

THE FIRST AMENDMENT IN TIMES OF CRISIS: AN ANALYSIS OF FREE PRESS ISSUES IN FERGUSON, MISSOURI

Angela Rulffes[†]

CONTENTS

INTRODUCTION	607
I. TREATMENT OF THE PRESS IN CRISIS SITUATIONS.....	609
<i>A. Treatment of the Press over the Past Decade</i>	610
<i>B. Press Issues in Ferguson, Missouri</i>	613
II. FREEDOM OF THE PRESS RIGHTS.....	615
<i>A. Right to Gather News</i>	615
<i>B. Right to Film Police</i>	618
<i>C. Balancing Test</i>	620
III. FIRST AMENDMENT VIOLATIONS IN FERGUSON.....	624
<i>A. Unlawful Arrests of Journalists</i>	624
<i>B. Restricting Journalists from Accessing Demonstration Areas and Press Pens</i>	627
<i>C. Threats Against Journalists</i>	629
<i>D. Future Landscape of Activism</i>	629
CONCLUSION.....	633

INTRODUCTION

On August 9, 2014, Michael Brown, an unarmed black teenager, was fatally shot by white Ferguson Police Department Officer Darren Wilson.¹ In the days following the shooting, protestors gathered in Ferguson to voice their outrage over what they perceived to be the use of excessive force by a police officer.² In some cases, the demonstrations

[†] Angela Rulffes is an assistant professor within the Department of Communication Studies at Ithaca College, where she teaches classes on courtroom communication and freedom of expression. Her research is focused on freedom of speech as well as privacy rights in the digital age. Before coming to Ithaca College, Angela earned a Ph.D. in Mass Communication at the S.I. Newhouse School of Public Communications at Syracuse University. She is also an attorney licensed in New York and Ohio. Angela earned her J.D. from the Cleveland-Marshall College of Law. While in law school, she served as a law clerk and, subsequently, an attorney for the ACLU of Ohio, where she focused on civil liberties issues including freedom of speech. Angela also has an MS from Syracuse University and a BA from SUNY Plattsburgh.

1. Faith Karimi & AnneClaire Stapleton, *Report: Michal Brown's Fatal Encounter with Wilson Took Less than 2 Minutes*, CNN (Nov. 15, 2014, 5:07 PM), <http://www.cnn.com/2014/11/15/justice/ferguson-wilson-brown-encounter/>.

2. Dana Ford, *Missouri Governor on Ferguson: Violent Protests 'Cannot Be Repeated'*,

became violent with clashes between protestors and police.³ As a result of the events in Ferguson, journalists flocked to the small city to cover the developing situation. Since August 2014, there have been months of protests in Ferguson, numerous reports of journalist arrests, and restrictions on media access.⁴ Some reporters covering the demonstrations were threatened and hit with tear gas.⁵ Others were corralled into press pens, detained, or arrested.⁶

A public outcry began regarding the treatment of journalists in Ferguson, with local and national civil rights groups condemning the actions of police. “Journalists around the nation are angry at the reports of excessive force and outright violation of the law by Ferguson police officers,” said Society of Professional Journalists President David Cuillier.⁷ The Reporters Committee for Freedom of the Press sent a letter to the Justice Department in September 2014 on behalf of forty-four news organizations, urging investigations into the press issues in Ferguson.⁸ The organization stated in the letter, “[a]n important element of protecting civil rights is allowing uninhibited news coverage of the sometimes scalding controversies that follow race, gender, and other issues relating to political equality around the nation.”⁹ Taking matters a step further, the American Civil Liberties Union (ACLU) of Missouri filed a motion for a preliminary injunction in federal district court, seeking to enjoin police from arresting journalists.¹⁰ The court granted

CNN (Nov. 12, 2014, 8:28 AM), <http://www.cnn.com/2014/11/11/us/ferguson-missouri-governor/>.

3. *See id.*

4. Brenda E. Stevenson, *The Legitimate Fear That Months of Civil Unrest in Ferguson, Missouri Will End in Rioting*, OUPBLOG (Nov. 19, 2014), <https://blog.oup.com/2014/11/civil-unrest-ferguson-missouri/>; The Times Editorial Bd., *How the FAA Helped Muzzle the Media in Ferguson*, L.A. TIMES (Nov. 4, 2014), <http://www.latimes.com/nation/la-ed-ferguson-police-faa-media-20141104-story.html>.

5. Brian Stelter, *6 More Journalists Arrested in Ferguson Protests*, CNN (Aug. 19, 2014), <https://www.cnn.com/2014/08/19/us/ferguson-journalists-arrested/index.html> [Stelter, *6 More Journalists*].

6. *Id.*; see Runa A. Sandvik, *Documenting the Arrests of Journalists in Ferguson*, FREEDOM PRESS FOUND. (Aug. 19, 2014), <https://freedom.press/news-advocacy/documenting-the-arrests-of-journalists-in-ferguson/> (providing a list of journalists arrested in Ferguson, Missouri from August 13, 2014 to November 25, 2014).

7. Press Release, Soc’y of Prof’l Journalists, SPJ Outraged by Arrests of Journalists in Ferguson, Mo., Offers Assistance to Educate Police Department (Aug. 14, 2014), <http://www.spj.org/news.asp?ref=1269>.

8. Press Release, Reporters Comm. for Freedom of the Press, Reporters Committee, News Organizations Urge Justice Department to Include Press Issues in Ferguson Investigations (Sept. 23, 2014), <http://www.rcfp.org/reporters-committee-news-organizations-urge-justice-department-include-press-issues-ferguson-investi>.

9. *Id.*

10. *See* Press Release, ACLU, ACLU Secures Three Court Orders Regarding the Right

the motion on November 21, 2014.¹¹ The granting of this injunction was important because it prohibited the enforcement of any policy that would allow police to interfere with journalists who were reporting on the protests.¹² The police could only arrest journalists if they were breaking the law or inhibiting the officers' abilities to do their jobs.¹³ "Police have an obligation to protect First Amendment rights, not violate them," said Tony Rothert, legal director of the ACLU of Missouri.¹⁴

The First Amendment to the U.S. Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press."¹⁵ The express language contained in the First Amendment affords broad press and speech rights; nonetheless, there are times when the freedom of the press is restricted¹⁶—sometimes illegally. In fact, in the United States there is a discernable pattern of First Amendment violations under specific circumstances—namely, in times of crises, tragedy, or unrest.

