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FIRST AMENDMENT UNDER ARREST: PHOTOGRAPHING POLICE
IN PUBLIC PLACES AT ISSUE ON MULTIPLE FRONTS

THOMAS G. WILKINSON, JR.* & MATTHEW A. GLAZER**

I. INTRODUCTION

A recent federal court decision in Philadelphia concluded that members of the public have no constitutional right to photograph or videotape police activity, including during public protests and when making arrests. In a ruling that has received national attention, the U.S. District Court for the Eastern District of Pennsylvania determined that citizens do not possess a First Amendment right to photograph or video police activity “absent any criticism or challenge to police conduct.”¹ Instead, the court found that the act of simply recording police activity is not the type of “expressive conduct” protected by the First Amendment.²

One Plaintiff, Amanda Geraci, “a self-described ‘legal observer,’” was watching an anti-fracking environmental protest outside the Philadelphia Convention Center when she saw police arrest a protester.³ She moved closer so she could photograph the arrest, but, according to her complaint, an officer shoved her against a pillar and physically restrained her across the neck and prevented her from taking photos of the arrest.⁴

The other Plaintiff, Richard Fields, a Temple University student, was walking on the sidewalk one night when he noticed about twenty Philadelphia police officers across the street evidently clearing out a house party.⁵ After Fields took a photo of the scene with his phone, he was approached by a police officer who asked, “[d]o you like taking pictures of grown men?”⁶ When Fields refused to leave as directed by police, he was detained and handcuffed. Police took away his cell phone and placed him in the back of a police van.⁷

Fields and Geraci filed civil rights complaints alleging that Philadelphia police officers regularly used detention, arrest, and other actions to retaliate against citizens who attempted to record their official activities, and that the department had failed to implement training and supervisory procedures to

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1. See *Fields v. City of Philadelphia*, No. 14-4424, slip op. at 1 (E.D. Pa. Feb. 19, 2016).
2. See *id.*
3. See *id.* at 2.
4. See *id.*
5. See *id.* at 1.
6. See *id.*
7. See *id.* at 2. Fields was cited for Obstructing Highways and Other Public Passages under 18 PA. CONS. STAT. ANN. § 5507 (West 2016).

prevent such misconduct.⁸ The Pennsylvania ACLU and other First Amendment advocates pursued the complaints on behalf of both plaintiffs, neither of whom were members of traditional news media outlets.

The individual Defendants in *Fields* and *Geraci* moved for summary judgment on the issue of whether the police officer Defendants enjoyed qualified immunity because the right to record police is not clearly established law in the Third Circuit, while the City of Philadelphia argued that there was insufficient evidence to find municipal liability under *Monell v. Department of Social Services of New York*.⁹ The district court instead chose to “focus on the threshold issue” of whether Fields and Geraci engaged in First Amendment protected conduct, concluding: “We find there is no First Amendment right under our governing law to observe and record police officers absent some other expressive conduct.”¹⁰ The court determined that the officer Defendants were entitled to summary judgment on the First Amendment claims.¹¹

According to the court, Plaintiffs’ First Amendment claims hinged on their stated “purpose” for recording the police conduct.¹² In other words, the court’s determination was based on the reason *why* the Plaintiffs were recording the police activity:

We have not found, and the experienced counsel have not cited, any case in the Supreme Court or this Circuit finding citizens have a First Amendment right to record police conduct without any stated purpose of being critical of the government. Absent any authority from the Supreme Court or our Court of Appeals, we decline to create a new First Amendment right for citizens to photograph officers when they have no expressive purpose such as challenging police actions. The citizens are not without remedy because once the police officer takes your phone, alters your technology, arrests you or applies excessive force, we proceed to trial on the Fourth Amendment claims.¹³

8. *See generally* Complaint, *Geraci v. City of Philadelphia*, No. 2:14-cv-05264-WY (E.D. Pa. Sept. 15, 2014); Complaint, *Fields v. City of Philadelphia*, No. 14 4424. (E.D. Pa. July 24, 2014). The complaints alleged that there were at least 19 incidents prior to Geraci’s restraint and two after Fields’s arrest in which city police officers retaliated against civilians for recording police activity. In early 2013 the Police Advisory Commission wrote to then-Philadelphia Police Commissioner Charles Ramsey to bring a pattern of such complaints to his attention and to recommend more training for officers.

9. 98 S. Ct. 2018, 2022 (1978) (overruling *Monroe v. Pape*, 81 S. Ct. 473 (1961), “insofar as it holds that local governments are wholly immune from suit under [42 U.S.C.] § 1983”).

10. *Fields*, slip op. at 3. The court described the applicable test as follows: “Expressive 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.’” *See id.* at 4 (citing *Heffernan v. City of Paterson*, 777 F.3d 147, 152 (3d Cir. 2015) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989))).

11. *See id.* at 10.

12. *See id.* (holding citizens have no First Amendment right to record police officers without “expressive purpose”).

13. *Id.*

The district court looked to other cases involving expressive conduct such as picketing, armband-wearing, and flag-burning, all of which had been deemed protected by the Supreme Court.¹⁴ Concluding that the leading cases required “direct and expressive” conduct, Judge Kearney determined that “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.”¹⁵ Plaintiffs’ claims amounted to nothing more than a “bare assertion” of expressive conduct, which, the court opined, fell far short of their burden of proof.¹⁶ Simply “observing and recording” police activity does not suffice as expressive conduct.¹⁷ Although Fields and Geraci initially moved the court to enter partial summary judgment against them on the First Amendment claim consistent with the court’s opinion so as to permit an immediate appeal, the court denied their request.¹⁸ The Plaintiffs thereafter dismissed their remaining claims so as to proceed with their appeal and filed a notice of appeal to the Third Circuit on March 21, 2016.¹⁹

II. PURPOSEFUL RECORDING OF POLICE

The court deemed that filming for the purpose of criticizing or challenging police conduct had a greater constitutional dimension than filming for other purposes, such as Plaintiff Geraci’s more generalized concern that protesters’ rights might be infringed. The opinion contrasted a recent Eastern District decision concluding that “[p]eaceful criticism of a police officer performing his

14. *Fields*, slip op. at 4 n.33, 6 (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (finding flag burning constitutionally-protected free speech)); *see also* *U.S. v. Eichman*, 496 U.S. 310, 317-18 (1990) (striking down Flag Protection Act of 1989) (citations omitted); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (striking down public school prohibition on “symbolic” speech of wearing armbands protesting Vietnam War) (citations omitted).

