

2016

## The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?

Clay Calvert

University of Florida Levin College of Law, [profclaycalvert@gmail.com](mailto:profclaycalvert@gmail.com)

Follow this and additional works at: <https://scholarship.law.ufl.edu/facultypub>



Part of the [First Amendment Commons](#)

---

### Recommended Citation

Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. Rev. Discourse 230 (2016)

This Article is brought to you for free and open access by the Faculty Scholarship at UF Law Scholarship Repository. It has been accepted for inclusion in UF Law Faculty Publications by an authorized administrator of UF Law Scholarship Repository. For more information, please contact [kaleita@law.ufl.edu](mailto:kaleita@law.ufl.edu).

# The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?



Clay Calvert

## ABSTRACT

Using the February 2016 federal district court ruling in *Fields v. City of Philadelphia* as an analytical springboard, this Article examines growing judicial recognition of a qualified First Amendment right to record images of police working in public places. The Article argues that Judge Mark Kearney erred in *Fields* by requiring that citizens must intend to challenge or criticize police, via either spoken words or expressive conduct, in order for the act of recording to constitute “speech” under the First Amendment. It asserts that a mere intent to observe police—not to challenge or criticize them—suffices. It then also explores how recording falls within the scope of what some scholars call “speech-facilitating conduct.” Additionally, the Article criticizes the district court’s view in *Fields*, as well as that of the Southern District of New York in 2015, suggesting that the right to record is possessed only by journalists, not by all citizens.

## AUTHOR

Professor & Brechner Eminent Scholar in Mass Communication and Director of the Marion B. Brechner First Amendment Project at the University of Florida, Gainesville, Fla. B.A., 1987, Communication, Stanford University; J.D. (Order of the Coif), 1991, McGeorge School of Law, University of the Pacific; Ph.D., 1996, Communication, Stanford University. Member, State Bar of California. The author thanks Amy Barrett and Olivia Vega for their excellent work on early drafts of this Article.

## TABLE OF CONTENTS

INTRODUCTION .....	232
I. CUTTING AGAINST THE GROWING GRAIN OF AUTHORITY: RETICENCE IN <i>FIELDS</i> AND THE THIRD CIRCUIT TO RECOGNIZE A FIRST AMENDMENT RIGHT TO RECORD .....	236
II. SPEECH-FACILITATING CONDUCT: PROTECTING THE PROCESS OF MAKING EXPRESSION, NOT JUST THE FINAL PRODUCT .....	241
IV. VIEWPOINT-BASED FOCUS ON SPEECH AND INTENT IN <i>FIELDS</i> : ANOTHER STRIKE AGAINST THE RULING .....	244
III. WHOSE RIGHT IS IT ANYWAY? DISTINGUISHING BETWEEN CITIZENS AND THE PRESS .....	249
CONCLUSION .....	252

## INTRODUCTION

In February 2016, a federal district court in *Fields v. City of Philadelphia*<sup>1</sup> held there is no First Amendment<sup>2</sup> right to record images of police performing duties in public places, “absent any *criticism or challenge* to police conduct.”<sup>3</sup> Specifically, U.S. District Judge Mark Kearney found “no basis to craft a new First Amendment right based solely on ‘observing and recording’ without expressive conduct,”<sup>4</sup> and he concluded that “photographing police is not, as a matter of law, expressive activity.”<sup>5</sup>

The court reasoned that the two plaintiffs in *Fields* lost under this standard because they “essentially concede[d] they spoke no words or conduct expressing criticism of the police before or during their image capture.”<sup>6</sup> The court explained that the intent of Richard Fields, a Temple University student, in using “his cell phone to photograph approximately twenty police officers standing outside a home hosting a party,”<sup>7</sup> was merely to take “a picture of an ‘interesting’ and ‘cool’ scene.”<sup>8</sup> Similarly, the intent of plaintiff Amanda Geraci, who videotaped “a public protest against hydraulic fracturing,”<sup>9</sup> was simply to serve as a “legal observer”<sup>10</sup> and “to observe only.”<sup>11</sup>

Thus, because the intent of Fields and Geraci was neither to challenge nor to criticize the police actions they recorded, and because both silently

- 
1. *Fields v. City of Philadelphia*, No. 14-4424, 2016 U.S. Dist. LEXIS 20840 (E.D. Pa. Feb. 19, 2016).
  2. The First Amendment to the U.S. Constitution provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech, or of the press.” U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety-one years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925).
  3. *Fields*, 2016 U.S. Dist. LEXIS 20840, at \*2 (emphasis added).
  4. *Id.* at \*3.
  5. *Id.* at \*19.
  6. *Id.* at \*12.
  7. *Id.* at \*4.
  8. *Id.* at \*22.
  9. *Id.* at \*6.
  10. *Id.* at \*6.
  11. *Id.* at \*22.

filmed rather than spoke up,<sup>12</sup> their First Amendment speech claims failed. This result is, perhaps, more disturbing for Geraci, who claims an officer physically stopped her from recording as she moved closer to film police arresting a protestor.<sup>13</sup>

In the court's view, however, the silent conduct of recording only equates to speech under the First Amendment if it constitutes symbolic expression, such as, he wrote, "picketing, armband-wearing, flag-waving and flag-burning."<sup>14</sup> The test for symbolic expression, fashioned four-plus decades ago by the U.S. Supreme Court in *Spence v. Washington*,<sup>15</sup> requires both "an intent to convey a particularized message" and a great likelihood "that the message would be understood by those who viewed it."<sup>16</sup>

In a nutshell, because neither Fields nor Geraci intended to convey a particular message when they recorded images, as required under the first prong of *Spence*, they did not engage in expressive conduct. At a more granular level, the twin acts of *pushing a record button* on a smartphone and *holding the device aloft* to capture images of police are, in Judge Kearney's estimation, merely conduct, not speech. He reasoned, in applying *Spence*, that:<sup>17</sup>

Fields and Geraci cannot meet the burden of demonstrating their taking, or attempting to take, pictures with no further comments or conduct is "sufficiently imbued with elements of communication" to be deemed expressive conduct. Neither Fields nor Geraci direct us to facts showing at the time they took or wanted to take pictures, they asserted anything to anyone. There is also no evidence any of the officers understood them as communicating any idea or message.<sup>18</sup>

On March 14, 2016, Judge Kearney affirmed his prior ruling on Amanda Geraci's First Amendment claim in *Fields*, making it final.<sup>19</sup> The judge reiterated in his March decision that "[w]e have not seen, and counsel has not shown us,

---

12. See *supra* note 6 and accompanying text.

13. See generally *Fields*, 2016 U.S. Dist. LEXIS 20840, at \*6 (providing specifically that the officer "attacked her" by physically restraining her against a pillar and preventing her from videotaping the arrest).

14. *Id.* at \*10.

15. 418 U.S. 405 (1974).

16. *Id.* at 410-411.

17. Judge Kearney wrote that "[e]xpressive conduct exists where 'an intent to convey a particularized message was present, and the likelihood was great that the message would be understood by those who viewed it.'" *Fields*, 2016 U.S. Dist. LEXIS 20840, at \*10 (quoting *Heffernan v. City of Paterson*, 777 F.3d 147, 152 (3d Cir. 2015)).

