
RECENT CASES

CONSTITUTIONAL LAW — QUALIFIED IMMUNITY — THIRD CIRCUIT HOLDS BYSTANDERS HAVE FIRST AMENDMENT RIGHT TO RECORD POLICE BUT GRANTS QUALIFIED IMMUNITY TO OFFICERS INVOLVED. — *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017).

Smartphones have enabled individuals to capture and broadly disseminate recordings of their interactions with law enforcement. Despite the ubiquity of these recordings, many citizens attempting to record police activity have faced retaliation from police officers.¹ In response, several federal appeals courts have, over the years, recognized citizens' constitutional right to record the police.² Recently, in *Fields v. City of Philadelphia*,³ the Third Circuit agreed, holding that citizens have a First Amendment right to record police officers engaged in official duties in public.⁴ Although the Third Circuit deftly applied precedent by addressing the substantive First Amendment question in *Fields* head-on, rather than proceeding directly to the officers' qualified immunity defense, the court's subsequent grant of immunity was analytically problematic, highlighting the undue strength of the immunity doctrine.

In September 2012, Amanda Geraci attempted to record the arrest of an antifracking protester with her camera, doing so without interfering with police duties.⁵ A Philadelphia police officer restrained her, preventing her from recording the arrest.⁶ During a separate incident in September 2013, Richard Fields, a Temple University sophomore, stood on a public sidewalk and used his iPhone to take a photo of officers breaking up a party; when Fields refused to leave the scene, an officer confiscated his phone, searching through it before releasing him with a citation.⁷ Geraci and Fields brought 42 U.S.C. § 1983 suits against the City of Philadelphia and the officers involved for violations of their First Amendment right to record police activity and their Fourth Amendment right to be free from unreasonable search or seizure.⁸ Plaintiffs pointed to Philadelphia Police Department policy, which acknowledged citizens' right to record police.⁹

¹ See, e.g., Eli Rosenberg, *Suit Accuses New York Police of Violating Citizens' Right to Film*, N.Y. TIMES (July 7, 2016), <http://nyti.ms/2DRfIKQ> [<https://perma.cc/3QWT-GT8V>].

² See, e.g., *Glik v. Cunniffe*, 655 F.3d 78 (1st Cir. 2011).

³ 862 F.3d 353 (3d Cir. 2017).

⁴ *Id.* at 356.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* This citation was ultimately withdrawn. *Id.*

⁸ *Id.*

⁹ *Id.*

The trial court granted partial summary judgment to the defendants.¹⁰ Judge Kearney of the Eastern District of Pennsylvania held that the First Amendment did not protect plaintiffs' recording acts, as neither Fields nor Geraci intended to express their beliefs or criticize the police through their footage.¹¹ Because of this ruling, the district court did not address questions of qualified immunity or municipal liability.¹²

The Third Circuit reversed and remanded.¹³ Writing for the panel, Judge Ambro¹⁴ first rejected defendants' argument that the court avoid ruling on the First Amendment issue and find instead that, "regardless of the right's existence, the officers [were] entitled to qualified immunity."¹⁵ The constitutional issue of recording police activity presented an unanswered question of "great importance" for the court¹⁶ — especially considering how widespread these recordings had become and their salience in "our national discussion[s] of proper policing."¹⁷

Judge Ambro then turned to the constitutional question itself. Joining a "growing consensus" of courts,¹⁸ Judge Ambro held that plaintiffs did have a right to record police officers conducting official activities in public.¹⁹ According to Judge Ambro, the district court erred in its focus on plaintiffs' intent.²⁰ The First Amendment protects the "public's right of access to information about their officials' public activities."²¹ Citizen recording of officers inherently fell within this principle, as photos, film, and audio footage (1) allowed viewers to "see and hear more accurately" the police activity they were already entitled to witness and (2) facilitated "citizen discourse."²² Judge Ambro concluded this analysis by detailing the benefits of this right to record: bystander footage of officers fills in gaps in officer body-camera and dashboard-camera recordings, enriches journalistic reporting, and "spur[s] action at all levels of government to address police misconduct and to protect civil rights."²³

¹⁰ *Fields v. City of Philadelphia*, 166 F. Supp. 3d 528, 542 (E.D. Pa. 2016).

¹¹ *Id.* at 535 (holding that "taking . . . pictures with no further comments" did not constitute protected "expressive conduct").

¹² *See id.* at 539.