15. *See Fields*, slip op. at 4.

16. *See id.*

17. *See id.* at 1. The district court allowed Geraci’s claim of excessive force against four officers and Fields’ Fourth Amendment claims of false arrest and unreasonable search and seizure of his cell phone against one officer to proceed to trial. The court also dismissed Fields’ malicious prosecution claim.

18. Counsel for Geraci also moved to amend the district court’s order and place Geraci’s Fourth Amendment claim in administrative suspense pending a contemplated appeal of the court’s First Amendment ruling, but the court declined to delay the trial on the excessive force claim and expressed concern about the potential for piecemeal appeals. *See Geraci v. City of Philadelphia*, slip op., No. 14-5264 (E.D. Pa. Mar. 14, 2016). The court also shed additional light on its First Amendment ruling, explaining that it was “narrowly tailored to the exceptionally narrow facts presented.” *See id.* at 2 n.6. The court also noted that it had “not seen, and counsel has not shown us, any court extending the First Amendment rights to speech to include silent observation without expressing any challenge to the police.” *Id.* at 2.

19. *See* Jason Nark, *ACLU Challenges Ruling on Right to Film Police*, PHILLY.COM (Mar. 23, 2016), http://articles.philly.com/2016-03-23/news/71735501_1_police-activity-police-state-police-incidents [<http://perma.cc/3A7Z-7K47>].

duties in a public place is a protected activity under the First Amendment.”²⁰

The soundness of the *Fields* decision’s logic might be questioned because the witness taking a photo or video of police activity may not know or even suspect that any violation of a civil right will occur when he or she first takes the photograph or presses “record” to take video.²¹ This may be the very purpose of recording—to capture such a scene for later review and consideration of whether to challenge the action or to encourage others to do so. An “expressive purpose” within the ambit of the district court’s test may not materialize until the events unfold and the video or photo take on a meaning and significance well beyond *Fields*’ stated basis for filming the large police presence, which was that he “just thought [it] would make a great picture.”²²

The district court’s analysis presents a legal and practical quandary—whether courts must routinely examine and assess the credibility of a police observer’s “expressive conduct,” with the litmus test being whether the person intended to criticize, praise, or not express any particular opinion about the police conduct itself. However, efforts to impose some test to “validate” a speaker’s views have largely failed to pass First Amendment muster in recent years.²³

According to Washington Post legal blogger Eugene Volokh, the district

20. *Fields*, slip op. at 6 n.49 (quoting *Montgomery v. Killingsworth*, No. 13-CV-256, 2015 WL 289934, at *6 (E.D. Pa. Jan. 22, 2015) (citation omitted)) (internal quotation marks omitted).

21. One author highly critical of the *Fields* ruling notes that by protecting only those who record police activity with the express goal of “opposing” the police, Judge Kearney appears to withdraw any First Amendment protection for the mere investigation of public officials. Many citizen observers want to create a record for potential judgment and for use in resolving who-did-what disputes in case of potential disagreements — suggesting that only openly confrontational citizens can assert First Amendment rights if they record the police seems to give a perverse incentive to heighten police/citizen conflicts, when the social good is clearly in favor of decreasing such conflicts.

William J. Brennan, *A Problematic Ruling on Photographing Police in Public*, LAW360 (Mar. 25, 2016, 10:32 AM), <http://www.law360.com/articles/774744/a-problematic-ruling-on-photographing-police-in-public> [<http://perma.cc/9DG6-5PCK>].

22. See *Fields*, slip op. at 1. An editorial characterized the district court ruling as “convoluted,” and suggested that those who want to video record police in action should “remember to say the magic words Judge Kearney wants to hear. Something like ‘I’m engaging in expressive activity!’ should do the trick.” Editorial, *People Have a Right to Video Cops*, PHILA. INQUIRER, Mar. 10, 2016, at A14.

23. See *Citizens United v. FEC*, 558 U.S. 310, 392-93 (2010) (Scalia, J., concurring) (“The [First] Amendment is written in terms of ‘speech,’ not speakers. Its text offers no foothold for excluding any category of speaker”); see also *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (Scalia, J.) (finding local ordinance prohibition against hate speech unconstitutional as it contravened First Amendment). Justice Scalia joined in the majority opinions protecting flag burning as protected First Amendment activity. He joined in the opinion reversing the conviction of a Pennsylvania man for Facebook posts consisting of violent rap lyrics directed to his wife. See *Elonis v. United States*, 135 S. Ct. 2001 (2015). Justice Scalia also joined in the majority opinion concluding that protesters at military funerals could not be liable in tort for emotional distress and also were entitled to “special protection” under the First Amendment, which cannot be overcome by a jury finding that such picketing was outrageous. See *Snyder v. Phelps*, 562 U.S. 443 (2011).

court opinion runs contrary to recent decisions from several U.S. Court of Appeals:

Whether one is physically speaking (to challenge or criticize the police or to praise them or to say something else) is relevant to whether one is engaged in expression. But it's not relevant to whether one is *gathering* information, and the First Amendment protects silent gathering of information (at least by recording in public) for possible future publication as much as it protects loud gathering of information.²⁴

Almost every appellate court that has addressed this issue in recent years has recognized that the First Amendment protects video recording of public official activity.²⁵ The First Circuit determined that

[t]he filming of government officials engaged in their duties in a public place, including police officers performing their responsibilities, fits comfortably within these [First Amendment] principles. Gathering information about government officials in a form that can readily be disseminated to others serves a cardinal *First Amendment* interest in protecting and promoting “the free discussion of governmental affairs.”²⁶