18. *Fields*, 2016 U.S. Dist. LEXIS 20840, at \*11.

19. *Geraci v. City of Philadelphia*, No. 14-5264, 2016 U.S. Dist. LEXIS 32146, at \*4 (E.D. Pa. Mar. 14, 2016).

any court extending the First Amendment rights to speech to include *silent observation* without expressing *any challenge* to the police.”<sup>20</sup> When it comes to achieving First Amendment status for recording images of police, then, silence is anything but golden in the Keystone State.

This Article critiques the February 2016 opinion in *Fields v. City of Philadelphia*. It argues the ruling is problematic for at least four reasons. First, as Part I illustrates, *Fields* is out of step with a growing body of cases from outside the U.S. Court of Appeals for the Third Circuit (the circuit in which Judge Kearney sits) that recognizes a qualified First Amendment right to record images of police doing their jobs in public venues, regardless of the intent of the recorder.<sup>21</sup>

Second, Part II argues<sup>22</sup> that *Fields* ignores the fact that pushing a record button on a smartphone to capture video amounts to what Wesley Campbell, executive director of the Stanford Constitutional Law Center, recently called “speech-facilitating conduct.”<sup>23</sup> By way of a timely analogy, just as the U.S. Court of Appeals for the Eleventh Circuit in December 2015 recognized that the *process* of tattooing—not simply the final *product* of the tattoo—merits First Amendment protection,<sup>24</sup> so too is the process of recording, videotaping, or photographing images—not merely the ultimate images—protected speech.

Indeed, the U.S. Court of Appeals for the Seventh Circuit concluded in 2012 that “[t]he act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”<sup>25</sup> This comports with Professor Ashutosh Bhagwat’s more general observation in 2015 that “information gathering is necessary to produce speech,”<sup>26</sup> given that the act of video recording is tantamount to gathering information in the form of visual images.

Part III then analyzes the court’s focus in *Fields* on a person’s expressed intent or purpose when recording as providing the critical key for deciding if the act of recording may enter through the otherwise locked door of First Amendment protection as speech.<sup>27</sup> In the process, Part III asserts that the court’s rule in *Fields* embodies unconstitutional viewpoint-based censorship.

---

20. *Id.* at \*5 (emphasis added).

21. *See infra* Part I.

22. *See infra* Part II.

23. Wesley J. Campbell, *Speech-Facilitating Conduct*, 68 STAN. L. REV. 1, 4 (2016).

24. *Buehrle v. City of Key West*, 813 F.3d 973, 976 (11th Cir. 2015).

25. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012).

26. Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1052 (2015).

27. *See infra* Part III.

Next, Part IV criticizes another facet of the *Fields* opinion.<sup>28</sup> Specifically, in the course of dismissing the plaintiffs' First Amendment argument, the judge in *Fields* remarked that the plaintiffs "are not members of the press."<sup>29</sup> This fact of non-press status, the Article argues, should be irrelevant regarding whether recording police is protected expression. Yet, it is a point Judge Kearney reiterated in his March 2016 decision, writing that "[w]e do not view our role as expressing an opinion on the First Amendment in any other context involving other interests, such as the press or seeking to petition the government. We review only whether these facts constitute the required expressive conduct equal to a citizen's 'speech.'"<sup>30</sup> This suggests, even more clearly, that Judge Kearney distinguishes between citizens' freedom of speech under the Speech Clause of the First Amendment and journalists' freedom under the Press Clause. In other words, for Judge Kearney, a member of the press might be protected while silently recording police, but a citizen such as Amanda Geraci is not.

If the right to record exists, however, then it surely is a citizen's right, not merely a journalist's right. Specifically, as the U.S. Court of Appeals for the First Circuit in *Glik v. Cunniffe*<sup>31</sup> opined in 2011:

[C]hanges in technology and society have made the lines between private citizen and journalist exceedingly difficult to draw. The proliferation of electronic devices with video-recording capability means that many of our images of current events come from bystanders with a ready cell phone or digital camera rather than a traditional film crew, and news stories are now just as likely to be broken by a blogger at her computer as a reporter at a major newspaper.<sup>32</sup>

Finally, the Article concludes by calling on the U.S. Court of Appeals for the Third Circuit to reverse *Fields*,<sup>33</sup> which the American Civil Liberties Union (ACLU) is, in fact, appealing.<sup>34</sup> This is particularly important because, as the Article points out in Part I, the Third Circuit today fails to recognize a qualified First Amendment right to film police in public places.

---

28. See *infra* Part IV.

29. *Fields v. City of Philadelphia*, No. 14-4424, 2016 U.S. Dist. LEXIS 20840, at \*22 (E.D. Pa. Feb. 19, 2016).

30. *Geraci v. City of Philadelphia*, No. 14-5264, 2016 U.S. Dist. LEXIS 32146, at \*5-6 (E.D. Pa. Mar. 14, 2016) (emphasis added).

31. 655 F.3d 78 (1st Cir. 2011).

32. *Id.* at 84.

33. See *infra* Conclusion.

34. See generally *Fields v. City of Philadelphia*, ACLU OF PA., <http://www.aclupa.org/our-work/legal/legaldocket/fields-v-city-philadelphia> [<https://perma.cc/E8HG-RMJT>] (noting that "[t]he ACLU has appealed this ruling to the U.S. Court of Appeals for the Third Circuit").

I. CUTTING AGAINST THE GROWING GRAIN OF AUTHORITY:  
RETICENCE IN *FIELDS* AND THE THIRD CIRCUIT TO RECOGNIZE A  
FIRST AMENDMENT RIGHT TO RECORD

A 2015 law journal article asserts that “videotaping the police has become a cultural phenomenon with the aid of advances in technology.”<sup>35</sup> Yet, the U.S. Supreme Court never has squarely addressed if there is a First Amendment right to record images of police performing their jobs in public.<sup>36</sup>

That is both unfortunate and problematic. Every week, according to Mickey Osterreicher, general counsel of the National Press Photographers Association, multiple incidents occur “in which police either harass, interfere or arrest citizens—not journalists—for shooting video.”<sup>37</sup> For example, a U.S. Marshal in April 2015 grabbed and smashed the smartphone of non-journalist Beatriz Paez in South Gate, California, as she peacefully filmed several law enforcement officials working on a public sidewalk in a residential neighborhood.<sup>38</sup>

Several federal appellate circuits, however, “have held that private citizens have a First Amendment right to record law enforcement activities.”<sup>39</sup> Indeed, as Professor Marc Jonathan Blitz and his colleagues pointed out in 2015 in the *William & Mary Law Review*, “in a series of recent cases on video recording of police encounters, federal courts have increasingly recognized such a right.”<sup>40</sup> One federal district court in August 2015 concluded, in fact, that “most courts of appeal . . . have acknowledged that the First Amendment broadly protects the right to

35. Alexander Shaaban, *Officer! You Are on Candid Camera: Why the Government Should Grant Private Citizens an Exemption From State Wiretap Laws When Surreptitiously Recording On-Duty Officers in Public*, 42 W. ST. U. L. REV. 201, 204 (2015).