I. TREATMENT OF THE PRESS IN CRISIS SITUATIONS

When the nation is at the height of crisis or unrest the government sometimes takes steps to restrict First Amendment rights in the name of national security or public safety.¹⁷ Arguably, it is during these times of crisis when the American people rely most heavily on the press for updates and in-depth coverage. Yet, it is under those same circumstances that the government vigorously seeks to control access to information for a variety of reasons, some of which could be related to governmental

to Record Police (Nov. 21, 2014), <http://www.aclu-mo.org/newsviews/2014/11/21/aclu-secures-three-court-orders-regarding-right-record-polic> [hereinafter ACLU Secures Three Court Orders].

11. *Id.*; see Jennifer S. Mann, *ACLU Wins Federal Court Orders on Right to Video Police in Ferguson, Elsewhere*, ST. LOUIS POST-DISPATCH (Nov. 21, 2014), http://www.stltoday.com/news/local/crime-and-courts/aclu-wins-federal-court-orders-on-right-to-video-police/article_7deb6bf7-c619-55d3-ae22-141e6cb4d3e8.html.

12. ACLU Secures Three Court Orders, *supra* note 10.

13. See Mann, *supra* note 11.

14. Press Release, ACLU, ACLU Statement Regarding the Nov. 22 Arrest of Reporter in Ferguson (Nov. 23, 2014), <http://www.aclu-mo.org/newsviews/2014/11/23/aclu-statement-regarding-nov-22-arrest-reporter-ferguson>.

15. U.S. CONST. amend. I.

16. See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 726 (1971) (first citing *Schenck v. United States*, 249 U.S. 47, 52 (1919); and then citing *Near v. Minnesota*, 283 U.S. 697, 716 (1931)). For example, the press can be censored if there is a direct, immediate threat to national security. *Id.* The press's access to military bases, nuclear plants, and prisons is also restricted. See *id.*

17. See *N.Y. Times Co.*, 403 U.S. at 726 (citing *Near*, 283 U.S. at 716). The Supreme Court has noted that some speech, such as the location or movement of troops, can be censored in order to protect national security. *Near*, 283 U.S. at 716.

misconduct.¹⁸ The events in Ferguson, Missouri are a recent example of this phenomena. Ferguson is not, however, the first incident in United States history that raised questions regarding First Amendment violations during a time of unrest.

A. Treatment of the Press over the Past Decade

Over just the last decade, media organizations have complained about free press violations in a number of high profile situations. In 2005, during the aftermath of Hurricane Katrina, there were reports that police acted violently toward journalists and confiscated video recordings.¹⁹ In particular, some media outlets complained that officials seized film of shoot-outs between police and looters.²⁰ A photographer claimed that he was threatened after he photographed an interaction between police and looters.²¹ The officers threatened him at gun point, yanked his camera from his neck, and confiscated his memory card.²² Two other journalists said the police pushed them and tossed their equipment on the ground.²³ NBC newscaster Brian Williams complained that police ordered him to stop filming a National Guard unit that was securing a downtown store.²⁴ In addition, the Federal Emergency Management Agency (FEMA) requested that news organizations stop photographing bodies being recovered at the time.²⁵

There were similar reports in September 2008 during the Republican National Convention in St. Paul, Minnesota.²⁶ *Democracy Now!* host Amy Goodman and two of her producers were arrested while they were

18. *N.Y. Times Co.*, 403 U.S. at 723–24. The Supreme Court noted in *N.Y. Times Co.*, also called the *Pentagon Papers* case, that the government cannot censor speech in order to hide embarrassing information. *Id.*

19. *Reporters Face Police Violence and Restrictions in Katrina Aftermath*, COMM. TO PROTECT JOURNALISTS (Sept. 9, 2005, 12:00 PM), <http://www.cpj.org/2005/09/reporters-face-police-violence-and-restrictions-in.php> [hereinafter *Reporters Face Police Violence*]; *Police Violence Against Journalists in New Orleans in Katrina Aftermath*, REPS. WITHOUT BORDERS (Jan. 20, 2016), <http://en.rsf.org/united-states-police-violence-against-06-09-2005,14894.html> [hereinafter *Police Violence Against Journalists*].

20. *Reporters Face Police Violence*, *supra* note 19.

21. *Police Violence Against Journalists*, *supra* note 19.

22. *Id.*

23. *Reporters Face Police Violence*, *supra* note 19.

24. *Id.*

25. *Id.*

26. *See Charges Will Not Be Pressed Against Journalists Arrested During Republican Convention*, REPS. WITHOUT BORDERS (Jan. 20, 2016), <http://en.rsf.org/united-states-charges-will-not-be-pressed-22-09-2008,28393.html> [hereinafter *Charges Will Not Be Pressed*]; *Dozens of Journalists Arrested While Covering RNC*, COMM. TO PROTECT JOURNALISTS (Sept. 8, 2008, 2:43 PM), <https://cpj.org/2008/09/dozens-of-journalists-arrested-while-covering-rnc.php> [hereinafter *Dozens of Journalists*].

covering anti-war demonstrations taking place near the convention center.²⁷ Goodman was charged with obstruction, and her colleagues were charged with incitement to riot.²⁸ Two Associated Press (AP) reporters covering the protests were also arrested and charged with unlawful assembly.²⁹ Reports estimated that, in all, approximately 800 people, including dozens of journalists, were arrested during the convention.³⁰ City officials later decided to drop the charges against any journalists, including Goodman, her producers, and the AP reporters.³¹

Around the same time, *ABC News* producer Asa Eslocker was arrested during the Democratic National Convention in Denver, Colorado, when he was filming on the sidewalk outside the Brown Palace Hotel where the convention was taking place.³² He received a number of charges including trespass and failure to follow a lawful order.³³ Reporters Without Borders stated that, days earlier, *USA Today* videographer Garrett Hubbard was assaulted by a Denver police officer while filming a protest.³⁴

In 2011, more than two dozen journalists were arrested while covering the Occupy Wall Street demonstrations in New York City.³⁵ A number of journalists said that the police acted violently toward them, in some cases hitting reporters with batons, shoving them against walls, and confiscating their equipment.³⁶ Journalists said they were arrested even when they informed police they were members of the media and displayed their press badges.³⁷ There were also reports that the police

27. *Charges Will Not Be Pressed*, *supra* note 26.

28. *Id.*; *Dozens of Journalist*, *supra* note 26.

29. *Dozens of Journalists*, *supra* note 26.

30. *Id.*; *Charges Will Not Be Pressed*, *supra* note 26.

31. *Id.*

32. *Charges Against ABC News Reporter Arrested During the Democratic National Convention Dropped*, REPS. WITHOUT BORDERS (Oct. 20, 2008), <http://en.rsf.org/united-states-charges-against-abc-news-reporter-20-10-2008,28348.html>.