¹³ *Fields*, 862 F.3d at 362. The court remanded solely on the issue of municipal liability. *Id.* The parties later settled. *ACLU of Pennsylvania Announces Settlements in Philadelphia Lawsuits that Established a First Amendment Right to Record the Police*, ACLU PA. (Dec. 5, 2017), <https://www.aclupa.org/news/2017/12/05/aclu-pennsylvania-announces-settlements-philadelphia-lawsuit> [https://perma.cc/M37V-TVA8].

¹⁴ Judge Ambro was joined by Judge Restrepo.

¹⁵ *Fields*, 862 F.3d at 357.

¹⁶ *Id.*

¹⁷ *Id.* at 358.

¹⁸ *Id.* at 355–56 (citing cases from five circuits, including four cases from before the *Fields* facts).

¹⁹ *Id.* at 356.

²⁰ *Id.* at 358.

²¹ *Id.* at 359.

²² *Id.*

²³ *Id.* at 359–60.

Judge Ambro then determined the officers were entitled to qualified immunity. Qualified immunity provides a defense to government actors unless they violate a right “so clearly established that ‘*every reasonable official* would have understood that what he is doing violates that right.’”²⁴ As Judge Ambro explained, the clearly established inquiry required the court to consider the “right ‘in light of the specific context of the case.’”²⁵ Drawing from binding precedent, he characterized the inquiry as whether a “robust consensus” had emerged that put the existence of the right “beyond debate.”²⁶ According to Judge Ambro, the state of First Amendment law in 2012 and 2013 — the respective years Geraci and Fields attempted to take photos of officers — did not clearly establish plaintiffs’ ability to record the police.²⁷ First, the Third Circuit had held in 2010 in *Kelly v. Borough of Carlisle*²⁸ that no established right existed, and no later case had established such a right by 2013.²⁹ Moreover, Judge Ambro dismissed the applicability of the Department’s recording policy — concluding it was likely ineffective in conveying the right.³⁰ Finally, although he acknowledged that other circuits had recognized the right to record prior to 2012 and 2013, Judge Ambro nonetheless concluded that this case law did not create enough consensus.³¹

Judge Nygaard concurred in part and dissented in part.³² He concurred that this First Amendment right exists today,³³ but dissented from the qualified immunity holding because he concluded the right was *also* clearly established in 2012 and 2013. First, Judge Nygaard asserted that four of the circuit decisions Judge Ambro referenced to establish the present-day right preceded the facts of *Fields* and sufficiently provided “robust consensus.”³⁴ Then, he pointed to the Department’s official policy as “indisputable”³⁵ evidence of this First Amendment right’s existence “well before the incidents under review.”³⁶ As he documented, the Department issued a memorandum in 2011 to educate officers on recording rights.³⁷ The memorandum stated, “police should reasonably expect to be photographed, videotaped and or audibly recorded” by the public, and it made clear that officers “‘shall not’ obstruct or prevent

²⁴ *Id.* at 360–61 (quoting *Zaloga v. Borough of Moosic*, 841 F.3d 170, 175 (3d Cir. 2016)).

²⁵ *Id.* at 361 (quoting *L.R. v. Sch. Dist.*, 836 F.3d 235, 248 (3d Cir. 2016)).

²⁶ *Id.*

²⁷ *Id.* at 362.

²⁸ 622 F.3d 248 (3d Cir. 2010).

²⁹ See *Fields*, 862 F.3d at 361.

³⁰ *Id.*

³¹ *Id.* at 361–62.

³² *Id.* at 362 (Nygaard, J., concurring in part, dissenting in part).

³³ *Id.* He agreed the issue of municipal liability should be remanded. *Id.*

³⁴ *Id.* at 363.

³⁵ *Id.* at 364.

³⁶ *Id.* at 363.

³⁷ *Id.*

this conduct.”³⁸ In November 2012, the Department provided even clearer guidance, issuing a directive to “protect the constitutional rights of individuals to record police officers engaged in the public discharge of their duties.”³⁹ Finally, Judge Nygaard argued that because of the pervasiveness of smartphones, “it [would be] unreasonable to assume that the police officers were oblivious to the First Amendment implications of . . . attempt[ing] to curtail such recordings.”⁴⁰