36. See *Garcia v. Montgomery Cnty.*, No. TDC-12-3592, 2015 U.S. Dist. LEXIS 151059, at \*23 (D. Md. Nov. 5, 2015) (noting that the plaintiff “asserts that the officers violated his First Amendment right to video record police officers in the routine public performance of their duties. The United States Supreme Court has not yet spoken on whether this is a right protected by the First Amendment.”).

37. Frank Eltman, *Citizens Taking Video of Police See Themselves Facing Arrest*, SAN DIEGO UNION-TRIBUNE (Aug. 29, 2015, 8:48 AM), <http://www.sandiegouniontribune.com/news/2015/aug/29/citizens-taking-video-of-police-see-themselves/> [https://perma.cc/CVE8-4DHS].

38. Steve Almasy, *Marshal Caught on Cell Phone Video Smashing a Woman's Cell Phone*, CNN (Apr. 22, 2015, 10:07 PM), <http://www.cnn.com/2015/04/22/us/california-marshal-smashed-phone> [https://perma.cc/F4R7-ZF62]; Joseph Sema, *With Smartphones Everywhere, Police on Notice They May Be Caught on Camera*, L.A. TIMES (Apr. 21, 2015, 5:30 PM), <http://www.latimes.com/local/lanow/la-me-ln-feds-probe-video-phone-in-south-gate-20150421-story.html> [https://perma.cc/6MAM-2WUP].

39. Robert H. Gruber, *Commercial Drones and Privacy: Can We Trust States With “Drone Federalism”?*, 21 RICH. J.L. & TECH. 1, ¶ 31 (2015).

40. Marc Jonathan Blitz et al., *Regulating Drones Under the First and Fourth Amendments*, 57 WM. & MARY L. REV. 49, 85–86 (2015).



make audio or visual recordings of police activity.”<sup>41</sup> This Part briefly reviews some of these cases, providing context for better understanding the February 2016 *Fields* opinion at the heart of this Article. A more comprehensive, in-depth analysis of the other cases is available elsewhere.<sup>42</sup>

At the federal appellate court level, the U.S. Court of Appeals recognized a qualified First Amendment right to record police in public places in 2011 in *Glik v. Cunniff*.<sup>43</sup> The right is qualified—not absolute—because it “may be subject to reasonable time, place, and manner restrictions.”<sup>44</sup> The recording in *Glik* occurred in Boston Common, where three police officers were arresting a man.<sup>45</sup> The First Circuit declined to specify what might constitute a reasonable restriction in this situation.<sup>46</sup>

Three years later, the First Circuit extended the right to record police beyond park settings like Boston Common to roadside traffic stops in *Gericke v. Begin*.<sup>47</sup> Although holding that “a traffic stop does not extinguish an individual’s right to film,” the First Circuit noted the qualified nature of this right, pointing out that “[r]easonable restrictions on the exercise of the right to film may be imposed when the circumstances justify them.”<sup>48</sup> It suggested that safety concerns, such as when the individual pulled over is armed, might justify restricting the right to record.<sup>49</sup> Finally, the appellate court drew a clear line between recording and interfering, opining that a “police order that is specifically directed at the First Amendment right to film police performing their duties in public may be constitutionally imposed only if the officer can reasonably conclude that the filming itself is *interfering*, or is *about to interfere*, with his duties.”<sup>50</sup>

---

41. Order on Pending Motions, *Hudlins v. City of Indianapolis*, 2015 U.S. Dist. LEXIS 103039, at \*45 (S.D. Ind. Aug. 6, 2015).

42. See generally Clay Calvert, *The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 3 TEX. A&M L. REV. 131 (2015) (providing a review of the case law in this area through May 2015).

43. 655 F.3d 78 (1st Cir. 2011).

44. *Id.* at 84.

45. *Id.* at 79–80.

46. See *id.* at 84 (“[T]he right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions. . . . We have no occasion to explore those limitations here, however.” (citation omitted)).

47. 753 F.3d 1, 7 (1st Cir. 2014).

48. *Id.*

49. *Id.* at 8.

50. *Id.* (emphasis added).

Other federal appellate circuits recognizing a qualified right to film police in public venues include the Seventh,<sup>51</sup> Ninth,<sup>52</sup> and Eleventh Circuits.<sup>53</sup> Significantly, and as noted above,<sup>54</sup> the Seventh Circuit ruling in *ACLU of Illinois v. Alvarez*<sup>55</sup> is clear that the *act of recording*—not just the end product of that recording—falls within the ambit of First Amendment protection.<sup>56</sup> And, unlike *Fields*, none of the abovementioned cases or circuits require the act of recording to be done with the intent to challenge or to criticize police conduct or to be accompanied by spoken words in order to constitute speech.

Most recently, a federal district court in Maryland, which falls within the U.S. Court of Appeals for the Fourth Circuit,<sup>57</sup> concluded in November 2015 “that video recording of police activity, if done peacefully and without interfering with the performance of police duties, is protected by the First Amendment.”<sup>58</sup> The decision is particularly important because it provides a legal beachhead for the Fourth Circuit to recognize such a right—something that, as U.S. District Judge Theodore Chuang observed in *Garcia v. Montgomery County*, it “has not addressed in a published opinion.”<sup>59</sup>

- 
51. See *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 600 (7th Cir. 2012) (concluding that an Illinois “eavesdropping statute restricts a medium of expression—the use of a common instrument of communication—and thus an integral step in the speech process. As applied here, it interferes with the gathering and dissemination of information about government officials performing their duties in public.”).
52. See *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (recognizing a “First Amendment right to film matters of public interest” in the context of a man who “was videotaping people on the streets of Seattle,” including police, during a public protest march).
53. See *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (recognizing “a First Amendment right, subject to reasonable time, manner, and place restrictions, to photograph or videotape police conduct”).
54. See *supra* note 25 and accompanying text.
55. 679 F.3d 583.
56. See *id.* at 595 (opining that “[t]he act of *making* an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording,” and adding that “[t]he right to publish or broadcast an audio or audiovisual recording would be insecure, or largely ineffective, if the antecedent act of *making* the recording is wholly unprotected”).
57. See *About the Court*, U.S. CT. OF APPEALS FOR THE FOURTH CIR., <http://www.ca4.uscourts.gov/about-the-court> [<https://perma.cc/HWY4-2H9F>] (noting that the Fourth Circuit “hears appeals from the nine federal district courts in Maryland, Virginia, West Virginia, North Carolina, and South Carolina”).
58. *Garcia v. Montgomery Cty.*, No. TDC-12-3592, 2015 U.S. Dist. LEXIS 151059, at \*27 (D. Md. Nov. 5, 2015).
59. *Id.* at \*25.