33. *Id.*

34. *Id.*

35. Jack Mirkinson, *Occupy Wall Street November 17: Journalists Arrested, Beaten by Police*, HUFFINGTON POST (Nov. 17, 2011, 12:27 PM), http://www.huffingtonpost.com/2011/11/17/occupy-wall-street-nov-17-journalists-arrested-beaten_n_1099661.html; *Journalists Arrested and Obstructed Again During Occupy Wall Street Camp Eviction*, REPS. WITHOUT BORDERS (Jan. 20, 2016), <http://en.rsf.org/united-states-absurd-charges-brought-against-09-11-2011,41370.html> [hereinafter *Journalist Arrested and Obstructed*]; *Journalists Obstructed from Covering OWS Protests*, COMM. TO PROTECT JOURNALISTS (Nov. 15, 2011, 5:41 PM), <https://cpj.org/2011/11/journalists-obstructed-from-covering-ows-protests.php#more> [hereinafter *Journalists Obstructed*].

36. Mirkinson, *supra* note 35; *Journalist Arrested and Obstructed*, *supra* note 35; *Journalists Obstructed*, *supra* note 35.

37. Mirkinson, *supra* note 35; *Journalist Arrested and Obstructed*, *supra* note 35;

restricted the press from entering Zuccotti Park where the Occupy Wall Street demonstrations were being held, which led journalists to dub the actions a “media blackout.”³⁸ Journalists who were arrested were charged with violations that included disorderly conduct and unlawful assembly.³⁹ In some cases, journalists were released without charges.⁴⁰ In September 2012, Occupy Wall Street held protests in commemoration of its one-year anniversary, and media reported that journalists were again arrested while covering the demonstrations.⁴¹

Over the past decade, journalists, exercising their First Amendment rights, were harassed, threatened, and arrested on multiple incidences. There is a pattern of free press violations during protests that take place on the national stage. History shows that the involvement of law enforcement officials during large protests works as a catalyst, leading to allegations of First Amendment violations. Thus, it is, unfortunately, not surprising that accusations of constitutional violations began to fly soon after the protests started in Ferguson. Nonetheless, with the freedom of the press protections guaranteed by the First Amendment, stories such as these should not be a foreseeable reality.

The Supreme Court has recognized that the freedom of the press “lies at the foundation of free government by free men.”⁴² Moreover, the Court has stated that “[a] free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves.”⁴³ Not only is the freedom of the press a fundamental

Journalists Obstructed, *supra* note 35.

38. *Journalists Obstructed*, *supra* note 35; Jack Mirkinson, *Occupy Wall Street ‘Media Blackout’: Journalists Arrested, Roughed Up, Blocked from Covering Clearing*, HUFFINGTON POST (Nov. 15, 2011, 8:10 AM), http://www.huffingtonpost.com/2011/11/15/occupy-wall-street-raid-journalists-arrested_n_1094564.html.

39. *Journalists Arrested and Obstructed*, *supra* note 35.

40. *See id.*

41. *Journalists Arrested During Occupy Wall Street Anniversary Protests*, HUFFINGTON POST (Sept. 17, 2012, 1:41 PM), http://www.huffingtonpost.com/2012/09/17/journalists-arrested-occupy-wall-street_n_1891068.html.

42. *Schneider v. State*, 308 U.S. 147, 151 (1939).

This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men.

Id. at 150–51.

43. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936).

personal right,⁴⁴ it is critical to the exchange of ideas⁴⁵ and discussions of governmental affairs.⁴⁶ In situations where the media is covering public protests, along with reporting on the actions of police and government officials, newsgathering is crucial in order to disseminate important information to the rest of the nation.⁴⁷

B. Press Issues in Ferguson, Missouri

PEN America released a report on October 27, 2014, documenting a number of the incidents between the press and Ferguson officials.⁴⁸ According to the report, more than twenty-one journalists had been arrested in Ferguson since August.⁴⁹ In many cases, police detained journalists for a short time before releasing them, sometimes only after police verified their press credentials.⁵⁰ One prominent example was the arrests of *Washington Post* reporter Wesley Lowery and *Huffington Post* reporter Ryan Reilly. The two journalists were sitting in a McDonalds near an area where protest activity was taking place.⁵¹ According to

44. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (quoting *Lovell v. Griffin*, 303 U.S. 444, 450–52 (1938)) (“Freedom of the press is a ‘fundamental personal right’ which ‘is not confined to newspapers and periodicals.’”).

45. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions. The constitutional safeguard, we have said, ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’

Id.

46. *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.”).

47. *See Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011).

Moreover, as the Court has noted, ‘[f]reedom 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.’ This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties.

Id. (alterations in original) (citing *First Nat’l Bank v. Bellotti*, 435 U.S. 765, 777 (1978)); *see Sullivan*, 376 U.S. at 269 (quoting *Roth*, 354 U.S. at 484); *Grosjean*, 297 U.S. at 250.

48. PEN AM., PRESS FREEDOM UNDER FIRE IN FERGUSON 9–16 (Oct. 27, 2014), http://www.pen.org/sites/default/files/PEN_Press-Freedom-Under-Fire-In-Ferguson.pdf.

49. *Id.* at 10.

50. *Id.*

51. *Id.*

reports, Ferguson police officers entered the restaurant requesting press credentials and subsequently informed those in the McDonalds that it needed to be cleared.⁵² Lowry and Reilly alleged that as they gathered their equipment and attempted to vacate the facility, the officers arrested them.⁵³ They waited in handcuffs for fifteen minutes for a police car to arrive and, upon reaching the station, they were briefly placed in a holding cell.⁵⁴ Upon release, the two journalists requested an arrest report and the names of the officers involved; however, the information was not provided.⁵⁵ A Turkish journalist also reported that he was arrested and held for five hours.⁵⁶

Two other journalists said they showed police their press credentials but were shot with rubber bullets and subsequently taken into custody and detained for hours for allegedly failing to disperse.⁵⁷ Other reports include arrests of Scott Olson, a Getty Images photographer, and Kerry Pickett, a reporter for *Breitbart News*, who were both later released without charges.⁵⁸ In fact, more than two months into the demonstrations in Ferguson the police were still arresting journalists who were lawfully gathering news. On November 22, 2014, the *Huffington Post* reported that *News2Share* journalist Trey Yingst, who was wearing media credentials and carrying a camera, was arrested while standing on a public sidewalk during a lawful, peaceful protest in Ferguson.⁵⁹ He was charged with unlawful assembly and released the next day.⁶⁰

Along with arrests, journalists alleged that police threatened and acted hostile toward them.⁶¹ According to PEN America, many journalists indicated that when they asked officers questions, or requested information, police pointed weapons at them in a threatening manner.⁶² Other incidents included threats of mace, arrests, confiscation of film, and

52. *Id.* at 10–11.

