint decision in *Fields v. City of Philadelphia* and *Geraci v. City of Philadelphia*, holding for the first time that "observing and recording" police activities is not protected by the First Amendment *unless* an observer visibly challenges police conduct in that moment. The right to record police activities, under both the First and Fourth Amendments, is an increasingly vital digital rights issue. If allowed to stand, *Fields* would not only hamstring efforts to improve police accountability, but—given disturbing patterns across the U.S.—could also lead to unnecessary violence.

Criticism of the *Fields* decision emerged quickly, but focused mostly on its artificial distinction between what counts as protected "expression" under the First Amendment and what does not. Unfortunately, that fallacy is merely one among several that pervade the decision.

## Artificial Distinctions in the Law

In previous cases emerging from across the country, appellate courts have held that the First Amendment "unambiguously" confers on civilians a right to record police activities, so long as they don't interfere with those activities.

Both the First Circuit (in 2011, in *Glik v. Cunniffe*) and the Seventh Circuit (in 2012, in *ACLU of Illinois v. Alvarez*) have established controlling precedents establishing that rule within their jurisdictions. As a result, residents of Boston and Chicago, for instance, are entitled to observe and record police unless they interfere with them.

In the Third Circuit, however, prior cases failed to resolve whether recording police activity is inherently expressive, or whether instead some other expressive element—such as intending to *share* the photograph to communicate a message—is required to justify First Amendment protection.

In *Kelly v. Borough of Carlisle* (2010), the Third Circuit declined to adopt "a broad right to videotape police" and embraced other cases that "imply that videotaping without an expressive

purpose may not be protected." Within this zone of uncertainty, the district court in *Fields* could have agreed with the First and Seventh Circuits and found that "image capture before the decision to transmit the image is, as a matter of law, expressive conduct."

Instead, the court adopted the untenable position that, as a general matter, recording police officers engaged in their public duties is not protected by the First Amendment.

Yet any attempted distinction between clear acts of expression (such as displaying photographs) and their antecedents (taking the photos in the first place) is artificial for First Amendment purposes. In *U.S. v. Stevens* (2010), the Supreme Court struck down a law prohibiting not only the sale and manufacture, but also the creation of films depicting animal cruelty, on the basis that the First Amendment protects both the creation and dissemination of such videos. UCLA law professor Eugene Volokh succinctly illustrates why a distinction between expression and antecedent acts is meaningless:

Your being able to spend money to express your views is protected even when you don't say anything while writing the check (since your plan is to use the funds to support speech that takes place later).

Even the *Fields* court acknowledged the findings of other courts that "photographing or observing official conduct...is a necessary step in the process of expressing a right to criticize or challenge government behavior." Allowing the suppression of such "a necessary step" inevitably limits subsequent expression. How can an artist or community resident display photos that she was prevented from ever taking?

### **Undermining Transparency**

Even if recording police activity were not inherently expressive, it would remain necessary to ensure transparency and police accountability. By denying constitutional protection to observers of police who take care to avoid interfering with officers' activities while recording, the *Fields* decision undermines community oversight. As described by the Cato Institute's Adam Bates:

The ability of individuals to record police in public *without fear of reprisal* is an essential mechanism for injecting transparency where it is sorely lacking, for holding the government accountable for misconduct, and in many cases for protecting good police officers from misattributed blame. (emphasis added)

The incentives constructed by *Fields* would undermine this "essential mechanism for...transparency," by inviting police officers to either suppress recordings of potential abuse (as they did in both of the cases before the court) or contrive their actions when they are being recorded. As photographer and journalist Jeremy Gray writes:

If you are required to announce to police that you're recording them...what are the chances that any illegal conduct that you had been observing will continue when you start taking photos?

More fundamentally, as noted by Reggie Shuford at the ACLU of Pennsylvania, "The freedom to monitor the police without fearing arrest or retaliation is one of the ways we distinguish a free society from a police state."

### **Inviting Police Discretion, With Dangerous Consequences**

An objective, "bright line" rule recognizing First Amendment protection for recording police engaged in their public duties, regardless of the purpose, not only facilitates community oversight, but also facilitates decision-making by both police officers and judges. In contrast, a requirement that photographers demonstrate a hostile purpose in order to secure constitutional protection for recording police invites discretion that is difficult—and dangerous—to apply.

How, exactly, is a police officer supposed to recognize whether someone recording their activities is hostile? Is it reasonable to expect—or even ask—police to give overtly hostile people wider berth than others who calmly observe, as the plaintiffs in these cases tried to do?

By perversely encouraging adversarial relations with police, *Fields* essentially requires civilians and photojournalists to risk police retaliation in order to exercise a constitutional right. Such retaliation often includes physical violence (as Ms. Geraci endured while being denied her right to record), arbitrary arrest, and contrived charges such as "assault on a police officer."

A further tension emerges in light of prior cases sharply distinguishing *observing and recording* police activities (recognized as constitutionally protected acts) from acts *interfering* with police activities, which remain within the state's authority to legitimately prohibit. In order for a police accountability activist like Ms. Geraci to gain constitutional protection under *Fields*, she would have to risk prosecution under the rule in *Alvarez*.

Moreover, judging from their behavior in the instances before the court, the police in these cases *did* think the plaintiffs were hostile, leading them to detain Fields and seize his phone, and to "attack" Geraci and restrain her from taking photos. At least in Geraci's case, they were right: she trained with Cop Watch Berkeley and was visibly associated with organizers of a protest that she was observing specifically to record any possible police misconduct.

The district court's failure to correctly apply its own subjective standard to the facts of *Fields* and *Geraci* reflects yet another reason why *Fields* was incorrectly decided: it invents a rule that is simply inadministrable, impossible to apply consistently across differing facts.

### **Undermining Communities Vulnerable to Police Violence**

People who record police rarely do so recreationally. They usually do so because, around the country, evidence has emerged that police apply unnecessary force and even kill innocent people with disturbing frequency. In this context, *Fields* places at risk not only the rights of millions of people, but also their safety.

By limiting constitutional protection for recording police, *Fields* denies vulnerable communities the essential tool that has exposed the public, courts, and Congress to recurring acts of police violence prohibited under the law. *Fields* would not only expose individuals to police retaliation for acts of civic engagement, but also make their communities more vulnerable to systemic patterns of arbitrary police abuses.

The decision's failure to even address this outcome implicit in its reasoning, let alone its various other defects, renders it worthy of prompt reversal. We eagerly await the Third Circuit's ruling in a forthcoming appeal to correct this novel, unprecedented, and ultimately dangerous ruling.