



TO RECORD AND PROTECT

Why New Jersey Needs a Statewide First Amendment Policing Policy



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INTRODUCTION

George Floyd. Eric Garner. Walter Scott. Freddie Gray. Alton Sterling.

We know these names because concerned bystanders bravely recorded tragic acts of police violence. How many more names do we not know and how many stories will we not hear, simply because no one was there to record?

Camera phones are everywhere and many New Jerseyans have the ability to record at a moment's notice. Videos and recordings can be critical tools in documenting police abuse and holding law enforcement accountable.

The First Amendment to the United States Constitution and Article I, paragraph 6 of the New Jersey Constitution both protect the right to free expression, which includes the “right to receive information and ideas.”¹ The U.S. Court of Appeals for the Third Circuit, New Jersey’s Appellate Division and the U.S. Department of Justice all agree that the right to receive information and ideas must include the ability to record police conducting their official duties.² Thus, if police officers try to intimidate or otherwise prevent residents from recording, they may be infringing on First Amendment rights.³

As New Jersey, along with the rest of the nation, seeks to transform policing and ensure anti-racist policies and practices, we need to go beyond reforming police conduct and empower communities to hold law enforcement accountable. Reform means nothing without accountability to the communities served. An important next step in New Jersey is to reaffirm every resident’s right to record police activity through the creation of a statewide First Amendment Policing Policy.

WHAT IS A FIRST AMENDMENT POLICING POLICY?

Several major police departments—including Chicago,⁴ Philadelphia,⁵ New York City⁶ and Newark⁷—have created First Amendment Policing policies to ensure officers are properly trained on how to interact with residents who seek to record them.

While each policy varies, a police department’s First Amendment Policing policy should typically instruct officers on how to respond in the following circumstances:

- People verbally criticizing police
- People recording police activity
- Officers requesting to review the pictures, video or audio captured on a bystander’s recording device
- Officers pursuing a warrantless search and/or seizure of a bystander’s recording device

WHY DOES NEW JERSEY NEED A FIRST AMENDMENT POLICING POLICY?

Although the right to speak freely and the right to record officers are clearly established under the First Amendment and Article I, paragraph 6 of the New Jersey Constitution, there have been numerous incidents of officers intimidating or retaliating against bystanders who record them. As more people seek to hold law enforcement accountable through recording police activity, New Jersey can be a national leader by reaffirming these basic rights through policy, ensuring residents know their rights and officers receive training about them.

Even though these rights have been established for years, ongoing incidents of police retaliating against New Jersey residents for recording them demonstrate the need for clear and consistent guidance. For example, in 2020, after nearly two years of court proceedings, a man was finally cleared of charges of obstructing justice after he filmed plainclothes Paterson police officers performing an arrest.⁸ There have also been cases in Newark and West New York of officers wrongfully detaining or arresting residents for recording, which have resulted in settlement agreements requiring those police departments to create First Amendment Policing policies.⁹ No resident should have to go through this much effort to vindicate their right to record, and it is impossible to know how many residents are charged and plead guilty to avoid the fight, or are intimidated into not recording at all.

These incidents demonstrate the need for New Jersey to educate all officers on the First Amendment right to record police and prohibit police from stopping, discouraging or retaliating against residents who seek to record them.

NEW JERSEY MUST CREATE A STATEWIDE FIRST AMENDMENT POLICING POLICY

The New Jersey Institute for Social Justice (NJISJ) and ACLU-NJ believe that all police departments in New Jersey should have a First Amendment Policing policy that protects the right to record and even criticize police conduct.

Just as Attorney General Grewal recently revised New Jersey's statewide Use of Force Policy,¹⁰ the Attorney General should also create a statewide First Amendment Policing Policy to guide law enforcement's interactions with people exercising their First Amendment right to record and criticize the police.

New Jersey has taken some important steps in its police reform efforts, which include new Attorney General guidance on law enforcement interactions with members of the press¹¹ and enactment of a law mandating a statewide body-worn camera system.¹² However, much more is required, and New Jersey would miss the moment if it were to overlook the importance of reaffirming the First Amendment rights of community members in interacting with police officers. As we seek to increase transparency and build trust, it is critical to empower community members—just like Darnella Frazier, who filmed George Floyd's murder—to hold law enforcement accountable through exercising their First Amendment rights to criticize and record police conduct.

Specifically, the Attorney General should, in collaboration with community partners and stakeholders, create a First Amendment Policing Policy that is binding on police departments and reflects current best practices and at a minimum:

- Outlines the scope of the First Amendment right to record police
- Prohibits officers from discouraging, intimidating or retaliating against people who verbally criticize police
- Prohibits officers from discouraging, intimidating or retaliating against people recording police conduct
- Outlines narrowly-defined circumstances under which an officer may conduct a warrantless search and seizure of a bystander's recording device

New Jersey must ensure in this critical moment of racial reckoning that every New Jersey resident is empowered to exercise their First Amendment right to record police conduct and hold law enforcement accountable.