53. PEN AM., *supra* note 48, at 10–11; Jack Mirkinson, *Outrage After Assault and Arrest of Reporters in Ferguson*, HUFFINGTON POST (Aug. 13, 2014, 9:20 PM), http://www.huffingtonpost.com/2014/08/13/ferguson-reporters-assaulted-arrested_n_5676878.html.

54. PEN AM., *supra* note 48, at 11.

55. *Id.*

56. *Id.*

57. *Id.* at 11–12.

58. Stelter, *6 More Journalists*, *supra* note 5.

59. Ryan J. Reilly, *On a Night Of Peaceful Protests in Ferguson, One Reporter's Arrest Breaks the Calm*, HUFFINGTON POST (Nov. 23, 2014, 5:53 PM), <http://www.huffingtonpost.com/2014/11/23/ferguson-protests6207980.html> [hereinafter Reilly, *Peaceful Protests*].

60. *Id.*

61. PEN AM., *supra* note 48, at 12.

62. *Id.*

physical violence.⁶³ There were also allegations that police fired tear gas at an *Al Jazeera America* news crew while they were filming protestors.⁶⁴ The journalists said they had identified themselves as press and that when they were forced to leave their gear behind to flee the tear gas, the police took their lighting equipment down.⁶⁵ Around the same time, a separate news crew also reported that police approached them with guns drawn and shot beanbag rounds at their cameras.⁶⁶

Journalists in Ferguson also complained that the police restricted their access to public areas within the city.⁶⁷ In some cases, police officers told journalists to leave the area where protesters were gathered and to go to a designated media area, sometimes upon threat of arrest if they left the specified zone.⁶⁸ Lastly, journalists said police restricted them from entering protest areas for hours.⁶⁹

II. FREEDOM OF THE PRESS RIGHTS

Although not expressly stated in the Constitution, the courts have found that journalists have a number of privileges under the First Amendment, including the right to gather news and the right to film law enforcement officials.⁷⁰

A. Right to Gather News

Initially, it should be noted that the First Amendment does not bestow any special protection or rights on the press.⁷¹ In other words, the press has the same freedom of speech rights as the general public.⁷² Courts have also determined that the media does not have a special right to access crime scenes if the public is prohibited from the area,⁷³ though

63. *Id.*

64. *Id.* at 13.

65. *Id.*

66. PEN AM., *supra* note 48, at 13.

67. *Id.*

68. *Id.* at 14.

69. *Id.* at 15.

70. *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972)); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (citing *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994)).

71. *Branzburg*, 408 U.S. at 684 (citing *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965)) (“It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”); *Asociacion de Periodistas de P.R. v. Mueller*, 529 F.3d 52, 58 (1st Cir. 2008) (citing *Richmond Newspapers v. Virginia*, 448 U.S. 555, 577–78 (1980)) (“The First Amendment does not grant the press a special right of access to property beyond the public domain.”).

72. *Branzburg*, 408 U.S. at 684 (citing *Zemel*, 381 U.S. at 16–17).

73. *Id.* at 684–85 (“Newsmen have no constitutional right of access to the scenes of crime

at least one court found that journalists have a First Amendment right to photograph accident scenes when there is no interference with the police's ability to secure the scene.⁷⁴ Notably, there have been times when courts upheld arrests of journalists attempting to access areas not open to the public.⁷⁵ In *People v. Bukowski*, the Michigan Court of Appeals upheld an obstruction conviction of a journalist who was arrested after crossing the police "do not cross" line at a traffic accident scene, and refused to leave the area when requested to do so by police.⁷⁶ In a similar case, the Supreme Court of New Jersey upheld the conviction of disorderly conduct for a photojournalist who was arrested after refusing to move back from the scene of a motor vehicle accident.⁷⁷

Nonetheless, the courts have recognized an "undoubted right to gather news."⁷⁸ Specifically, the U.S. Supreme Court has recognized that in order to gather news, the media must have some legitimate protections.⁷⁹ As the Court stated in *Branzburg v. Hayes*, "[w]e do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for

or disaster when the general public is excluded . . ."); see *Asociacion de Periodistas de P.R.*, 529 F.3d at 58 (finding that FBI agents did not violate the First Amendment when they used physical force to remove journalists from a private condominium complex while reporters were attempting to gather information regarding the FBI's execution of a search warrant).

74. *Connell v. Town of Hudson*, 733 F. Supp. 465, 469–71 (D.N.H. 1990). The police requested that a freelance reporter, who was taking photos of a car accident scene, stop taking pictures. *Id.* at 466. The reporter moved further from the accident scene (he eventually entered a home that was close by to take pictures from an upstairs window); however, the police continued to request he stop photographing the scene. *Id.* at 466–67. Finally, the police threatened to arrest him, and the reporter stopped taking pictures under protest. *Id.* He later filed suit, alleging the police had violated his First Amendment rights. *Id.* at 468. The federal district court agreed. *Connell*, 733 F. Supp. at 473 ("The appropriate analysis balances plaintiff's rights against police authority to secure an accident scene. Under the facts presented here, that balance plainly favors the plaintiff.").

75. *People v. Bukowski*, No. 293011, 2011 Mich. App. LEXIS 864, at * 1–2 (Mich. Ct. App. May 10, 2011); *State v. Lashinsky*, 404 A.2d 1121, 1123–24, 1131 (N.J. 1979); *City of Oak Creek v. King*, 436 N.W.2d 285, 286 (Wis. 1989) (affirming the disorderly conduct conviction of a reporter and holding that the appellant had no First Amendment right to access the scene of an airplane crash where the public did not have a general right of access).

76. 2011 Mich. App. LEXIS 864, at *1–2.

77. *Lashinsky*, 404 A.2d at 1124, 1131.

78. *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (quoting *Branzburg v. Hayes*, 408 U.S. 665, 681–82 (1972)) ("There is an undoubted right to gather news 'from any source by means within the law.'"); *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011) (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)) ("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.'").