Also in 2015, a federal court in the Western District of Texas<sup>60</sup> and one in the Southern District of New York<sup>61</sup> found that there is a qualified First Amendment right to film police doing their jobs in public venues. Unfortunately, the decision by U.S. District Judge P. Kevin Castel of the Southern District of New York suggests—in accord with Judge Kearney’s February 2016 observation in *Fields* that the plaintiffs in that case were not members of the press<sup>62</sup>—that this right is held only by “a journalist who is otherwise unconnected to the events recorded.”<sup>63</sup> This facet of Judge Castel’s opinion is critiqued in greater detail later in Part IV.<sup>64</sup>

Against this growing spate of judicial authority, however, stands the U.S. Court of Appeals for the Third Circuit—the circuit within which the district court in *Fields v. City of Philadelphia* sits. In 2015, Judge William Yohn Jr. of the Eastern District of Pennsylvania—the same district in which *Fields* is being litigated—observed, somewhat apologetically, that:

Whether the Third Circuit will eventually decide to follow what appears to be a growing trend in other circuits to recognize a First Amendment right to observe and record police activity is, of course, not for this court to decide, *even if there are good policy reasons I adopt that change.*<sup>65</sup>

The emphasized portion of this quotation implies that while Judge Yohn believed there were solid justifications for recognizing a right to record, he felt somewhat hamstrung by Third Circuit precedent from doing so. Specifically, the Third Circuit in 2010 in *Kelly v. Borough of Carlisle*<sup>66</sup> concluded that “the right to videotape police officers during traffic stops was not clearly established”<sup>67</sup> in May 2007 when the incident at the heart of *Kelly* occurred.<sup>68</sup> It explained “there was insufficient case law establishing a right to videotape police officers during a traffic stop to put a reasonably competent officer on ‘fair notice’ that seizing a camera

---

60. See *Buehler v. City of Austin*, 2015 U.S. Dist. LEXIS 20878, at \*25 (W.D. Tex. Feb. 20, 2015) (holding that the “the right to photograph and videotape police officers as they perform their official duties was clearly established” in 2012 when the three incidents in question took place).

61. *Higginbotham v. City of New York*, 105 F. Supp. 3d 369, 380 (S.D.N.Y. 2015) (holding “that the right to record police activity in public, at least in the case of a journalist who is otherwise unconnected to the events recorded, was in fact ‘clearly established’ at the time of the events alleged in the complaint” on November 15, 2011).

62. See *supra* note 29 and accompanying text.

63. *Higginbotham*, 105 F. Supp. 3d at 380.

64. See *infra* Part IV.

65. *Montgomery v. Killingsworth*, 2015 U.S. Dist. LEXIS 7152, at \*41 n.7 (E.D. Pa. Jan.21, 2015) (emphasis added).

66. 622 F.3d 248 (3d Cir. 2010).

67. *Id.* at 263.

68. See *id.* at 251 (noting that the recording occurred on May 24, 2007).

or arresting an individual for videotaping police during the stop would violate the First Amendment.<sup>69</sup> Because the right to record was not clearly established in May 2007, the defendant police officer escaped monetary liability<sup>70</sup> under the doctrine of qualified immunity.<sup>71</sup>

Throwing a small judicial bone to the First Amendment right to record, however, the Third Circuit in *Kelly* noted that “even insofar as it is clearly established, the right to record matters of public concern is not absolute; it is subject to reasonable time, place, and manner restrictions.”<sup>72</sup> Additionally, the appellate court specified that while it previously had “not addressed directly the right to videotape police officers,”<sup>73</sup> it had, in a 2005 case called *Gilles v. Davis*,<sup>74</sup> “hypothesized that ‘videotaping or photographing the police in the performance of their duties on public property *may* be a protected activity.”<sup>75</sup>

Thus, when Judge Kearney surveyed the legal landscape of the Third Circuit in his February 2016 ruling in *Fields*, he found that “[w]hile acknowledging activities observing and recording the police *may* be protected, our Court of Appeals has never held speech unaccompanied by an expressive component is always afforded First Amendment protection.”<sup>76</sup> He therefore reasoned that the only way in which image recordation constitutes speech within the confines of the First Amendment is if the act of recording is “‘expressive’ or otherwise ‘critical’ of the government.”<sup>77</sup>

In summary, the Third Circuit and, within it, the Eastern District of Pennsylvania (the venue for *Fields*), find themselves lagging behind other federal courts in endorsing a qualified First Amendment right to film police doing their jobs in public places. The next Part of this Article illustrates that the district court’s effort in *Fields* to separate the conduct of speech creation (the act of

---

69. *Id.* at 262.

70. *See id.* at 263 (concluding that “Officer [David] Rogers was entitled to qualified immunity on [Brian] Kelly’s First Amendment claim”).

71. *See Ashcroft v. Al-Kidd*, 563 U.S. 731, 735 (2011) (observing that “[q]ualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was ‘clearly established’ at the time of the challenged conduct”); *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (observing that “[q]ualified immunity is applicable unless the official’s conduct violated a clearly established constitutional right”).

72. *Kelly*, 622 F.3d at 262.

73. *Id.* at 260.

74. 427 F.3d 197 (3d Cir. 2005).

75. *Kelly*, 622 F.3d at 260 (emphasis added) (quoting *Gilles v. Davis*, 427 F.3d 197, 212 n.14 (3d Cir. 2005)).

76. *Fields v. City of Philadelphia*, No. 14-4424, 2016 U.S. Dist. LEXIS 20840, at \*12 (E.D. Pa. Feb. 19, 2016).

77. *Id.* at \*13.

recording) from the end product of the process (the videos and images) is extremely problematic.

## II. SPEECH-FACILITATING CONDUCT: PROTECTING THE PROCESS OF MAKING EXPRESSION, NOT JUST THE FINAL PRODUCT

There is a fundamental dichotomy in First Amendment jurisprudence between speech and conduct.<sup>78</sup> Yet, conduct is necessary to produce speech. Professor Wesley Campbell notes that “the Supreme Court has recognized some First Amendment protection for the speech process, and not merely the expressive end product.”<sup>79</sup> Campbell cites the Court’s observation in *Citizens United v. Federal Election Commission*<sup>80</sup> that “[l]aws enacted to control or suppress speech may operate at different points in the speech process.”<sup>81</sup> The initial point in the “speech process,” is the act of creating the speech itself. The macro-level issue thus becomes, as Professor Ashutosh Bhagwat wrote in 2015, “whether, and if so to what extent, the First Amendment protects the antecedent act of producing speech, not just the eventual communication.”<sup>82</sup>

An area in which courts increasingly recognize that the antecedent process of speech creation merits First Amendment protection equal to that of the speech product is the conduct of creating a tattoo. A trio of cases over the past six years illustrates this trend. Most recently, the U.S. Court of Appeals for the Eleventh Circuit in December 2015 held that “tattooing is artistic expression protected by the First Amendment.”<sup>83</sup> In reaching this result, the Eleventh Circuit reasoned that:

Protected artistic expression frequently encompasses a sequence of acts by different parties, often in relation to the same piece of work. The First Amendment protects the artist who paints a piece just as surely as it protects the gallery owner who displays it, the buyer who purchases it, and the people who view it.<sup>84</sup>

---

78. See Randall P. Bezanson, *Is There Such a Thing as Too Much Free Speech?*, 91 OR. L. REV. 601, 601 (2012) (emphasizing that the First Amendment guarantee of free speech traditionally “has rested on two fundamental boundaries: speech versus conduct and liberty versus utility”); Martin H. Redish, *Fear, Loathing, and the First Amendment: Optimistic Skepticism and the Theory of Free Expression*, 76 OHIO ST. L.J. 691, 700 (2015) (addressing “the fundamental distinction between speech and conduct”).