Endnotes

¹ See David L. Hudson Jr., *Filming the Police*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1550/filming-the-police> (last visited May 20, 2021); see also *Fields v. Philadelphia*, 862 F.3d 535, 359 (3d Cir. 2017) (“recording police activity in public falls squarely within the First Amendment right of access to information”); *Ramos v. Flowers*, 429 N.J. Super. 13, 25 (App. Div. 2012) (citing *State v. Schmid*, 84 N.J. 535, 557, 423 A.2d 615 (1980), appeal dismissed sub nom., *Princeton Univ. v. Schmid*, 455 U.S. 100, 102 S.Ct. 867, 70 L.Ed.2d 855 (1982))(noting Article 1, paragraph 6 of the N.J. Constitution provides broader protections than the First Amendment).

² *Fields*, 862 F.3d at 359 (establishing right to record police conduct within the U.S. Court of Appeals for the Third Circuit); *Ramos*, 429 N.J. Super. at 30 (establishing right to record police conduct in New Jersey); *Sharp v. Baltimore City Police Dep’t*, No. 1:11-cv-02888-BEL, dkt. No.4 (Jan. 10, 2012) (D.O.J.’s position that recording police activity is protected conduct under the First Amendment).

³ See Peter Holley, *Police falsely told a man he couldn’t film them. ‘I’m an attorney,’ he said. ‘I know what the law is.’*, WASH. POST (Mar. 10, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/03/10/video-shows-police-telling-an-uber-driver-its-against-the-law-to-record-police-its-not/>; see also Press Release, ACLU-NJ, ACLU-NJ Defends West New York Man Arrested After Filming Police (Dec. 22, 2015), <https://www.aclu-nj.org/news/2015/12/22/aclu-nj-defends-west-new-york-man-arrested-after-filming-pol>.

⁴ *First Amendment Rights*, G.O. G02-02, CHICAGO POLICE DEP’T (April 13, 2021), <http://directives.chicagopolice.org/directives/data/a7a57be2-1287e496-14312-87ee-09b7a8a4b7d34441.html>.

⁵ *Pictures, Video, and Audio Recordings of Police Officers while Performing Official Functions in Public Spaces*, Directive 8.12, PHILADELPHIA POLICE DEP’T (Nov. 9, 2012).

⁶ *When a Member of the Service Encounters an Individual Observing, Photographing, and/or Recording Police Activity*, Procedure No: 203-29, NYC POLICE DEP’T (2020), https://www1.nyc.gov/assets/nypd/downloads/pdf/public_information/public-pguide1.pdf.

⁷ *First Amendment Right to Observe, Object to, and Record Police Activity*, G.O. 18-12, NEWARK POLICE DIV. (June 12, 2019), https://c3bb32f4-4b49-462c-abf8-5d2c1d510fe0.filesusr.com/ugd/582c35_d198ac4670cc41c2b075fccfeaa85245.pdf.

⁸ *State v. Malique*, ACLU-NJ, <https://www.aclu-nj.org/cases/state-v-malique> (last visited May 20, 2021).

⁹ See James Queally, *Newark Police settle case with teen illegally detained for filming cops*, NJ.COM (Nov. 19, 2012), https://www.nj.com/news/2012/11/newark_police_settle_case_with.html; John Heinis, *West New York, ACLU come to terms on public’s right to film police*, HUDSON CNTY. VIEW (Jan. 20, 2017), <https://hudsoncountyview.com/west-new-york-aclu-come-to-terms-on-public-rights-to-film-police/>.

¹⁰ *Use of Force Policy*, N.J. OFF. OF THE ATT’Y GEN. (Dec. 21, 2020), <https://www.nj.gov/oag/force/docs/UOF-2020-1221-Use-of-Force-Policy.pdf>.

¹¹ *Guidance on Interactions Between Law Enforcement and Press at Protests*, N.J. OFF. OF THE ATT’Y GEN., DEP’T OF LAW & PUB. SAFETY (April 20, 2021), <https://nj.gov/oag/newsreleases21/AG-Guidance-Press-and-Police-Intractions-During-Protest-Events.pdf>.

¹² N.J.S.A. 40A:14-118.3 & 118.4 (P.L. 2020, c. 128), https://www.njleg.state.nj.us/2020/Bills/PL20/128_.HTM; N.J.S.A. 40A:14-118.5 (P.L. 2020, c. 129), https://www.njleg.state.nj.us/2020/Bills/AL20/129_.HTM.