The First Circuit analogized the rights of a citizen recorder to the First Amendment right to gather news.²⁷

24. Eugene Volokh, Op-Ed., *Court: No First Amendment Right to Videorecord Police Unless You Are Challenging the Police at the Time*, WASH. POST: VOLOKH CONSPIRACY (Feb. 23, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/23/no-first-amendment-right-to-videorecord-police-unless-you-are-challenging-the-police-at-the-time> [<https://perma.cc/8NF8-AQKD>]; *see also* Radley Balko, Op-Ed., *Federal Judge: Recording Cops Isn't Necessarily Protected by the First Amendment*, WASH. POST: WATCH (Feb. 23, 2016), <https://www.washingtonpost.com/news/the-watch/wp/2016/02/23/federal-judge-recording-cops-isnt-necessarily-protected-by-the-first-amendment> [<https://perma.cc/8S2N-3W9Q>].

25. *See, e.g.*, *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014); *Adkins v. Limtiaco*, 537 F. App'x 721, 722 (9th Cir. 2013); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 599-600 (7th Cir. 2012) (striking statute that would prohibit recording of police officers with a cell phone on First Amendment grounds); *Glik v. Cunniffe*, 655 F.3d 78, 79 (1st Cir. 2011) (holding “clearly established” constitutional right to videotape police activity); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (finding “First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct”).

26. *See Glik*, 655 F.3d at 82 (citing *Mills v. Alabama*, 384 U.S. 214, 218 (1966)); *see also* *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (citing Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 877 (1966)) (“Freedom of expression has particular significance with respect to government because ‘[i]t is here that the state has a special incentive to repress opposition and often wields a more effective power of suppression.’”).

27. *See Glik*, 655 F.3d at 83. The court stated that [i]t is of no significance that the present case . . . involves a private individual, and not a reporter, gathering information about public officials. The *First Amendment* right to gather news is, as the Court has often noted, not one that inures solely to the benefit of the news media; rather, the public's right of access to information is

At least one Eastern District case concluded that “federal case law has overwhelmingly held that citizens do indeed have a right to record officers in their official capacity so long as they do not interfere with an officer’s ability to do his or her job.”²⁸ Conversely, the Third Circuit had found police officers entitled to qualified immunity on claims they had retaliated against those who recorded them.²⁹ According to the Third Circuit, “there was insufficient case law establishing a right to videotape police . . . to put a reasonably competent officer on ‘fair notice’” that an individual would assert a claim that a police officer’s seizure of a camera for videotaping police during the stop would violate the First Amendment.³⁰

The court in *Fields* was not swayed by a Philadelphia Police Department policy prohibiting officers from interfering with the very recordings at issue in this case. The Police Department policy provides that “[a]ll police personnel, while conducting official business or while acting in an official capacity in any public space, should reasonably anticipate and expect to be photographed,

coextensive with that of the press.

Id. (emphasis added).

28. *Gaymon v. Borough of Collingdale*, No. 14-5454, 2015 WL 4389585, at *9 n.9 (E.D. Pa. July 17, 2015) (McHugh, J.) (citing Elizabeth J. Frawley, Comment, *No Calling Cut: The Political Right to Record Police*, 17 U. PA. J. CONST. L. 287, 288 (2014)). In *Collingdale*, plaintiff Kia Gaymon started video recording a police officer yelling at her husband outside their house after a neighbor’s complaint. *See id.* at *1. The officer moved toward Gaymon, who backed into her house. *See id.* The officer followed Gaymon into her home without permission and ordered that she stop videotaping him, declaring that she was violating the Wiretap Act. *See id.* at *2. When she refused, the officer is claimed to have pushed her against a wall and held a taser to her chest and placed her under arrest for disorderly conduct. *See id.* In denying defendants’ motion to dismiss, the court rejected qualified immunity as a viable defense, noting that the Wiretap Act was inapposite because the recording was not surreptitious in nature and characterizing the criminal charges lodged against the Gaymons as “makeweight.” *See id.* at *10.

29. *See Kelly v. Borough of Carlisle*, 622 F.3d 248, 263 (3d Cir. 2010). District courts in this circuit have produced inconsistent results on First Amendment claims against individual officers. *See, e.g., Montgomery v. Killingsworth*, No. 13cv256, 2015 WL 289934, at *8 (E.D. Pa. Jan. 22, 2015) (Yohn, J.) (concluding “peaceful criticism” of police has “strong social value” and is protected under First Amendment); *see also Matheny v. Cnty. of Allegheny*, No. 09-1070, 2010 WL 1007859, at *6 (W.D. Pa. Mar. 16, 2010) (dismissing First Amendment claim by student charged with Wiretap Act violation after recording university police because “right to record police conduct was not ‘clearly established’”); *Pomykacz v. Borough of West Wildwood*, 438 F. Supp. 2d 504 (D.N.J. 2006) (holding arrest of self-described citizen activist for taking photographs and monitoring local mayor constituted First Amendment retaliation); *Robinson v. Fetterman*, 378 F. Supp. 2d 534, 538–42 (E.D. Pa. 2005) (Bartle, J.) (upholding First Amendment right to videotape state troopers over truck safety concerns). *Fields* and *Geraci* argued that the post-*Kelly* decisions do not directly address the right to record police but only whether such a right is “clearly established” for qualified immunity purposes. The *Kelly* court did not overrule these decisions, but it distinguished them due to the particular danger inherent with traffic stops. *See Kelly*, 622 F.3d at 262 (“Our decision on the First Amendment question is further supported by the fact that none of the precedents upon which *Kelly* relies involved traffic stops, which the Supreme Court has recognized as inherently dangerous situations.”).