79. Campbell, *supra* note 23, at 4.

80. 558 U.S. 310 (2010).

81. *Id.* at 336.

82. Bhagwat, *supra* note 26, at 1034.

83. *Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015).

84. *Id.* at 977.

The Eleventh Circuit added that “[a] regulation limiting the creation of art curtails expression as effectively as a regulation limiting its display. The government need not ban a protected activity such as the exhibition of art if it can simply proceed upstream and dam the source.”<sup>85</sup>

The Supreme Court of Arizona reached a similar conclusion, predicated on comparable reasoning, in 2012 in *Coleman v. City of Mesa*.<sup>86</sup> In holding that “the process of tattooing is expressive activity”<sup>87</sup> and that “the process of tattooing is protected speech,”<sup>88</sup> Arizona’s high court reasoned that “the art of writing is no less protected than the book it produces; nor is painting less an act of free speech than the painting that results.”<sup>89</sup>

Both the Eleventh Circuit’s decision in *Buerhle v. City of Key West* and the Arizona Supreme Court’s opinion in *Coleman v. City of Mesa* build on the foundation laid by the Ninth Circuit in 2010 in *Anderson v. City of Hermosa Beach*.<sup>90</sup> The Ninth Circuit in *Anderson* reasoned that:

Neither the Supreme Court nor our court has ever drawn a distinction between the process of creating a form of pure speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded. Although writing and painting can be reduced to their constituent acts, and thus described as conduct, we have not attempted to disconnect the end product from the act of creation.<sup>91</sup>

The Ninth Circuit thus held that “[t]he tattoo *itself*, the *process* of tattooing, and even the *business* of tattooing are not expressive conduct but purely expressive activity fully protected by the First Amendment.”<sup>92</sup>

Of particular importance above is the conclusion that tattooing is pure speech, not merely expressive conduct. This finding obviates the need to apply the two-part symbolic speech analysis under *Spence* to determine if conduct rises to the level of speech for purposes of the First Amendment.<sup>93</sup> This logic in *Anderson*, of course, stands in opposition to the district court’s observation in *Fields* that the process of recording a video of police in public places “is only afforded

---

85. *Id.*

86. 284 P.3d 863 (Ariz. 2012).

87. *Id.* at 870.

88. *Id.* at 871.

89. *Id.* at 870.

90. 621 F.3d 1051 (9th Cir. 2010).

91. *Id.* at 1061–62.

92. *Id.* at 1060.

93. See *supra* notes 15–16 and accompanying text (describing the *Spence* test).

First Amendment protection if we construe it as *expressive conduct*.”<sup>94</sup> This requirement—that the plaintiffs in *Fields* first needed to meet the test for expressive conduct—thwarted their First Amendment argument under *Spence*. The first part of the test for expressive conduct under *Spence* requires an “intent to convey a specific message.”<sup>95</sup> Here, the plaintiffs stated they intended to record to merely observe and to take images of an interesting, cool scene<sup>96</sup>—not to convey a specific message. Thus, the plaintiffs in *Fields* did not even satisfy the first prong of *Spence* because they had no intent to convey a message (an image), merely to capture one.

They should never have been required to satisfy the *Spence* test, however, because legally separating the unprotected act of pushing record from the speech product it immediately creates is disingenuous. The act of recording speech—visual images, in *Fields*—is a necessary condition for the pure speech product (photos or videos) to exist in the first place. Furthermore, not only is the conduct of pushing the record button a *necessary condition* for producing the speech product, but it also is the *immediate antecedent act* that triggers speech production. In other words, no intervening conduct by a human between pushing record and capturing the image is needed to produce the image. Finally, in addition to the close *physical proximity* between human conduct and image creation, the *temporal proximity* between pushing record and the resultant image being captured is nearly instantaneous on a smartphone. All of these facts suggest it is somewhat disingenuous to erect a legal barrier separating the unprotected act of pushing record from the speech product it immediately creates.

There is yet another reason why imposing the expressive-conduct requirement of an intent “to communicate a particularized message”<sup>97</sup> upon the act of recording, as in *Fields*’s reasoning, is misguided. In 2011, University of Pennsylvania Professor Seth Kreimer argued that “in the emerging environment of pervasive image capture, the difference between capturing images and disseminating images erodes rapidly.”<sup>98</sup> Illustrating how the mere recordation of information constitutes speech, regardless of an intent to transmit that

---

94. *Fields v. City of Philadelphia*, No. 14-4424, 2016 U.S. Dist. LEXIS 20840, at \*9 (E.D. Pa. Feb. 19, 2016) (emphasis added).

95. ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1118 (5th ed. 2015).

96. See *supra* notes 7–11 and accompanying text.

97. Diahann DaSilva, *Playing a “Labeling Game”: Classifying Expression as Conduct as a Means of Circumventing First Amendment Analysis*, 56 B.C. L. REV. 767, 774 (2015).

98. Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335, 376 (2011).

information—such as, to convey a particularized message with it, per *Spence*—to an audience, Kreimer writes that:

We would recognize police seizure of, or prosecution for, drafts of letters or manuscripts as an interference with freedom of expression, even if the seizure occurred before the writer had decided to send or publish them, though no designated “audience” had been deprived of their content. So, too, image capture before the decision to transmit images falls within the scope of the emerging medium.<sup>99</sup>

Ultimately, the U.S. Supreme Court has held that the First Amendment’s words “speech” and “press” are not narrowly cabined by some literal meaning, but instead encompass certain penumbral rights. As the Court wrote in *Griswold v. Connecticut*<sup>100</sup> more than a half-century ago, “[t]he right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, [and] the right to read.”<sup>101</sup> Critically, the Court in *Griswold* added that “[w]ithout those peripheral rights the specific rights would be less secure.”<sup>102</sup> Today, the right to record images might be considered another peripheral right. Indeed, without the peripheral First Amendment right to record images today, the ability for the images to even exist would be nonexistent, not simply less secure.

### III. VIEWPOINT-BASED FOCUS ON SPEECH AND INTENT IN *FIELDS*: ANOTHER STRIKE AGAINST THE RULING

In *Fields*, plaintiffs Richard Fields and Amanda Geraci broadly asserted that “the mere act of observing and recording is entitled to First Amendment protection.”<sup>103</sup> Yet, when it came to framing the key issue before the court, the district court wrote—much more narrowly—that it was whether citizens “enjoy a First Amendment right to photograph police *absent any criticism or challenge* to police conduct.”<sup>104</sup>

In addressing the issue of whether there is a First Amendment right to photograph police absent any criticism or challenge to police conduct, the district

---

99. *Id.* at 377.

100. 381 U.S. 479 (1965).

101. *Id.* at 482.

102. *Id.* at 482–83.

103. *Fields v. City of Philadelphia*, No. 14-4424, 2016 U.S. Dist. LEXIS 20840, at \*9 n.27 (E.D. Pa. Feb. 19, 2016).