In *Fields*, the Third Circuit correctly followed Supreme Court precedent by addressing the substantive constitutional question *before* reaching qualified immunity. The court’s decision to adjudicate plaintiffs’ claims aided development of First Amendment doctrine and provided definitive judicial guidance to future plaintiffs and officers. However, the *Fields* court’s qualified immunity holding was analytically problematic in two regards. First, the majority inadequately explained why the case law on police recordings, which sufficiently reflects a growing consensus of a First Amendment right today, did not clearly establish this right in 2012 and 2013. Second, by dismissing the applicability of the Philadelphia Police Department’s policy on recordings with little explanation, the majority appeared to depart from its own prescription to examine the clarity of legal precedent on a right in light of the “specific context” of the case. That the *Fields* court granted qualified immunity is unsurprising and consistent with recent Supreme Court precedent. But the majority’s questionable reasoning nonetheless reflects the undue strength of the immunity doctrine itself, such that the “Equilibration Thesis” — that courts calibrate rights with factors such as remedial consequences — has become distorted in favor of government defendants.⁴¹

The *Fields* court’s decision to adjudicate the constitutional issue correctly answered a question the Supreme Court left to the “sound discretion” of lower courts.⁴² In *Pearson v. Callahan*,⁴³ the Court gave lower courts the choice of whether to decide if a rights violation occurred or proceed directly to qualified immunity, encouraging those courts to decide constitutional questions where doing so would “promote[] the development of constitutional precedent.”⁴⁴ The Third Circuit certainly sought to advance constitutional doctrine in *Fields* by answering what it considered a frontier First Amendment question. Although simply finding the *Fields* officers were entitled to immunity may have saved

³⁸ *Id.*

³⁹ *Id.* at 363–64.

⁴⁰ *Id.* at 364.

⁴¹ See Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies —And Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 634–37 (2006).

⁴² *Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

⁴³ 555 U.S. 223.

⁴⁴ *Id.* at 236.

judicial resources and avoided an “[u]nnecessary” ruling⁴⁵ in the short run, this would have ultimately created negative doctrinal consequences. Since police officers are government officials, cases where plaintiffs record them will necessarily involve qualified immunity; consequently, skirting the First Amendment question in a case like *Fields* would likely mean skirting it in perpetuity. As a result, First Amendment doctrine may have stagnated in the Third Circuit, and the right of information access may have become degraded⁴⁶ at a critical time — when police recordings are ever increasing.⁴⁷ But, by resolving this question, the *Fields* court wisely sought to provide clarity to future plaintiffs seeking vindication and public officials attempting to avoid wrongdoing.

However, the majority did not adequately explain why the case law that suffices to recognize the right to record today did not also clearly establish this right in 2012 and 2013. Of course, a court’s constitutional violation inquiry and its clearly established inquiry are two separate analyses.⁴⁸ Per *Pearson*, these inquiries are meant to analyze the right in question not just at two different points in time, but also under different legal standards.⁴⁹ Because the clearly established inquiry involves the question of notice to government actors and may result in liability, it understandably requires a higher threshold of rights establishment — that is, a “robust consensus,” “beyond debate” — as compared to a present-day constitutional inquiry, where broader assessments of “growing” appellate consensus are permitted. Although the *Fields* plaintiffs certainly did face a higher threshold for demonstrating that the right to record police was clearly established than for satisfying their present-day claim, the case law suggests this higher threshold was also met.

Four pre-2012 cases found a First Amendment right to record police.⁵⁰ Two considerations buttress the dissent’s characterization of these cases as a “robust consensus.” First, these cases reflected a state of *total* appellate agreement. Though some courts, including the Third Circuit, had skipped addressing the question of citizens’ right to record, no court to address the right substantively prior to 2012 had held that it did not

⁴⁵ *Id.* at 236–37 (explaining how deciding a constitutional question may not be advisable when it has “no effect on the outcome of the case”).

⁴⁶ *See, e.g.*, John C. Jeffries, Jr., *Reversing the Order of Battle in Constitutional Torts*, 2009 SUP. CT. REV. 115, 120 (“Functionally, the Constitution will be defined not by . . . judges, in their wisdom . . . but by the most grudging conception that an executive officer could reasonably entertain.”).

⁴⁷ *See, e.g.*, Mariana Alfaro, *More Complaints Against NYPD Officers Include Video Evidence, Study Finds*, WALL ST. J. (June 28, 2017, 12:00 AM), <http://on.wsj.com/2nTa5lk> [<https://perma.cc/NWK6-NBM9>].

⁴⁸ *Pearson*, 555 U.S. at 232.