30. *See Kelly*, 622 F.3d at 262.

videotaped and/or be audibly recorded by members of the general public.”³¹ The policy further instructs officers not to interfere with recording activities, not to intentionally damage or confiscate recording devices, and not to delete recorded material.³²

The journalistic lines have blurred from the traditional media outlets in recent years due to the proliferation of social media and the ubiquitous use of cellphone cameras to document important breaking news developments, as well as completely mundane human activities.³³ The *Fields* case presents an interesting and important question of whether the courts will not just acknowledge, but also affirmatively take steps to recognize, those expanded boundaries in its First Amendment jurisprudence.

III. HOUSE BILL 1538—PROMOTING POLICE PRIVACY OVER TRANSPARENCY?

The ongoing tension between greater police transparency, accountability, and asserted safety concerns is also being played out before the Pennsylvania legislature. Pending bills would restrict public officials from releasing the name of a law enforcement officer who was involved in either a “use of force” or discharge of firearm while on duty.³⁴ House Bill 1538,³⁵ introduced in September 2015, would shield from public view the identity of the officers involved in almost all use of force incidents and police shootings. The legislation would prohibit release of the officer’s identity at any time before a completed “official investigation.”³⁶ Proponents of the proposed law maintain that it would serve to protect the reputations of officers from public condemnation until after the internal investigation is complete, and also help to ensure the safety of officers

31. Phila. Police Dep’t Memorandum 11-01, REPORTERS COMMITTEE FOR THE FREEDOM OF PRESS 1 (Sept. 23, 2011), http://www.rcfp.org/sites/default/files/docs/20120326_164818_phiadelphia_police_memo.pdf [<https://perma.cc/34ZG-9KT5>].

32. *See id.* That memorandum was later amended and adopted as Directive 8.12. *See* Directive 8.12, PHILA. POLICE DEP’T (Nov. 9, 2012), <https://www.phillypolice.com/assets/directives/D8.12-PicturesVideoAndAudioRecordingsOfPoliceOfficers.pdf> [<https://perma.cc/G325-CTHF>]. The directive clarifies that “press credentials” are not necessary to record police. *See id.* at 2.

33. What or who qualifies as a member of the media in this era of YouTube videos, blogs, and the decline of traditional media-supported investigative reporting is well beyond the scope of this article. For a detailed review of the First Amendment speech implications of the proliferation of technology permitting anyone to record and disseminate images and audio, see Seth F. Kreimer, *Pervasive Image Capture and the First Amendment: Memory, Discourse, and the Right to Record*, 159 U. PA. L. REV. 335 (2011).

34. *See, e.g.*, H.R. 1538, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015). The prohibition would extend to “any public official or public employee conducting or participating in the official investigation or any person acting on behalf of such public official or public employee.” *Id.* at § 511(a).

35. *Id.*

36. *See id.*; *see also* Jonathan Blanks, Editorial, *In Pa., a Misguided Attempt to Protect Police*, PHILA. INQUIRER, Apr. 21, 2016, at A18.

and their families against retaliation. If the official investigation does not result in a criminal charge being lodged against the officer relating to the discharge of the firearm or the use of force, then the officer's name and identifying information still may not be released to the public, "if the release of the information can reasonably be expected to create a risk of harm to the person or property of the law enforcement officer or an immediate family member of the law enforcement officer."³⁷

At the press conference announcing the bill, its prime sponsor, flanked by members of the Fraternal Order of Police, asserted that withholding police officer identities serves to avoid the proverbial "rush to judgment" and to diminish concerns over acts of revenge or retribution directed toward the officers involved and their families.³⁸ The Pennsylvania House approved HB 1538 as amended by a vote of 162-38 in November 2015, and the bill was referred to the Senate Committee on Law and Justice.³⁹ A parallel Senate bill, SB 1061,⁴⁰ has identical language, except that it would also punish those public officials who violate the law with a second degree misdemeanor offense.⁴¹ Therefore, if the Senate version of the bill becomes law, a police chief or others involved in the investigation could be charged criminally for releasing the identity of an officer who fired a weapon or used force, if that disclosure is made any time before the official investigation is complete.

The Pennsylvania NewsMedia Association (PNA) has opposed the legislation, contending that these bills present an obstacle to the public's right to know and understand what is happening with law enforcement in communities.⁴²

37. See H.B. 1538 at § 511(b)(2). Section 511(a) provides:

General rule.—Pending the conclusion of an official investigation that involves the discharge of a firearm or use of force by a law enforcement officer during the performance of the law enforcement officer's official duties, the name and identifying information of the law enforcement officer may not be released to the public by any public official or public employee conducting or participating in the official investigation or any person acting on behalf of such public official or public employee.

Id. at § 511(a).

38. See Martina White, *Press Release: Protecting Identities of Police Officers Under Investigation*, YOUTUBE (Sept. 21, 2015), <https://www.youtube.com/watch?v=IoKx2wwJreA> [<https://perma.cc/KS2V-ZHPX>].

39. In order to quell some objections raised, section 511(b) of the bill was amended to provide that the law enforcement officer's name and identifying information "shall" be released to the public if the officer is charged with a criminal offense relating to the discharge of the firearm or use of force.

40. S.B. 1061, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015).

41. See *id.* at § 511(c).

42. See Letter from Paula K. Knudsen, Director of Government Affairs/Legislative counsel, Pa. NewsMedia Ass'n, to Ron Marsico, Chairman, Pa. House Judiciary Committee and Joseph Petrarca, Minority Chairman, Pa. House Judiciary Committee (Nov. 9, 2015), <http://panewsmedia.org/docs/default-source/government-affairs/2015-2016/pna-letter-hb-1538.pdf> [<https://perma.cc/MH9S-5WKT>]. The Police Advisory Commission in Philadelphia expressed similar objections. See Cherri Gregg, *Philly's Top Cop Speaks Out on Bill Aimed at Protecting Identity of Officers Involved in Shootings*, CBS PHILA. (Nov. 24, 2015, 8:10

While recognizing that law enforcement officers keep the public safe and put themselves at great risk, PNA argues that it is important for residents to be able to learn the circumstances when force or a weapon has been used in order to assess the performance of police and the public officials responsible for their hiring, supervision, and training.⁴³ In a letter to legislators, PNA cited standards suggested by the U.S. Department of Justice COPS program and the International Association of Chiefs of Police that, in fact, stress the importance of promptly convening a press conference after all officer-involved shootings and promoting transparency as a key element in strengthening police–community relations.⁴⁴