104. *Id.* at \*2. Judge Kearney added that he was “*not* addressing a First Amendment right to photograph or film police when citizens challenge police conduct.” *Id.* at \*3 (emphasis added).



court emphasized that neither Richard Fields nor Amanda Geraci “uttered any words to the effect he or she sought to take pictures to oppose police activity.”<sup>105</sup> Furthermore, he wrote that “[n]either Fields nor Geraci assert they engaged in conduct ‘critical’ of the government; both assert they were only ‘observing’ police activity.”<sup>106</sup> The court emphasizes that criticism of police—found either in the expressive conduct of the recorder or in the words spoken by the recorder—is essential. It added that “Fields and Geraci essentially concede they spoke no words or conduct expressing criticism of the police before or during their image capture.”<sup>107</sup> Judge Kearney even dropped a footnote to point out that “[n]either Fields nor Geraci allege or offer evidence their conduct expressed *criticism* of police activity.”<sup>108</sup> And, ultimately, Judge Kearney concluded that “photographing police *without any challenge or criticism*”<sup>109</sup> does not constitute speech protected by the First Amendment.

This analysis, with its uncompromising requirement that recording must be accompanied by spoken words critical of the police or be done with an intent to criticize the police, is troubling for two key reasons. First, it suggests that citizens may be protected by the First Amendment when they record images of police, but only if they first announce, either through their words or their expressive actions, to the very same officers they are recording, that they are doing so to criticize or challenge the officers’ actions. This, of course, is not likely to go over well with the officers, who might very well order the recording stopped, seize the phone or camera, or otherwise obstruct the recording.

Notably, plaintiff Richard Fields had his iPhone seized and thrown to the concrete—cracking its screen, in the process—by a Philadelphia police officer, and all Fields merely said to the officer was that he was standing on public property, not interfering with any police investigation, and would not leave.<sup>110</sup> One wonders what might have happened had he said something critical of the officer.

As Carlos Miller, the founder and publisher of *Photography is Not a Crime*, bluntly put it, Judge Kearney held that “citizens do not have the First Amendment right to record police in public. That is, unless those citizens are telling the cops to go fuck themselves. Then it’s protected speech.”<sup>111</sup> Similarly, under the

---

105. *Id.* at \*9 (emphasis added).

106. *Id.* at \*22 (emphasis added).

107. *Id.* at \*12 (emphasis added).

108. *Id.* at \*9 n.27 (emphasis added).

109. *Id.* at \*2 (emphasis added).

110. Complaint at 3–4, *Fields v. City of Philadelphia*, No. 14-4424 (E.D. Pa. Feb. 19, 2016).

111. Carlos Miller, *Rookie Federal Judge in Pennsylvania Rules Citizens Do Not Have First Amendment Right to Record Police*, PHOTOGRAPHY IS NOT A CRIME (Feb. 22, 2016),

district court's requirement in *Fields* that speech or conduct critical of police must accompany the act of recording, Pennsylvania attorney Jordan Rushie contends, "If you want to film the police, also make sure to maybe yell at them too."<sup>112</sup>

The bottom line is that imposing a requirement that citizens either must explicitly tell police they are recording them for purposes of criticism or that citizens must somehow convey this same message through "expressive conduct" creates a profound chilling effect on the right to record. Few citizens would risk possible physical abuse at the hands a police officer by telling him, "I think what you are doing is wrong, so I'm going to record it." In other words, Judge Kearney adopted a test for speech that inherently chills it.

The only requisite intent that should be necessary to consider as "speech" the conduct of filming police is the intent to observe their actions, in accord with the classic watchdog tradition of a free press.<sup>113</sup> As Reggie Shuford, executive director of the ACLU of Pennsylvania, explained in response to Judge Kearney's opinion:

Police have extraordinary power, and civilian recordings of police actions are essential to holding police accountable for how they use that power. 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.<sup>114</sup>

Attorney Mary Catherine Roper, the deputy legal director for the ACLU of Pennsylvania who represents both Richard Fields and Amanda Geraci, added

<https://photographyisnotacrime.com/2016/02/22/rookie-federal-judge-in-pennsylvania-rules-citizens-do-not-have-first-amendment-right-to-record-police> [<https://perma.cc/7M2T-PTSQ>].

112. Jordan Rushie, *Apparently You Do Not Have a First Amendment Right to Photograph the Police in Pennsylvania*, PHILLY LAW BLOG (Feb. 22, 2016) <https://phillylawblog.wordpress.com/2016/02/22/apparently-you-do-not-have-a-first-amendment-right-to-photograph-the-police-in-pennsylvania-unless-you-do-a-little-jig> [<https://perma.cc/DSH2-JD24>].
113. The U.S. Supreme Court recognizes the role of the press "as a watchdog of government activity." *Leathers v. Medlock*, 499 U.S. 439, 447 (1991). As the late C. Edwin Baker explained, "the press receives constitutional protection to be a voice independent of the government (or, at least, independent of the other three 'estates') in order to perform the crucial democratic tasks of providing an independent source of vision and information, including performance of a watchdog role." C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 968 (2007). More simply put by Professor Vincent Blasi, the value of a free press is that it "serve[s] in checking the abuse of power by public officials." Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (1977). Watchdog journalism involves "documenting the activities of government, business, and other public institutions in ways that expose little-publicized or hidden activities to public scrutiny." W. Lance Bennett & William Serrin, *The Watchdog Role*, in *THE PRESS* 169, 169 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005).
114. *ACLU-PA Issues Statement in Response to Copwatch Ruling*, ACLU OF PA. (Feb. 24, 2016), <http://www.aclupa.org/news/2016/02/24/aclu-pa-issues-statement-response-copwatch-ruling> [<https://perma.cc/FT2V-EX5E>].

that “in this day and age, frankly, the ability to record police is such an important part of our move to ensure that our police are accountable.”<sup>115</sup>

Roper’s words are not empty rhetoric regarding the link between the ability to record police and holding them accountable. In fact, it was a citizen-taken video of a white police officer Michael Slager shooting an unarmed African American Walter Scott multiple times in the back in North Charleston, South Carolina, in 2015 that now provides the critical evidence for holding Slager legally accountable for murder at his trial slated for October 2016.<sup>116</sup> As Mark Berman wrote in the *Washington Post*, the video of the Scott shooting taken by barber Feidin Santana while walking to work demonstrates “the acute power of video to establish evidence of police brutality, even when the officers say they have done nothing wrong.”<sup>117</sup> In brief, attorney Roper’s remarks in the aftermath of *Fields* about the link between recording of police and holding them accountable rings profoundly true.

The second and, perhaps, even more troubling aspect of the district court’s decision is that it embraces a viewpoint-based test. Specifically, Judge Kearney’s ruling “means that only photos and videos of police taken in the spirit of protest or meant to express some other message of disapproval are protected.”<sup>118</sup> Conversely, recordings made with the intent to laud or to praise the police seemingly would not constitute speech. In other words, the specific viewpoint and intent adopted by a person recording police appears to be outcome determinative of First Amendment protection under the district court’s analysis.