⁴⁹ *Id.*

⁵⁰ *Am. Civil Liberties Union of Ill. 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).

exist. In light of *Pearson*⁵¹ and other cases where courts granted qualified immunity based on the existence of judicial disagreement or silence,⁵² the level of judicial agreement here is especially compelling. Moreover, the dissent's "robust consensus" assertion is apt because the four cases represent proper analogues to *Fields*. Although the majority attempted to distinguish these cases as only recognizing a right to record tied to expressive intent,⁵³ this characterization wrongly narrows their holdings. Like *Fields*, these cases relate generally to protecting recording officers in public, regardless of intent.⁵⁴ Given these considerations, the majority's sole reliance on *Kelly* — a case evaluating the state of the law in 2007 with respect to the particular context of a traffic stop⁵⁵ — appears insufficient. And the majority's vague references to legal developments to justify finding a right today also fail to show that the right was not clearly established by 2012.⁵⁶

In addition to its case law analysis, the *Fields* majority did not appear to engage fully with the facts of the case. As the majority wrote, the clearly established inquiry requires courts to examine the "specific context" of the case. Although not a subjective analysis of a defendant's state of mind, the inquiry is still meant to be relatively fact-dependent.⁵⁷ Courts examine the information available to public officials — from precedent to internal policies⁵⁸ — and evaluate whether every reasonable official confronted with the particular facts of the case would, based on this information, understand the state of the law and know they were violating the constitutional right in question.⁵⁹ In the facts of *Fields*, the Third Circuit seemingly had such a scenario of clarity. As the dissent

⁵¹ See 555 U.S. at 244–45 (holding Fourth Amendment right of freedom from warrantless home entry by undercover officers after consent is gained was not clearly established because two state supreme courts and three courts of appeals had previously found no constitutional violation).

⁵² See, e.g., *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1776–78 (2015) (noting disagreement between Ninth Circuit and other circuits regarding whether officers are required to provide accommodations for mental illness or other disabilities during forced entries).

⁵³ *Fields*, 862 F.3d at 361–62.

⁵⁴ E.g., *Alvarez*, 679 F.3d at 595–603 ("[T]he First Amendment goes beyond . . . self-expression . . . to prohibit government from limiting the stock of information from which members of the public may draw." *Id.* at 597 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)); *Cunniffe*, 655 F.3d at 82–84 (noting that "[t]he filming of government officials engaged in their duties in a public place," *id.* at 82, lies well within First Amendment protections for information gathering).

⁵⁵ *Kelly v. Borough of Carlisle*, 622 F.3d 248, 263 (3d Cir. 2010).

⁵⁶ The majority cited only two cases, *Turner v. Lieutenant Driver*, 848 F.3d 678 (5th Cir. 2017), and *Gericke v. Begin*, 753 F.3d 1 (1st Cir. 2014), decided after the *Fields* events, *Fields*, 862 F.3d at 355–56, and did little to demonstrate how these cases solidified a First Amendment right that was not clearly established by the four cases prior.

⁵⁷ See, e.g., Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 *TOURO L. REV.* 501, 517–21 (2008).

⁵⁸ See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 745–46 (2002) (explaining that Alabama prison officials who tied prisoners to hitching posts were not entitled to immunity in part because Alabama Department of Corrections policy prohibited such action and advised it was likely unconstitutional).

⁵⁹ See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 639–40 (1987).

documented, the Department's official policy, dating back to 2011, explicitly recognized citizens' First Amendment right to record officers, *absent any expressive intent*.⁶⁰ On two separate occasions, sergeants read this policy out loud at roll call, Department-wide.⁶¹ From these rich facts, it *should* have at least been worth discussing whether the Department clearly understood the right to record.

Nonetheless, the majority largely disregarded the Department's policy, concluding it was likely "ineffective." The majority did not offer any concrete critiques of the policy's content, which labeled recording police activity a constitutional right and barred officers from impeding recorders. Nor did the majority criticize the policy's delivery to officers in both written form and in person. And the majority cited no metrics to capture Philadelphia police officers' past or present knowledge of a citizen's right to record, relying instead on a citation to the briefs for the proposition that officers were unaware of this right in 2012 and 2013.⁶² The majority's few sentences of reasoning,⁶³ devoid of the rich context the dissent elucidated, foreclosed even the possibility of considering whether the officers truly "had . . . ground to claim ambiguity about the boundaries of the citizens' constitutional right."⁶⁴

Although the majority's treatment of case law and the Department's policy appeared cursory, the *Fields* qualified immunity holding was, ultimately, unsurprising. Over the past fifteen years, the Supreme Court has insistently strengthened immunity doctrine in a number of ways. Whereas "fair warning" once sufficed to defeat an officer's immunity,⁶⁵ now, rigid requirements of well-settled case law mean that "all but the plainly incompetent or those who knowingly violate the law" are protected.⁶⁶ In light of this, *Fields* is well in line with precedent and is not legally "wrong." The two elements of the majority's reasoning discussed above, therefore, do not represent misapplications of qualified immunity by the Third Circuit, but instead flaws in the underlying doctrine itself — revealing its excessive strength in favor of defendants.