The pending legislation imposes no time limit on the prohibition of the release of identity information except the issuance of a final investigative report.⁴⁵ Nor does it define the term “use of force” or the rather amorphous “risk of harm” standard that public officials would be required to observe under threat of arrest if they exercised their discretion to publicly disclose an officer’s identity in violation of the law. If the official investigative report finds misconduct short of criminal conduct on the part of the officer(s) involved, the law may still preclude public officials in any way involved in the investigation from disclosing the officer’s identity. The reality is that some of these official investigations take years, and there is no mechanism in the proposed law to weigh the respective benefits of disclosure against the potential risk of harm either to the officer or the officer’s family.⁴⁶ The bill also does nothing to address the crisis of confidence

AM), <http://philadelphia.cbslocal.com/2015/11/24/phillys-top-cop-speaks-out-on-bill-aimed-at-protecting-identity-of-officers-involved-in-shootings/> [https://perma.cc/T9YQ-5R6M].

43. See Knudsen, *supra* note 42. PNA also opposed a like-minded measure that would have created a Right-to-Know Law exemption for home addresses of all public officials. See Paula Knudsen, *PNA Opposes Amendment to Senate Bill 411 Creating Blanket Exemption for Home Addresses*, PA. NEWSMEDIA ASS’N (Oct. 20, 2015), <http://panewsmedia.org/newspublications/pnapressrelease/2015/10/20/pna-opposes-amendment-to-senate-bill-411-creating-blanket-exemption-for-home-addresses> [https://perma.cc/WM8M-E4QG].

44. The Pennsylvania Bar Association (PBA) also opposes the pending legislation as an unreasonable restriction on First Amendment speech and because it impedes access to public information already regulated by the Pennsylvania RTKL. See generally 65 PA. CONS. STAT. ANN. §§ 67.101–67.3104 (West 2016). The PBA’s House of Delegates on May 13, 2016 approved a recommendation of the Civil & Equal Rights Committee in which the committee expressed concern that the legislation “does not adequately protect access to public information and free speech, and fails to grant public officials the ability to exercise judgment to release police identifying information when they may deem disclosure appropriate and in the best interests of the communities they serve.” Recommendation of the Pa. Bar Assoc. Civil & Equal Rights Comm. (Apr. 7, 2016) (on file with the *Villanova Law Review*).

45. See Arizona Governor Doug Ducey, a Republican, vetoed similar legislation last year that would have prohibited the release of the names of officers involved in shootings until sixty days after the incident. See Rick Rojas, *Arizona Governor Vetoes Bill to Shield Police Names*, N.Y. TIMES: POLITICS (Mar. 30, 2015), http://www.nytimes.com/2015/03/31/us/politics/arizona-governor-doug-ducey-vetoes-holding-back-the-names-of-officers-in-shootings.html?_r=0 [https://perma.cc/9HXG-G6XX].

46. A recent GUARDIAN article explored the trend in police employment contracts to keep officer discipline and citizen complaints from being publicly disclosed and to “slow down” misconduct investigations. See George Joseph, *Leaked Police Files Contain Guarantees Disciplinary Records Will be Kept Secret*, GUARDIAN: US POLICING (Feb. 7,

raised by recent highly publicized police shooting cases where the official investigation itself took an inordinate length of time and the delay in the release of findings heightened community distrust of the independence of the investigation and of the integrity of law enforcement. In such cases, while the investigation may well be careful and thorough, an inordinate delay in release of findings tends to undermine the legitimacy the public will give to the final report.⁴⁷ Of course, in any high-profile investigation, moving too fast or imposing artificial deadlines will inevitably be criticized as a “rush to judgment.”⁴⁸

Civil rights lawyers have expressed concern that concealing the identities of officers who have injured or killed others will render it more difficult in some instances to pursue available remedies on a timely basis or within the requisite statute of limitations. Objectors also point out that the Right-to-Know Law (RTKL) already allows officials to decline to disclose the identity of an officer involved in an incident, subject to the agency’s exercise of discretion to disclose otherwise exempt records under limited circumstances, including where “[t]he agency head determines that the public interest favoring access outweighs any individual, agency or public interest that may favor restriction of access.”⁴⁹ They

2016, 7:00 AM), <http://www.theguardian.com/us-news/2016/feb/07/leaked-police-files-contain-guarantees-disciplinary-records-will-be-kept-secret> [<https://perma.cc/35JR-JUWY>].

Those opposing the legislation note that the leaders of the Fraternal Order of Police in Pittsburgh and Philadelphia could not point to a single incident in Pennsylvania in which an officer or his family was harmed or threatened during an investigation of a shooting or use of force. See Jonathan D. Silver, *Pittsburgh FOP Head Backs Proposal to Keep Cops Anonymous During Investigations*, PITTSBURGH POST-GAZETTE (Sept. 18, 2015, 2:31 PM), <http://www.post-gazette.com/news/state/2015/09/18/Pittsburgh-FOP-head-backs-proposal-to-keep-cops-anonymous-during-investigations/stories/201509180303> [<https://perma.cc/5SMN-YZCJ>].

47. See, e.g., Wayne Drash, *Video Released of Deadly Chicago Police Shooting*, CNN (Jan. 14, 2016, 9:12 PM), <http://www.cnn.com/2016/01/14/us/chicago-police-shooting-cedrick-chatman-video/index.html> [<https://perma.cc/QD54-BBZM>] (“Newly released videos of 2013 fatal police shooting show a teen running away from two police officers when he is shot and killed in broad daylight in a South Side Chicago neighborhood. . . . The City of Chicago opposed the release of the videos for more than three years.”). In the Laquan McDonald case, Chicago “Mayor Rahm Emanuel was pilloried for delaying” for more than a year “the release of police dash-cam video” of police shooting McDonald 16 times. See John Bryne, *Anita Alvarez’s Re-election Could Hinge on Voters’ View of Laquan McDonald Case*, CHI. TRIB. (Mar. 4, 2016, 5:52 PM), <http://www.chicagotribune.com/news/local/politics/ct-anita-alvarez-cook-county-states-attorney-met-20160303-story.html> [<https://perma.cc/3GG8-XRML>]. Mayor Emanuel did not release the video until after he was reelected and only hours before the court-ordered release of the video. See *id.* In December 2015, Mayor Emanuel hastily appointed a Task Force on Police Accountability to improve independent oversight of police misconduct and establish best practices for release of videos of police-involved incidents.