That is exceedingly disturbing because, as Professor Joseph Blocher writes, “the prevention of viewpoint discrimination has long been considered the central concern of the First Amendment.”<sup>119</sup> In particular, viewpoint-based discrimination is a subcategory of content-based regulations,<sup>120</sup> and it is almost

---

115. Daniel Craig, *Pa. ACLU to Appeal Ruling Against First Amendment Right to Film Police*, PHILLY VOICE (Feb. 24, 2016), <http://www.phillyvoice.com/pa-aclu-appealing-ruling-against-first-amendment-right-film-police> [https://perma.cc/KV64-RVZ2].

116. See Alan Blinder & Timothy Williams, *Ex-South Carolina Officer Is Indicted in Shooting Death of Black Man*, N.Y. TIMES (June 8, 2015), <http://www.nytimes.com/2015/06/09/us/former-south-carolina-officer-is-indicted-in-death-of-walter-scott.html> [https://perma.cc/V5P5-95AH].

117. Mark Berman, *Shooting in South Carolina Emphasizes Power of Video Footage*, WASH. POST (Apr. 9, 2015), [https://www.washingtonpost.com/politics/shooting-in-south-carolina-emphasizes-power-of-video-footage/2015/04/09/47582818-df00-11e4-a500-1c5bb1d8ff6a\\_story.html](https://www.washingtonpost.com/politics/shooting-in-south-carolina-emphasizes-power-of-video-footage/2015/04/09/47582818-df00-11e4-a500-1c5bb1d8ff6a_story.html) [https://perma.cc/6SG9-Z6EB].

118. Brentin Mock, *The Right to Film Cops Comes Into Question*, CITYLAB (Feb. 24, 2016), <http://www.citylab.com/crime/2016/02/there-is-no-first-amendment-right-to-film-cops/470670> [https://perma.cc/CC8L-LPYH].

119. Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 696 (2011).

120. See Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L.

always unconstitutional as “an egregious form of content discrimination.”<sup>121</sup> As the U.S. Supreme Court wrote twenty-one years ago, “[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”<sup>122</sup>

Indeed, the Court has further observed that “[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.”<sup>123</sup> Judge Kearney’s analysis in *Fields*, however, turns this principle on its head by mandating that citizens express and adopt a specific sentiment—one criticizing or challenging police during the act of recording—if they seek shelter under the blanket of First Amendment protection.

In contrast to either viewpoint-based or content-based regulations,<sup>124</sup> as Professor John Fee writes, “content-neutral speech regulations are subject to a more lenient First Amendment standard,”<sup>125</sup> namely intermediate scrutiny.<sup>126</sup> Professor Seth Kreimer notes the importance of the content-neutrality doctrine at the level of the U.S. Supreme Court, observing that:

The Roberts Court has adverted to *content neutrality as a defining element of First Amendment doctrine* in no less than twenty-two of the thirty-seven free expression cases it has decided on the merits over the last eight years, and virtually all of the decisions of recognized public consequence. Majority opinions regularly declaim that

---

REV. 179, 195 (2001) (calling viewpoint discrimination “a subset of content discrimination”). Content-based regulations typically are valid only if they survive strict scrutiny review, which requires that a law “is justified by a compelling government interest and is narrowly drawn to serve that interest.” *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011); see *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 813 (2000) (noting that a content-based speech restriction “can stand only if it satisfies strict scrutiny,” and asserting that “[i]f a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest”).

121. *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

122. *Id.*

123. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

124. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (“Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed.”).

125. John Fee, *Speech Discrimination*, 85 B.U.L. REV. 1103, 1104 (2005).

126. See Dan V. Kozlowski, *Content and Viewpoint Discrimination: Malleable Terms Beget Malleable Doctrine*, 13 COMM. L. & POL’Y 131, 131–32 (2008) (asserting that “the Court has devised tests to review content-based and content-neutral regulations (strict scrutiny for content-based regulations, a more lenient intermediate scrutiny for those regulations deemed content neutral”).

“content-based” restrictions on speech are presumptively unconstitutional.<sup>127</sup>

Writing recently, Professor Corey Brettschneider explains that “[t]he doctrine of viewpoint neutrality is central to First Amendment jurisprudence. It requires the state to not treat speech differently based on a speaker’s political or philosophical opinions.”<sup>128</sup>

The intent of Amanda Geraci was, as noted earlier, simply to *observe* police action.<sup>129</sup> The intent to observe—an intent, in other words, to record while *not* taking sides or adopting a particular viewpoint—fully embodies the principle of content neutrality. It thus is quite ironic that the district court would deny Geraci—a neutral observer—First Amendment protection because she chose not to adopt an antigovernment viewpoint.

In summary, Judge Kearney’s analysis requiring citizens to announce to the police or to demonstrate through their expressive conduct that they intend to challenge and criticize police action is not only impractical in operation, but also conflicts with long-standing principles against viewpoint-based government regulations. The district court should not mandate a citizen to adopt a particular viewpoint in order to be protected by the First Amendment.

#### IV. WHOSE RIGHT IS IT ANYWAY? DISTINGUISHING BETWEEN CITIZENS AND THE PRESS

In ruling against Richard Fields and Amanda Geraci, Judge Kearney pointed out that “[t]hey are *not members of the press*. Each engaged in activity they personally described as non-confrontational ‘observing’ and ‘recording.’”<sup>130</sup> Perhaps *sub silentio* in this observation lurks the notion that if Fields and Geraci had been members of the press—if they had silently observed police as professional journalists—then the outcome would have been different. Why else, in other words, even raise or interject into the legal mix the fact of their non-press status if it was not somehow relevant?

Importantly, Judge Kearney is not the only federal judge to acknowledge different treatment of citizens and the press when it comes to the First

---

127. Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1265–66 (2014) (emphasis added).

128. Corey Brettschneider, *Value Democracy as the Basis for Viewpoint Neutrality: A Theory of Free Speech and Its Implications for the State Speech and Limited Public Forum Doctrines*, 107 NW. U. L. REV. 603, 605 (2013).

129. See *supra* notes 10–11 and accompanying text.

130. *Fields v. City of Philadelphia*, No. 14-4424, 2016 U.S. Dist. LEXIS 20840, at \*22 (E.D. Pa. Feb. 19, 2016).

Amendment right to record police in public places. Judge P. Kevin Castel of the Southern District of New York in 2015 in *Higginbotham v. City of New York*<sup>131</sup> concluded “that the right to record police activity in public, at least in the case of a journalist who is otherwise unconnected to the events recorded, was in fact ‘clearly established’ at the time of the events alleged in the complaint.”<sup>132</sup>

Latent in Judge Kearney’s analysis in *Fields* and in Judge Castel’s decision in *Higginbotham* suggesting the right to record cops is possessed by journalists, but not by citizens generally, is the related distinction between the Speech Clause and the Press Clause. The fork in the First Amendment road for those seeking to record police, at least in the courtrooms of Judges Kearney and Castel, perhaps goes something like this:

- *If you are a non-journalist, then you go down the path of the Speech Clause.* On this path, it is *not* sufficient merely to silently observe in order to gain First Amendment protection. One must instead, as a threshold matter, demonstrate that one is actually engaging in “speech.” This can be done either via the spoken word (verbally criticizing or challenging police while simultaneously recording them) or by some form of expressive conduct (akin to flag burning) that satisfies the *Spence* test for symbolic speech. Only after one clears this hurdle will First Amendment “speech” protection apply.
- *If you are a member of the press, then your silent recording of police garners Press Clause protection as a facet of the unenumerated right to gather news.* Getting on this path may not be easy, however, because determining who is a member of the press or a professional journalist poses a vast problem with the dichotomy suggested by Judges Kearney and Castel—and one for which they offer no solutions. Additionally, as Dean Erwin Chemerinsky points out, the U.S. Supreme Court’s rulings over the years—despite dicta in cases like *Branzburg v. Hayes*<sup>133</sup>—“without exception, have failed to provide any First Amendment protection for newsgathering. Indeed, the Court has declared that there is no exemption for the press from general laws.”<sup>134</sup> This path to protection is neither a smooth nor well-worn path, but rather quite rocky. Professor Sonja West concurs in a 2014 article, artfully writing:

---

131. 105 F. Supp. 3d 369 (S.D.N.Y. 2015).

