

# Filming Police in Action

By Tabitha Clark, Esq.

**T**amir Rice, Eric Garner, Michael Brown, Sandra Brown. The outcries for justice in the wakes of these individuals' deaths and others would not have been nearly as deafening had the last few moments of their lives not been captured on film. Whether taken by private citizens, local business security cameras, news outlets, or dash and body cameras, video footage has been invaluable used after the fact to analyze police actions and the consequences that flowed therefrom.

## Black Lives Matter

In the wake of these incidents, the Black Lives Matter movement and other initiatives have pushed the legal community to examine more closely the practices and policies that have shaped the current state of citizen and police relations. These forces at work aim to better those relations, and create policies that provide for the interests and safety of both groups. The right to film police in public spaces is protected by the First Amendment and critical to these efforts. U.S. District Judge Mark Kearney's recent decision out of the District Court of Pennsylvania swings wide of the mark on this issue and should not be left unchecked by the higher courts.

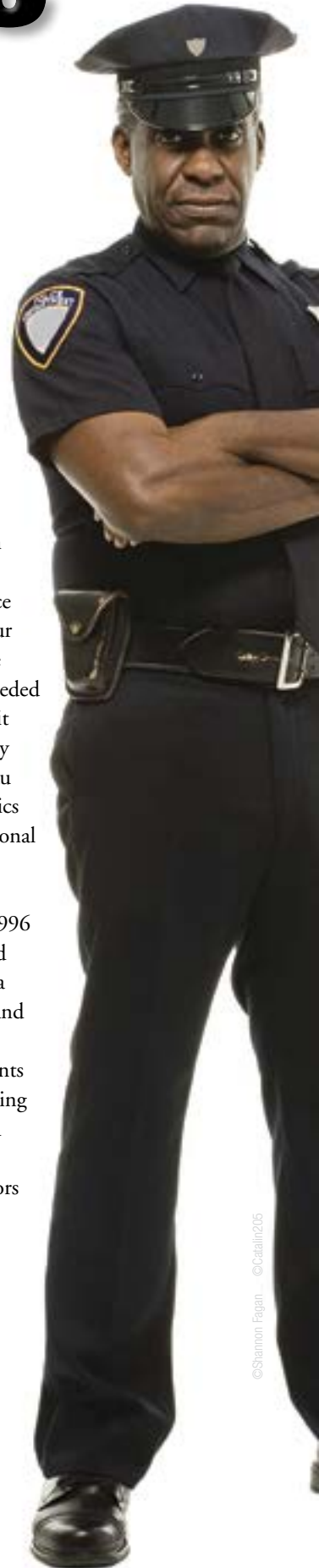
## Fourth Amendment Rights

The Fourth Amendment of the Constitution endows the Federal Government with the legitimate use of force to protect its people and to enforce the laws created under it. It states "The right of the people to be secure in their persons... against unreasonable searches and seizure, shall not be violated..." The Supreme Court held in *Tennessee v. Garner* (1985) and *Graham v. Connor* (1989) that police use of deadly and non-deadly force is a seizure and therefore only governed under the Fourth Amendment. The Fourth Amendment is violated only when police act unreasonably.

In the cases that followed *Garner* and *Graham*, the Supreme Court has held that the legal question is, "Was the level of force used, under the totality of the circumstances and facts known to the officer at the time, viewed from the perspective of the officer, reasonable?"

In answering that question, the Supreme Court has made clear that the Fourth Amendment analysis is not subject to retrospection and does not consider whether the officer was in fact right or wrong in assessing the situation. In cases where there is doubt, the officer is afforded greater credibility and receives the benefit of the doubt.

In the course of duty when and how often does the use of force cross the line and become "excessive" or an abuse of force? Millions of police interactions occur every year where force was not needed or when it was, it was appropriately used. The Bureau of Justice Statistics (BJS) in its National Data Collection on Use of Force highlighted in 1996 that tracking and maintaining data on use of force and trends over time allows departments to monitor training effectiveness and provide early warning indicators for officers who exhibit repeated



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troublesome patterns. However, the complexities and subtleties involved in reporting these incidences makes collecting accurate data difficult.

The areas of concern highlighted in the 1996 BJS report still remain inadequately addressed across the country. Campaign Zero ([www.campaignzero.org](http://www.campaignzero.org)) is a grassroots policy initiative started in August 2015 by Black Lives Matter activists in response to the unrest across the country aimed at improved police and civilian interactions. The campaign offers policy solutions in 10 categories including police use of force. According to their report, one of the most prevalent issues is that use of force by officers continues to lack transparency. Use of force policies are routinely not made available to the public, and when they are, they may be heavily redacted. ([www.useofforceproject.org](http://www.useofforceproject.org)). Police departments typically self-report use of force data and therefore what gets reported and how varies from department to department.

In October 2015, the New York Police Department (NYPD) announced major changes to its use-of-force rules that included tracking all instances when an officer uses force (the type and intensity) and when force is used against an officer. This initiative takes one of the methodologies from the 1996 BJS report almost word for word. A number of precincts of the NYPD have also begun expanding their use of body cameras.

### **First Amendment Rights**

Accountability is an important component of any initiative designed to address this issue and video footage has been a key instrument in exposing which practices are effective and which are not. In a decision issued earlier this year, U.S. District Judge Mark Kearney ruled that citizens are not afforded First Amendment

**In the course of duty when and how often does the use of force cross the line...**

protection when they film police officers—unless they are doing it for the purpose of criticizing police activity and make that purpose unequivocally clear at the time of filming. Kearney’s decision is a departure from previous rulings in higher courts that consider recording of police officers without expressive conduct to be protected free speech under the First Amendment. The decision is further contrary to Philadelphia’s own policy of allowing citizens to record police in public regardless of the circumstances.

Although the decision is not precedential and likely to be appealed, there needs to be clear, unequivocal language from the higher courts so as to minimize its influence on future decisions. Nothing has changed. Police in public spaces can still be recorded and this privately collected information remains a crucial component of any initiative to improve relations between citizens and police.

Tabitha Y. Clark spent one year as an associate with the Rutgers Law Associates before opening The Law Offices of Tabitha Y. Clark in 2015. Her practice areas include matrimonial litigation, child custody, and employment and civil rights law. Tabitha also serves as Of Counsel to the Law Office of Hanan M. Isaacs, P.C. in Kingston, NJ.



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