48. See, e.g., Jeff Gammage, *Paterno Family Report: JoePa Allegations Were ‘Rush to Judgment,’* PHILLY.COM (Feb. 11, 2013), http://articles.philly.com/2013-02-11/news/37022080_1_freeh-report-freeh-investigators-sue-paterno [<https://perma.cc/V8WD-RCRQ>].

49. See 65 PA. CONS. STAT. ANN. § 67.506(c)(3) (West 2016). It is unclear whether the prohibition on disclosure of officer identities in the proposed law, if enacted, might trump the foregoing section of the RTKL.

also maintain that police and prosecutors close to the investigation should continue to make the judgment call, whether the identities of the officer(s) involved in a serious incident should be disclosed, and whether there is a real and substantial risk of harm that outweighs any public right to such information and justifies withholding that information until the risk has abated.

The recent Eastern District decision in *Fields*, and the pending legislation that would prohibit disclosure of police identifying information following police shootings or use of force run contrary to the national trend toward greater disclosure and transparency in reporting on such incidents and raise cutting edge First Amendment issues. Perhaps the *Fields* appeal to the Third Circuit will generate more detailed guidance as to the permissible parameters of public photography and videotaping of police performing their duties in public places. Similarly, in the event the pending legislation is enacted limiting the release of officers' identifies until after the conclusion of an official investigation, the inevitable court challenge may test its constitutionality, and may also resolve the question of whether disclosure of police identifying information can be prohibited by law or even criminalized.

IV. MORE BODY CAMERAS, LESS PUBLIC ACCESS TO VIDEO RECORDINGS

Against this backdrop, law enforcement agencies across the country, including in Philadelphia, are purchasing (with the aid of federal grant dollars) and deploying body cameras for officers in the field. "Police-worn body cameras have been championed by police chiefs and politicians as critical to improving transparency."⁵⁰ Body camera evidence most often corroborates either testimony by police or police reports and helps to reduce credibility issues created with conflicting police and suspect accounts of arrests.⁵¹ On occasion, body cameras

50. Kimberly Kindy & Kennedy Elliott, *2015 Police Shootings Investigation*, WASH. POST (Dec. 26, 2015) [hereinafter *2015 Police Shootings*], <https://www.washingtonpost.com/graphics/national/police-shootings-year-end> [https://perma.cc/7D8W-K86S]; see also Kimberly Kindy, Marc Fisher, Julie Tate, & Jennifer Jenkins, *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015) [hereinafter *A Year of Reckoning*], <http://www.washingtonpost.com/sf/investigative/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000> [https://perma.cc/K6AG-MKNK]. Last year, six percent of the fatal shootings by police were captured by body cameras. See *A Year of Reckoning*, *supra* note 50. Indictments of police officers also tripled in 2015, compared with previous years. See *id.* In three-quarters of the fatal shootings, police were under attack or protecting someone who was, and one-quarter involved a fleeing suspect. See *2015 Police Shootings*, *supra* note 50.

51. See Michael D. White, *Police Officer Body-Worn Cameras: Assessing the Evidence*, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES (2014), <https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police%20Officer%20Body-Worn%20Cameras.pdf> [https://perma.cc/95VD-9EVZ]. The perceived benefits of officer body-worn cameras include (1) increased transparency and police legitimacy, (2) improved police behavior, (3) improved citizen behavior, (4) expedited resolution of citizen complaints/lawsuits, and (5) opportunities for police training. See *id.*; see also Chicago Police Dep't Special Order SO3-05 (Feb. 23, 2012), <http://directives.chicagopolice.org/directives/data/a7a57bf0-12dc41eb-af712-dc48->

will undermine a police officer's account of an arrest or use of force and provide support for a claim of wrongful arrest or abuse.⁵²

The pending legislation in Harrisburg would exempt certain oral and video recordings, such as body camera footage by law enforcement officers, from disclosure under the RTKL.⁵³ The bill mirrors a pending Indiana law that would allow police departments to withhold video from police body cameras, notwithstanding the fact that some view these videotapes as “arguably the single most effective deterrent of police abuse in the history of this country.”⁵⁴

V. ARE LAW ENFORCEMENT EFFORTS TO PRECLUDE PUBLIC ACCESS DESTINED TO REPEAT HISTORY?

Just last year, a new Pennsylvania law designed to show support for law enforcement and victims by restricting the rights of persons convicted of serious crimes from speaking publicly about matters that might cause emotional distress to the victims or their families was struck down on First Amendment grounds. The “Revictimization Relief Act,”⁵⁵ approved unanimously by the House of Representatives and by a substantial majority of the Senate and signed into law by former Governor Tom Corbett, was fast tracked to passage just weeks before a statewide election. The law was spurred by a college commencement speech made via audio recording from jail by a high-profile convicted cop killer.

The Revictimization Relief Act was so broadly worded that it could limit the

ff1427a411b25de4.pdf?hl=true [https://perma.cc/KBM8-DAXC] (“The in-car video systems can provide members with an invaluable instrument to enhance criminal prosecution by providing powerful evidence of criminal activity, limit civil liabilities and objectively document officer conduct during individual interactions.”); Pervaiz Shallwani, *NYPD Prepares to Expand Body Camera Use*, WALL ST. J. (Mar. 2, 2016, 2:38 PM), <http://www.wsj.com/articles/nypd-wrapping-up-body-camera-pilot-program-1456916402> [https://perma.cc/DD65-B78S].