132. *Id.* at 380 (emphasis added).

133. 408 U.S. 665 (1972). The Court wrote in *Branzburg* that “without some protection for seeking out the news, freedom of the press could be eviscerated.” *Id.* at 681.

134. Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143, 1145 (2000); see *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (describing a “well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news”).

If the Speech Clause is the Court's favorite child, the Press Clause has been the neglected one. During the same period that the Court has developed wide-ranging protections under the Speech Clause, it has all but failed to notice the Press Clause's existence, and when it has noticed, it has been with a mindset of skepticism and defeatism.<sup>135</sup>

Ultimately, a distinction based on status of the recorder—ordinary citizen versus professional journalist—when it comes to the right to film police is fundamentally flawed in ways far beyond the definitional difficulties. For example, Professor William Lee of the University of Georgia cogently argues that “because the value of expression does not depend upon the identity of its source, efforts to separate the citizen journalists from the press are constitutionally flawed. Stated differently, the constitutional value and protection of expression does not depend upon whether it emanates from an institution recognized as the press.”<sup>136</sup> Indeed, the value of the smartphone video—both to the criminal justice system and to the public at large—taken by citizen Feidin Santana of officer Michael Slager shooting Walter Scott in the back is as important as if it had been taken by a member of the press.<sup>137</sup>

Similarly, Professor Erik Ugland has called on the U.S. Supreme Court to “abandon any suggestion that ‘freedom of the press’ implies anything other than the *freedom of all citizens* to seek out the news and to communicate it through media.”<sup>138</sup> Even more broadly, Ugland urged the Court to reject the notion that the “the Speech and Press Clauses be read to provide distinct sets of rights based on communicators’ expertise, credentials, or institutional affiliations.”<sup>139</sup> Erasing the Speech and Press Clause distinction would, in turn, do away with the fork-in-the-First-Amendment-road problem described immediately above in the analyses of Judges Kearney and Castel. In summary, distinguishing between citizens and members of the press when deciding who possesses a First Amendment right to film police in public is unsound.

---

135. Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2439 (2014).

136. William E. Lee, *Citizen-Critics, Citizen Journalists, and the Perils of Defining the Press*, 48 GA. L. REV. 757, 771 (2014).

137. See *supra* note 116 and accompanying text (discussing this video).

138. Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113, 189 (2008) (emphasis added).

139. *Id.* at 179.

## CONCLUSION

The U.S. Court of Appeals for the Third Circuit has never recognized a clearly established First Amendment right to film the police doing their jobs in public venues.<sup>140</sup> The ACLU of Pennsylvania now is appealing *Fields*,<sup>141</sup> however, which provides the Third Circuit with a prime opportunity to finally join the First, Seventh, Ninth, and Eleventh Circuits<sup>142</sup> in embracing this constitutional right.

In recognizing this right and in reversing the district court's ruling, the Third Circuit should also make several key points clear in order to facilitate and buttress the strength of the First Amendment right to record police. These points entail specifying that:

1) *The right belongs to all citizens, not just to members of the press or professional journalists.* Citizens armed with smartphones play a vital watchdog role today on police, monitoring police activities and often when journalists are not present to capture abuses of authority. The citizen-taken video of the shooting of Walter Scott described above makes that clear.<sup>143</sup> Additionally, defining who constitutes a member of a select press class, at least for purposes of the right to record, is exceedingly difficult, further militating against drawing any citizen-versus-press dichotomy.

2) *There is no need for a citizen to hold a specific viewpoint about the police activity he or she is recording in order for the act of recording to constitute speech.* The Third Circuit should remove the district court's requirement that citizens are only protected by the First Amendment if they record with the intent to challenge or to criticize police activity. An intent to observe the police—for whatever reason or purpose, and certainly not requiring an unconstitutional viewpoint—based reason like the one suggested by Judge Kearney—should be sufficient to trigger First Amendment protection.

3) *A citizen's silence when recording police does not adversely affect the determination that the act of recording images of police is speech.* To require a person to speak up when simultaneously engaged in the act of image capture and creation simply is unnecessary. A tattoo artist need not talk when she works to create a tattoo in

---

140. See *supra* note 65 and accompanying text.

141. See *ACLU-PA Issues Statement in Response to Copwatch Ruling*, *supra* note 114 (quoting Reggie Shuford, executive director of the American Civil Liberties Union (ACLU) of Pennsylvania, for the proposition that “Judge Kearney’s ruling is an outlier, and we intend to appeal it”).

142. See *supra* notes 43–56 and accompanying text (addressing these courts’ recognition of qualified First Amendment right to record police in public places).

143. See *supra* notes 116–117 and accompanying text.



order for the act of tattooing to constitute speech.<sup>144</sup> Similarly, a citizen photographer need not speak while taking a picture to obtain First Amendment protection.

4) *There is no need to engage in expressive conduct under Spence when recording in order to trigger First Amendment protection.* The Third Circuit here should adopt the Seventh Circuit's conclusion that "[t]he act of making an audio or audiovisual recording is necessarily included within the First Amendment's guarantee of speech and press rights."<sup>145</sup>

5) *A citizen does not need to explain to police officers why he or she is recording their activity.* People should not be forced to tell government officials why they are engaging in the speech activity that is the recording of images. Just as the U.S. Supreme Court recognizes a qualified First Amendment right to engage in anonymous speech rather than being forced to reveal one's identity and thereby risk either government or private reprisal,<sup>146</sup> so too must there be a right not to be compelled to reveal to police the reason why one is recording them and risk retaliation or directly incur their wrath at the end of a baton stick.

In summary, the district court's ruling in *Fields*—that a person who is not a member of the press, but who nonetheless is recording the police, must either speak up or act up (expressive conduct) in a way that challenges and criticizes police in order to obtain speech protection under the First Amendment—is flawed for multiple reasons. This Article explored four such reasons. Now, the Third Circuit should recognize the flawed logic of the lower court in *Fields* and reverse the decision. In the process, the appellate court should embrace the five points set forth immediately above.

---

144. See *supra* notes 83–93 and accompanying text (addressing the tattooing-is-speech cases).

145. *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 595 (7th Cir 2012).

146. See *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (declaring unconstitutional an Ohio statute that prohibited the distribution of anonymous campaign literature, reasoning that “[u]nder our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority.”).