79. See *Branzburg*, 408 U.S. at 681–82.

seeking out the news, freedom of the press could be eviscerated.”⁸⁰ Moreover, courts have agreed that the gathering and dissemination of information regarding the actions of public officials is protected under the First Amendment.⁸¹ Indeed, the U.S. Court of Appeals for the First Circuit indicated that gathering information regarding public officials “serves as a cardinal First Amendment interest.”⁸² Accordingly, there is a clear understanding by the courts that newsgathering is constitutionally protected.⁸³ Moreover, the freedom of the press would be meaningless if journalists are prohibited from newsgathering.⁸⁴ Through newsgathering, the press has the ability to uncover abuses of public power. This is especially true in regard to law enforcement officials, who have significant discretion and the ability to unconstitutionally restrict civil liberties.⁸⁵ Newsgathering can be greatly hindered if the press is prohibited from accessing areas where newsworthy events are occurring. In *Richmond Newspapers v. Virginia*, the U.S. Supreme Court determined that the press works as a surrogate for the public, in which people can acquire information through the media rather than from first-hand experience.⁸⁶ The *Richmond* Court also stated, “The First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.”⁸⁷ The *Richmond* Court agreed with the *Branzburg* finding that there must be some protection of the news media.⁸⁸ Thus, there is a First Amendment right of newsgathering that is violated when the media is prohibited from

80. *Id.* at 681.

81. *See* *ACLU v. Alvarez*, 679 F.3d 583, 600 (7th Cir. 2012). The court found that an eavesdropping statute prohibiting the recording of conversations unless all of the parties provided consent “interferes with the gathering and dissemination of information about government officials performing their duties in public. Any way you look at it, the eavesdropping statute burdens speech and press rights and is subject to heightened First Amendment scrutiny.” *Glik*, 655 F.3d at 82 (quoting U.S. CONST. amend. I) (“It is firmly established that the First Amendment’s aegis extends further than the text’s proscription on laws ‘abridging the freedom of speech, or of the press,’ and encompasses a range of conduct related to the gathering and dissemination of information.”); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (“The First Amendment protects the right to gather information about what public officials do on public property . . .”).

82. *Glik*, 655 F.3d at 82 (quoting *Mills*, 384 U.S. at 218).

83. *Houchins*, 438 U.S. at 11 (quoting *Branzburg*, 408 U.S. at 681–82).

84. *Branzburg*, 408 U.S. at 681.

85. *Glik*, 655 F.3d at 82 (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978)). (“This is particularly true of law enforcement officials, who are granted substantial discretion that may be misused to deprive individuals of their liberties.”).

86. 448 U.S. 555, 572–73 (1980).

87. *Id.* at 575–76 (citing *First Nat’l Bank of Boston*, 435 U.S. at 783).

88. *Id.* at 576 (quoting *Branzburg*, 408 U.S. at 681).

accessing areas where newsworthy events are taking place.⁸⁹

Furthermore, a police officer, or other government official, violates the First Amendment if he or she prohibits a journalist from gathering news in a public area regarding a matter of public concern. The Supreme Court has determined that “streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised.”⁹⁰ In fact, according to the Court, streets and sidewalks “occupy a ‘special position in terms of First Amendment protection’ because of their historic role as sites for discussion and debate.”⁹¹ Moreover, courts have recognized a First Amendment right to “gather information about what public officials do on public property” and “record matters of public interest.”⁹² Therefore, when a journalist is gathering news in a traditionally open forum, the journalist’s conduct is generally protected by the First Amendment.⁹³

B. Right to Film Police

Multiple courts have held that individuals have a First Amendment right to videotape and photograph police.⁹⁴ Indeed, courts indicate that the filming of police conducting public “duties in a public space is a basic,

89. *See id.* There could also be a violation of the constitutional right to receive information. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972)). The U.S. Supreme Court has found that there is “a First Amendment right to ‘receive information and ideas,’ and that the freedom of speech ‘necessarily protects the right to receive.’” *Id.* In addition, “[w]hen one person has a right to speak, others hold a ‘reciprocal right to receive’ the speech.” *ACLU v. Alvarez*, 679 F.3d 583, 592 (7th Cir. 2012) (quoting *Ind. Right to Life, Inc. v. Shepard*, 507 F.3d 545, 549 (7th Cir. 2007)). Thus, when the protestors have a right to lawfully speak, the media has a right to cover the demonstrations and the public has a constitutional right to receive the information. *See Alvarez*, 679 F.3d at 592; *Va. State Bd. of Pharmacy*, 425 U.S. at 757.

90. *Richmond Newspapers, Inc.*, 448 U.S. at 578 (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939)); *see McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009)).

91. *McCullen*, 134 S. Ct. at 2529 (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)).

92. *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir.), *cert. denied*, 531 U.S. 978 (2000) (citing *Blackston v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994)).

93. *See id.*

94. *See, e.g., Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (citing *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011)) (“[T]he Constitution protects the right of individuals to videotape police officers performing their duties in public.”); *Alvarez*, 679 F.3d at 605–06. “The act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.” *Id.* at 595; *Smith*, 212 F.3d at 1333; *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (noting that a person has the right to “film matters of public interest” under the First Amendment).

vital, and well-established liberty safeguarded by the First Amendment.”⁹⁵ In *Glik v. Cunniffe*, plaintiff Simon Glik recorded police officers while they were arresting a man in Boston.⁹⁶ After the arrest was complete, the police approached Glik and ordered him to stop taking pictures.⁹⁷ When Glik explained that he was recording video and audio, the officers arrested him for violating Massachusetts’s wiretap statute, a charge that was later dismissed.⁹⁸ Glik subsequently filed suit against the officers and the city, alleging violations of his First and Fourth Amendment rights.⁹⁹ The First Circuit held that the act of videotaping police in the course of carrying out their public duties is protected by the First Amendment.¹⁰⁰ Similarly, in *American Civil Liberties Union of Illinois v. Alvarez*, the American Civil Liberties Union of Illinois filed a suit challenging the constitutionality of an Illinois eavesdropping statute that made it a felony to record a conversation without permission of all participants.¹⁰¹ The U.S. Court of Appeals for the Seventh Circuit indicated that “[t]he act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”¹⁰² Thus, it is clear that the First Amendment protects the right of the press to film police.

In regard to Ferguson, it is highly significant that a federal district court in Missouri granted orders against the Missouri State Highway Patrol, the County of St. Louis and the City of Ferguson, enjoining the entities from “interfering with individuals who are photographing or recording at public places but who are not threatening the safety of others or physically interfering with the ability of law enforcement to perform their duties.”¹⁰³ However, these orders were granted in November 2014, while the majority of arrests took place in August 2014.¹⁰⁴ The orders came after the ACLU of Missouri filed a motion for a preliminary

95. *Glik*, 655 F.3d at 85.

96. *Id.* at 79.