52. See, e.g., Jonathan Turley, *Video: Baltimore Police Officer Slaps and Kicks 16-Year-Old Student* (Mar. 4, 2016), <https://jonathanturley.org/2016/03/04/video-baltimore-police-officer-slaps-and-kicks-16-year-old-student> [https://perma.cc/7T6F-TPU6].

53. See S.B. 976, 2015 Gen. Assemb., Reg. Sess. (Pa. 2015). Practical concerns raised by law enforcement to restrict body-cam footage from disclosure under the RTKL or otherwise include having to address the anticipated influx of Office of Open Records (OOR) requests by citizens with no relationship to the incident and protecting the privacy of those who are recorded inside residences.

54. See Jonathan Turley, *Indiana Moves Toward Giving Police Departments the Right to Withhold Video From Police Body Cameras* (Jan. 29, 2016), <https://jonathanturley.org/2016/01/29/indiana-moves-toward-law-giving-police-departments-the-right-to-withhold-video-from-police-body-cameras> [https://perma.cc/TLW8-C6AH]; see also Sean Philip Cotter, *Body Cameras: Your Right to Know*, YORK DISPATCH (Apr. 25, 2016, 6:46 PM), <http://www.yorkdispatch.com/story/news/2016/03/13/body-cameras-your-right-know/81431794> [https://perma.cc/966R-7WUC].

55. See 18 PA. CONS. STAT. ANN. § 11.1304 (West 2015), *invalidated by* *Jamal v. Kane*, 105 F. Supp. 3d 448 (M.D. Pa. 2015). The statute authorized the Commonwealth's Attorney General, district attorneys, and “victims” of personal injury crimes to bring a civil action seeking injunctive and other relief whenever an “offender” engages in any “conduct which perpetuates the continuing effect of the crime on the victim.” See *id.*

speech of people professing their innocence during pending appeals. It could also have precluded former felons from speaking publicly about their experiences with the criminal justice system, including how to avoid getting involved in violence, gang, or drug activity. The act was promptly challenged in federal court as an impermissible restraint on protected speech, and Chief Judge Christopher C. Conner of the Middle District ruled that “[h]owever well-intentioned its legislative efforts, the General Assembly fell woefully short of the mark.”⁵⁶ “The result is a law that is manifestly unconstitutional.”⁵⁷ Chief Judge Conner concluded that the law was “unlawfully purposed, vaguely executed and patently overbroad in scope.”⁵⁸

Will HB 1538/SB 1061, if enacted, go the same route as the ill-fated Revictimization Relief Act when challenged? Putting First Amendment doctrine aside, both the *Fields* ruling and the pending legislation designed to preclude or delay disclosure of the identities of officers involved in serious incidents present the question of whether transparency or secrecy will enhance or further undermine the public’s trust and confidence in local law enforcement. At the same time police are being armed with body cameras, *Fields* and HB 1538/SB 1061 will deprive the public of information and images of police who are involved in the most high profile, and the most controversial, incidents. To the extent bolstering accountability is a goal of increasing use of video by law enforcement, it follows that increasing use by the public of video of police activity should advance the same objective. Unfortunately, neither *Fields* nor HB 1538/SB 1061 prioritizes accountability or transparency in the context of high profile police conduct at a time when greater transparency may be the surest path toward restoring and maintaining the public’s trust and faith in law enforcement.

VI. POLICE DASH CAM VIDEOS: DOES THE PUBLIC HAVE A RIGHT TO WATCH?

The movement toward body cameras as evidence-gathering tools follows the increasingly common use of patrol-car-mounted cameras that have captured many car chases and arrests, and provided regular fodder for the COPS TV Show, the second longest running television program on Fox.⁵⁹ Dash-cam videos or mobile video recordings (MVRs) present similar public access issues but are obviously equipment, like body cameras, that are under the control of law enforcement and not the private property of the photographer. The context in which such videos are sought is typically under the state’s RTKL requests. One such request has wound its way to the Pennsylvania Supreme Court and promises

56. See Jamal, 105 F. Supp. 3d at 452.

57. *Id.* (“The First Amendment does not evanesce at *any* gate, and its enduring guarantee of freedom of speech subsumes the right to expressive conduct that some may find offensive.”).

58. *Id.*

59. Part of COPS’ enduring appeal derives from its catchy theme lyrics: “Watcha gonna do when they come for you?” See BAD BOYS (Inner Circle 1987).

to shape the contours of the law in this rapidly-evolving field.⁶⁰

In *Pa. State Police v. Grove*,⁶¹ the Commonwealth Court concluded that two recordings of state troopers at the scene of a traffic accident made by vehicle cameras were not exempt from disclosure under either the RTKL or the Criminal History Record Information Act (CHRIA).⁶² The MVR equipment is activated and begins recording when a trooper turns on the patrol car's emergency lights or siren. The court deemed MVRs to be records "at the core [of] the RTKL's purpose of enabling the public to 'scrutinize the actions of public officials, and make public officials accountable for their actions.'"⁶³

The Supreme Court recently granted a state police petition to appeal from the *Grove* decision, leaving the parties to brief six questions, including whether an MVR is exempt under the RTKL or the CHRIA as criminal investigation material, and whether the audio of troopers speaking is exempt, as well as whether the Wiretap Act⁶⁴ applies to the audio component of MVRs. The Pennsylvania State Police have continued to deny access to videos following the Commonwealth Court decision, advising RTKL requesters that the case is on appeal.⁶⁵

In a second, unreported case presenting the issue last year, the Commonwealth Court affirmed the Office of Open Records' determination ordering state police to provide a copy of a video recording of a state trooper

60. Courts in New Jersey are also examining the issue of whether police dashboard cameras are disclosable under New Jersey's Open Public Records Act (OPRA). In a June 30, 2016 decision, a three-judge panel of the New Jersey Superior Court, Appellate Division, voted two to one to affirm a lower court's holding that dashboard camera footage is disclosable under the OPRA. *See Paff v. Ocean Cty. Prosecutor's Office*, No. A-4226-14T3, 2016 WL 3547502 (N.J. Super. Ct. App. Div. June 30, 2016).