According to the Equilibration Thesis, laid out by Professor Richard Fallon, courts often define rights with reference to connected factors like remedial outcomes, and vice versa.⁶⁷ As Fallon describes, courts do so

⁶⁰ See *Fields*, 862 F.3d at 363–64 (Nygaard, J., concurring in part, dissenting in part).

⁶¹ *Id.* at 364.

⁶² *Id.* at 361 (majority opinion) (citing Reply Brief of Appellants at 12, *Fields*, 862 F.3d 353 (Nos. 16-1650 & 16-1651)).

⁶³ See *id.*

⁶⁴ *Id.* at 364 (Nygaard, J., concurring in part, dissenting in part).

⁶⁵ See, e.g., *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

⁶⁶ *Messerschmidt v. Millender*, 565 U.S. 535, 546 (2012) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011)).

⁶⁷ Fallon, *supra* note 41, at 634–37.

to realize the best “bundle of rights and correspondingly calibrated remedies within our constitutional system.”⁶⁸ Qualified immunity is one way courts achieve this equilibration. For example, in the ideal, immunity strikes the “appropriate balance . . . between deterring officials from violating rights, on the one hand, and chilling officials from acting conscientiously to discharge their responsibilities, on the other hand.”⁶⁹

As *Fields* reveals, however, current precedent does not strike this idealized balance. The first “flaw” in *Fields* — that the First Amendment case law was likely sufficient to establish the right to record the police in 2012 and 2013 — is troubling because it reveals courts’ ability to delay the recognition of rights. Essentially, courts can reframe packages of “existing” rights more narrowly to exclude the “new” rights in question, barring plaintiffs’ recovery for these rights.⁷⁰ This reframing in turn improperly perpetuates qualified immunity; courts can repeatedly excuse public official misconduct not only by jumping to defendants’ immunity defenses, but also with each faulty recalibration of rights.⁷¹ And finally, the second *Fields* “flaw” — that the court ignored the Department’s official policy of the right to record — troublingly reveals qualified immunity’s interpretation in the most defendant-protective terms. When even obvious notice that officers had clarity regarding legal precedent can be disregarded almost outright, phrases like “specific context” are distorted within the already-convoluted qualified immunity doctrine,⁷² and the doctrine is transformed into near-absolute immunity.

In short, *Fields* has contradictory implications. On the one hand, the Third Circuit properly exercised its discretion to recognize citizens’ First Amendment right to record officers, absent any expressive intent. However, the *Fields* court’s grant of qualified immunity to the officers involved reflects qualified immunity’s undue strength today. Perhaps, as Justice Thomas recently wrote, it is time for the Court to “reconsider [its] qualified immunity jurisprudence.”⁷³

⁶⁸ Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 *FORDHAM L. REV.* 479, 480 (2011); *see also id.* at 482–84 (describing “best” as taking into account the values and interests reflected in rights, as well as prudential considerations such as the social benefits and costs of enforcing these rights).

⁶⁹ *Id.* at 494; *see, e.g.*, *Harlow v. Fitzgerald*, 457 U.S. 800, 806–07 (1982).

⁷⁰ *See, e.g.*, Amelia A. Friedman, Note, *Qualified Immunity in the Fifth Circuit: Identifying the “Obvious” Hole in Clearly Established Law*, 90 *TEX. L. REV.* 1283, 1286–87 (2012).

⁷¹ Though qualified immunity is recognized as beneficial for the expansion of rights, *see* Fallon, *supra* note 68, at 480 (“[I]n the absence of official immunity doctrines, courts might prove more hesitant to expand the scope of constitutional rights.”), the same cannot be said when courts are not truly expanding rights, but instead reconceptualizing existing rights as new.

⁷² *See, e.g.*, Jeffries, *supra* note 46, at 136.

⁷³ *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1872 (2017) (Thomas, J., concurring).