97. *Id.* at 80.

98. *Id.*

99. *Id.*

100. *Glik*, 655 F.3d at 85.

101. 679 F.3d 583, 586 (7th Cir. 2012).

102. *Id.* at 595.

103. *Hussein v. County of St. Louis*, No. 4:14-cv-1410-JAR, 2016 U.S. Dist. LEXIS 55888, at *1 (E.D. Mo. 2014); *Court Orders Ferguson Police to Not Interfere with Photographing or Recording in Public*, NAT’L PRESS PHOTOGRAPHY ASS’N (Nov. 21, 2014), <https://nppa.org/news/court-orders-ferguson-police-not-interfere-photographing-or-recording-public>.

104. *Hussein*, 2016 U.S. Dist. LEXIS 55888 at *1.

injunction against the entities in reaction to journalist arrests.¹⁰⁵ Thus, any actions by police in Ferguson that would hinder the filming of official government conduct is unlawful, with some limited exceptions.¹⁰⁶

C. Balancing Test

The constitutional rights to gather news and film law enforcement are not absolute. Reasonable time, place and manner restrictions can be established, even in a public forum, without resulting in a constitutional violation.¹⁰⁷ In the case of a traditional public forum,¹⁰⁸ restrictions on speech must be “justified without reference to the content of the regulated speech . . . narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information” in order to be constitutional.¹⁰⁹ Courts have frowned upon the attempt to limit the peaceful filming of law enforcement, stating that the “peaceful recording of an arrest in a public space that does not interfere with the police officers’ performance of their duties is not reasonably subject to limitation.”¹¹⁰ Thus, in general, law enforcement officials do not have the authority to stop journalists from peacefully

105. Motion for Temporary Restraining Order, *Hussein v. Cty. of St. Louis*, 2016 U.S. LEXIS 55888 (E.D. Mo. 2014) (No. 4:14-cv-1410).

106. *Gericke v. Begin*, 753 F.3d 1, 7–8 (1st Cir. 2014); *Alvarez*, 679 F.3d at 595; *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000); *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995); *Hussein*, 2016 U.S. Dist. LEXIS 55888 at *1.

107. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *Glik*, 655 F.3d at 84 (citing *Smith*, 212 F.3d at 1333) (“To be sure, the right to film is not without limitations. It may be subject to reasonable time, place, and manner restrictions.”); *Smith*, 212 F.3d at 1333 (“[W]e agree with the Smiths that they had a First Amendment right, subject to reasonable time, manner and place restrictions, to photograph or videotape police conduct.”).

108. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980) (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939)) (“[S]treets, sidewalks, and parks are places traditionally held open, where First Amendment rights may be exercised.”).

109. *McCullen*, 134 S. Ct. at 2529 (internal quotations omitted) (quoting *Ward*, 491 U.S. at 791).

Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum. Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

110. *Glik*, 655 F.3d at 84.

exercising their constitutional rights.¹¹¹ Courts have also indicated that law enforcement officials cannot, “give an order that has no colorable legal basis and then arrest a person who defies it.”¹¹² In *Iacobucci v. Boulter*, plaintiff Richard Iacobucci was arrested while videotaping a public meeting and charged with disorderly conduct and disrupting a public assembly.¹¹³ After being released, he filed suit against the officer in charge, alleging violations of his constitutional rights.¹¹⁴ In its opinion, the First Circuit indicated that Iacobucci was doing nothing illegal.¹¹⁵ He was lawfully videotaping in a public area and the police “lacked the authority” to stop him from exercising his First Amendment rights.¹¹⁶ Moreover, the fact that the officers in the case repeatedly told Iacobucci to stop recording did not render his actions illegal.¹¹⁷

1. Prior Restraint

The arrest or detention of a journalist who is lawfully exercising his or her First Amendment rights in a public area not only has a chilling effect on speech, but also constitutes a prior restraint in violation of the First Amendment.¹¹⁸ Indeed, some courts have determined that an arrest can be considered a prior restraint.¹¹⁹ The definition of prior restraint varies depending on the court;¹²⁰ however, the primary concern with prior

111. *Id.* at 83 (quoting *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999)). “[T]he plaintiff’s journalistic activities ‘were peaceful, not performed in derogation of any law, and done in the exercise of his First Amendment rights, [the officer] lacked the authority to stop them.’” *Id.*; *Connell v. Town of Hudson*, 733 F. Supp. 465, 470–71 (D.N.H. 1990) (“Chief Brackett could not lawfully interfere with [the plaintiff’s] picture-taking activities unless [the plaintiff] unreasonably interfered with police and emergency functions.”).

112. *Iacobucci*, 193 F.3d at 25.

113. *Id.* at 17–18.

114. *Id.* at 18.

115. *Id.* at 25.

116. *Id.*

117. *Iacobucci*, 193 F.3d at 25.

118. *Rossignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003). The Department of Justice has argued that “the First Amendment is implicated when police arrest and seize the camera of a person recording police activity in a public place, and that “for decades, the Supreme Court has recognized that government action intended to prevent the dissemination of information critical of public officials, including police officers, constitutes an invalid prior restraint on the exercise of First Amendment rights.” Statement of Interest of the U.S. at 5, 7, *Garcia v. Montgomery Cty.*, 145 F. Supp. 3d 492 (D. Md. 2015) (No. 8:12-cv-03592) (citing *Near v. Minnesota*, 283 U.S. 697, 723 (1931)).

119. *McCormick v. City of Lawrence*, 271 F. Supp. 2d 1292, 1303 (D. Kan. 2003) (citing *SOB, Inc. v. Cty. of Benton*, 317 F.3d 856, 866 (8th Cir. 2003)) (“[I]t appears that an arrest may constitute a ‘prior restraint’ in some circumstances.”), *amended*, 289 F. Supp. 2d 1264 (D. Kan. 2003), *aff’d*, 130 F. App’x 987 (10th Cir. 2005).