61. 119 A.3d 1102 (Pa. Commw. Ct. 2015), *appeal granted*, 133 A.3d 292 (Pa. 2016). As to the second recording, the court reversed and remanded in part to permit the state police to make limited redactions of exempt investigative information in the form of interviews from the audio component of the recording. The court also rejected a Wiretapping and Electronic Surveillance Act challenge on the grounds that the troopers had notice of the recordings and that the act is inapplicable to video. *See* 18 PA. CONS. STAT. ANN. § 5702 (West 2016).

62. The RTKL is "designed to promote access to government information so as to prohibit secrets, permit scrutiny of the actions of public officials, and make public officials accountable for their actions." *See Grove*, 119 A.3d at 1107 (citing *Levy v. Senate of Pa.*, 65 A.3d 361, 381 (Pa. 2013); *Pa. State Police v. McGill*, 83 A.3d 476, 479 (Pa. Commw. Ct. 2014); *Pa. Dep't of Environmental Protection v. Cole*, 52 A.3d 541, 547 (Pa. Commw. Ct. 2012)).

63. *See Grove*, 119 A.3d at 1108–09 (quoting *McGill*, 83 A.3d at 479). The court also recognized that MVRs that contain witness interviews, interrogations, and other investigative work are investigative information exempt from disclosure under the RTKL and CHRIA.

64. *See Pa. State Police v. Grove*, 133 A.3d 292 (Pa. 2016). For a discussion of recent controversial attorney prosecutions under the Pennsylvania Wiretap Act, see Thomas G. Wilkinson & Joshua N. Ruby, *Wiretap Prosecutions of Defense Attorneys: The Serious Legal and Ethical Concerns Arising from the Use of Recorded Conversations as Evidence*, 61 VILL. L. REV. TOLLE LEGE 1 (2016).

65. *See* Ben Seal, *Pa. Justices to Grapple with Public Access to Police Footage*, LEGAL INTELLIGENCER (Mar. 29, 2016), <http://www.thelegalintelligencer.com/id=1202753238162/Pa-Justices-to-Grapple-With-Public-Access-to-Police-Footage?slreturn=20160421231639>.

during a traffic stop under both the RTKL and the CHRIA.⁶⁶

VII. CONCLUSION: FIRST AMENDMENT IN THE CROSSHAIRS ON SEVERAL FRONTS

The ongoing tension between enhancing transparency and accountability in law enforcement by granting greater access to video images of police activity in public places and competing concerns raised by law enforcement over safety and privacy is being played out both in the courts and the legislature in Pennsylvania. The federal and state appellate courts may be called upon to resolve the difficult issues presented on multiple fronts in the near future.

The Eastern District decision in *Fields* and *Geraci* raises, but does not answer, the important question of when photographing or filming police, or other public officials for that matter, will be deemed protected speech so as to qualify for First Amendment protection. Instead, the court proffered its own litmus test, finding that the Plaintiffs failed to expressly criticize the police conduct they sought to photograph or video and that such omission deprived them of any First Amendment protection. How many clashes between photographers and police must occur for the right to film or photograph in a public place without interfering with lawful police activity to be recognized? The court declined to grapple with and resolve these questions, leaving them for another day or a higher authority, while other circuits have confronted the issue directly and found a First Amendment right to exist in this context. The appeal in *Fields* and *Geraci* offers the Third Circuit the opportunity to finally answer the question, and thereby provide useful guidance to law enforcement as well as those who choose to photograph or record the public conduct of police either because it would “make a great picture” or because they sincerely believe citizens’ rights are being infringed by the excessive use of force.

There is a similar clash between transparency and perceived safety concerns on the related question of whether the identities of law enforcement officers who use force or fire weapons in the line of duty may be disclosed to the public,

66. See *Pa. State Police v. Grove*, No. 1646 C.D. 2014, 2015 Pa. Commw. Ct. Unpub. LEXIS 714 (Pa. Commw. Ct. Sept. 28, 2015) (Leavitt, J.). Michelle Grove requested two recordings of Pennsylvania State Police (PSP) troopers at the scene of a traffic accident in Potter Township in March of 2014 (the same accident at issue in the Grove RTKL request). The PSP denied Grove’s request, asserting that it was exempt from disclosure as an investigative record under section 708(b)(16) of the RTKL and section 9106(c)(4) of the CHRIA. On appeal, the OOR affirmed in part and reversed in part. The OOR departed from two previous decisions and determined that the PSP’s decision to withhold the MVR for the stated reason that it was “investigative” in nature was erroneous because the MVR recordings are a “routine and automatic function of police work and does not inherently relate to any specific investigation. Further, [an MVR] does not reveal whether an investigation has been instituted or the progress of an ongoing investigation.” See *id.* at *4. The court agreed, viewing the connection to a criminal investigation “too tenuous to allow the State Police to claim the recording to be exempt as investigatory in nature.” See *id.* at *16. The court noted that Grove received only a warning, and, thus, there was no “criminal” proceeding. See *id.* at *12.

pending the outcome of an official investigation. In the event the pending legislation is passed, the courts will likely be asked to resolve that tension. However the controversy plays out as a legal matter, prohibiting or penalizing public officials from making disclosures concerning police use of force or weapons when they deem appropriate to keep the public adequately apprised of law enforcement activity appears to be a misstep toward opacity rather than transparency.

Finally, public access to police body camera and dash-cam videos or MVRs under the Commonwealth's RTKL presents another facet of the increasing demands for the right to record or photograph law enforcement officers in action, either for the sake of curiosity, for documenting newsworthy events, or for the investigation and pursuit of civil rights and other claims of abuse or excessive force. The Pennsylvania Supreme Court faces interesting challenges parsing through the scope of the investigatory records exemption under the law and weighing it against the statutory and public policy arguments favoring access to public records.