120. *Compare United States v. Quattrone*, 402 F.3d 304, 309 (2d Cir. 2005) (citing *Alexander v. United States*, 509 U.S. 544, 550 (1993)) (“A ‘prior restraint’ on speech is a law,

restraints is the governmental suppression of speech before it can be disseminated.¹²¹ The Supreme Court has been clear that prior restraints are presumptively unconstitutional.¹²² When the government attempts to impose a prior restraint, it “carries a heavy burden of showing justification.”¹²³ In fact, the Court has deemed prior restraints to be “the most serious and the least tolerable infringement on First Amendment rights,”¹²⁴ especially when dealing with the dissemination of news.¹²⁵ Prior restraints are so abhorrent that the Court has stated that the primary purpose of the First Amendment is to eradicate them.¹²⁶ The U.S. Supreme Court has taken a broad stance regarding the types of governmental action that constitutes a prior restraint. In *Citizens United v. Federal Election Commission*, the Court determined that, although the regulatory scheme set up by the Federal Election Commission (FEC) was not a prior restraint “in the strict sense of that term,” there was still censorship taking place.¹²⁷ Indeed, the Court stated, “As a practical

regulation or judicial order that suppresses speech—or provides for its suppression at the discretion of government officials—on the basis of the speech’s content and in advance of its actual expression.”), with *Alexander*, 509 U.S. at 550 (quoting MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH 4–14 (Matthew Bender ed. 1984)) (“The term ‘prior restraint’ is used ‘to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.’”).

121. *Quattrone*, 402 F.3d at 310 n.5 (2d Cir. 2005) (quoting *In re G. & A. Books, Inc.*, 770 F. 2d 288, 296 (2d Cir. 1985)).

122. *Near*, 283 U.S. at 733; *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)) (“Any system of prior restraints of expression . . . bear[s] . . . a heavy presumption against its constitutional validity.”).

123. *N.Y. Times Co.*, 403 U.S. at 714 (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

124. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

125. *See id.*

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.

. . . .

A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.

The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.

Id.

126. *Near*, 283 U.S. at 713; *Quattrone*, 402 F.3d at 309–10 (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 n.25 (1979)) (“[T]he Supreme Court has described the elimination of prior restraints as the ‘chief purpose’ of the First Amendment.”).

127. 558 U.S. 310, 335–36 (2010).

matter . . . a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against FEC enforcement must ask a governmental agency for prior permission to speak. These onerous restrictions thus function as the equivalent of prior restraint”¹²⁸ Although the arrest of journalists may not have been viewed by some in the legal field as a prior restraint within the strict sense, as a practical matter, arresting a journalist and detaining him or her even for a short time does result in the silencing of speech. Not only will the journalist be unable to get the story out to the public while in jail, but he or she will also be unable to record and provide a first-person account of the demonstrations taking place while the journalist is detained.

The arrest and detention of journalists could also result in a domino effect. In *Citizens United* the Supreme Court stated:

When the FEC issues advisory opinions that prohibit speech, “[m]any persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech—harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”¹²⁹

Similarly, rather than fighting for their rights in court, some journalists will avoid reporting on protests because of the fear of being arrested and charged with a crime that could include jail time and steep fines. This could lead to the loss of information to the public about protests and demonstrations taking place nationwide.

Some courts have held, and the Department of Justice has argued, that the seizure of camera equipment and film constitutes a prior restraint.¹³⁰ For example, in *Channel 10, Inc. v. Gunnarson*, a reporter

128. *Id.* at 335 (citing 2 U.S.C. § 437(f) (2012)).

129. *Id.* (quoting *Virginia v. Hicks*, 539 U.S. 113, 119 (2003)).

130. *Channel 10, Inc. v. Gunnarson*, 337 F. Supp. 634, 637 (D. Minn. 1972); Statement of Interest of the U.S. at 1, *Sharp v. Balt. City Police Dep’t.*, 2013 U.S. Dist. LEXIS 58111 (D. Md. Jan. 1, 2012) (No. 1:11-cv-02888) (urging the court to find that seizures of camera equipment and film recordings of officers constitutes a prior restraint); Statement of Interest of the U.S. at 1, *Garcia v. Montgomery Cty.*, 145 F. Supp. 3d 492 (D. Md. 2015) (No. 8:12-cv-03592) (echoing the Statement of Interest for *Sharp* and urging the court to find that seizures of camera equipment and film recordings of officers constitutes a prior restraint).

Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint . . .

Roaden v. Kentucky, 413 U.S. 496, 504 (1973).

was photographing the arrest of a burglary suspect.¹³¹ The reporter was standing on a public sidewalk, approximately ten feet from where the suspect was being led out of a building by police.¹³² Because it was night, the reporter was using a bright light in order to take photographs.¹³³ The police told the reporter to turn off the light and stop taking pictures.¹³⁴ The officers subsequently confiscated the camera.¹³⁵ The equipment and film was returned the following day.¹³⁶ The Court determined that the seizure of the equipment constituted a prior restraint, even if the film was not reviewed.¹³⁷ As mentioned previously, in the case of *American Civil Liberties Union of Illinois v. Alvarez*, a civil rights group filed a lawsuit arguing that the Illinois eavesdropping statute, that made it illegal to record conversations unless all of the parties provided consent, was an unconstitutional prior restraint.¹³⁸ The Seventh Circuit determined that making audio and audiovisual recordings is a protected act under the First Amendment.¹³⁹ Moreover, “[r]estricting the use of . . . recording device[s] suppresses speech just as effectively as restricting the dissemination of the resulting recording.”¹⁴⁰ In other words, restricting the use of recording devices suppresses speech in the same manner as a prior restraint.¹⁴¹ Accordingly, police officers violate the First Amendment protection against prior restraints when they obstruct journalists’ ability to lawfully film matters of public concern.¹⁴²

III. FIRST AMENDMENT VIOLATIONS IN FERGUSON

Some of the incidents reported by journalists in Ferguson were clearly a result of First Amendment violations by law enforcement officials.

A. Unlawful Arrests of Journalists

There were numerous reports of police arresting or detaining

131. 337 F. Supp. at 635–36.

132. *Id.* at 636.

133. *See id.*

134. *Id.*

135. *Id.*

136. *Channel 10, Inc.*, 337 F. Supp. at 636.

137. *Id.* at 637.

138. *See* No. 10 C 5235, 2011 U.S. Dist. LEXIS 2088, at *4 (N.D. Ill. Jan. 10, 2011).

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

140. *Id.* at 596.

141. *See id.*

142. *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973); *see Garcia v. Montgomery Cty.*, No. JFM-12-3592, 2013 U.S. Dist. LEXIS 120659, at *10 (D. Md. Aug. 23, 2013); *Alvarez*, 679 F.3d at 600; *Channel 10, Inc.*, 337 F. Supp. at 638.

journalists in Ferguson and then releasing them sometimes immediately and other times hours later. For example, Getty Images photographer Scott Olsen was arrested on August 18, 2014 and then released a few hours later.¹⁴³ *Breitbart News* reporter Kerry Pickett was arrested the same day and released “several hours” later.¹⁴⁴ These arrests and detentions constitute prior restraints in violation of the First Amendment. In addition, these actions by police also violated the journalists’ constitutional rights to gather news and film police while conducting their official duties.

As previously noted, a prior restraint is the governmental suppression of speech before it can be disseminated. When Ferguson law enforcement officials arrested journalists while they were attempting to cover protester demonstrations in public areas, the police were suppressing speech and information before it could be disseminated. Courts have also determined that the seizure of camera equipment is a prior restraint.¹⁴⁵ When law enforcement officials arrest a journalist, not only are they seizing the equipment the journalist has on his or her person, they are seizing the individual who plans to publish the material, which effectively quashes the dissemination of information. Moreover, it does not matter whether the journalists were actually charged with a crime. The detention on its own constitutes the prior restraint, even if it is for only a short time.¹⁴⁶

Prior restraints are presumptively unconstitutional and place a heavy burden on the government to show a legitimate reason for the restrictions. Some journalists in Ferguson alleged that they were arrested while in public areas when they were peacefully covering lawful demonstrations.¹⁴⁷ As precedent illustrates, it is unlikely that the police can overcome the presumption of unconstitutionality under those circumstances. Thus, the arrests of journalists in Ferguson who were

143. Stelter, *6 More Journalists*, *supra* note 5.

144. *Id.*

145. *Roaden*, 413 U.S. at 504 (“Seizing a film then being exhibited to the general public presents essentially the same restraint on expression as the seizure of all the books in a bookstore. Such precipitate action by a police officer, without the authority of a constitutionally sufficient warrant, is plainly a form of prior restraint”); *Channel 10, Inc.*, 337 F. Supp. at 637–38.

146. *United States v. Quattrone*, 402 F.3d 304, 310 (2d Cir. 2005) (citing *Alexander v. United States*, 509 U.S. 544, 550 (1993)) (explaining that a prior restraint is not constitutionally inoffensive merely because it is temporary).

147. See Wash. Post Editorial Bd., *St. Louis County’s Bogus Charges Against Two Reporters*, WASH. POST (Aug. 11, 2015), https://www.washingtonpost.com/opinions/st-louis-countys-bogus-charges-against-two-reporters/2015/08/11/fd20450c-4064-11e5-bfe3-ff1d8549bfd2_story.html?utm_term=.5ef1137e3801.

covering lawful protests constituted prior restraints in violation of the First Amendment.

The reason prior restraints are so abhorrent is because they impede the dissemination of information.¹⁴⁸ When the Ferguson police arrest and detain journalists, they are stopping the flow of information. For example, when police arrested *News2Share* journalist Trey Yingst on the evening of November 22, 2014, during peaceful protests, he was not released until the next morning—leaving him unable to cover the protests or disseminate information for a number of hours.¹⁴⁹ Notably, this arrest happened after a federal district court in Missouri ordered police to stop arresting journalists who were lawfully taking pictures of the Ferguson protests.¹⁵⁰ Every time a police officer arrests a journalist who is lawfully gathering news, the circulation of information is hindered. After Getty Images photographer Scott Olson was arrested in August 2014, he stressed that police should not arrest journalists unlawfully.¹⁵¹ “I want to be able to do my job as a member of the media and not be arrested for just doing my job,” Olson told Getty’s Vice President Pancho Bernasconi.¹⁵²

The arrests of journalists in Ferguson also violated the First Amendment right to gather news. Courts have recognized an “undoubted right to gather news”¹⁵³ and have indicated that the ability to uncover abuses in law enforcement power is especially important because police have the ability to restrict civil liberties.¹⁵⁴ In Ferguson, there have been allegations of police brutality. Indeed, the incident that led to the protests involved allegations of excessive, fatal force. According to legal precedent, this is the type of situation when the right of newsgathering is crucial. When law enforcement officials hinder the newsgathering process by arresting journalists who are in a public area, peacefully exercising their First Amendment rights, they are violating the journalists’ constitutional rights. Therefore, the Ferguson police violated the journalists’ First Amendment rights of newsgathering when they

148. See *Quattrone*, 402 F.3d at 312 (finding that the district court’s order that barred journalists from disseminating information relating to the trial was a prior restraint on speech); see also *Alexander*, 509 U.S. at 566 (citing *Arcara v. Cloud Books, Inc.* 478 U.S. 697, 705–06 (1986)).

149. See Reilly, *supra* note 59.

150. *Id.*

151. Stelter, *6 More Journalists*, *supra* note 5.

152. *Id.*

153. *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (citing *Brazenburg v. Hayes*, 408 U.S. 665, 681–82 (1972)).

154. *Glik v. Cunniffe*, 655 F.3d 78, 82 (1st Cir. 2011); cf. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1036 (1991)).

arrested those who were reporting on the protests.

In addition, courts recognize a right to film police when they are conducting their official duties.¹⁵⁵ Some of the journalists in Ferguson alleged they were trying to do just that when they were arrested. Police officers cannot unilaterally determine that the use of cameras on a public sidewalk is illegal.¹⁵⁶ If journalists are lawfully filming a public protest, their actions are not made illegal because police command them to stop recording.¹⁵⁷ Thus, it is clear that when Ferguson police arrested journalists who were covering the protests, they violated journalists' right to film police.

B. Restricting Journalists from Accessing Demonstration Areas and Press Pens

A primary complaint voiced by the media regarding Ferguson is that the police hindered journalists' ability to gather news. There were complaints that the police would not allow the media to enter areas where protesters were demonstrating, sometimes for hours.¹⁵⁸ In some instances, law enforcement personnel set up a designated area for

155. *Gericke v. Begin*, 753 F.3d 1, 7 (1st Cir. 2014) (citing *Glik*, 655 F.3d at 82) (“[T]he Constitution protects the right of individuals to videotape police officers performing their duties in public.”); *ACLU v. Alvarez*, 679 F.3d 583, 595 (7th Cir. 2012) (“The act of making an audio or audiovisual recording is necessarily included within the First Amendment’s guarantee of speech and press rights as a corollary of the right to disseminate the resulting recording.”); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000) (citing *Blackstone v. Alabama*, 30 F.3d 117, 120 (11th Cir. 1994)); see *Fordyce v. City of Seattle*, 55 F.3d 436, 439 (9th Cir. 1995) (noting that there is a First Amendment right to film matters of public interest).

156. *Iacobucci v. Boulter*, 193 F.3d 14, 25 (1st Cir. 1999).

157. *Id.* In addition, the Fourth Amendment could also be triggered if police physically assault reporters. See *PEN AM.*, *supra* note 48, at 11. For example, while Ferguson police officers were arresting *Huffington Post*’s Ryan Reilly and *Washington Post*’s Wesley Lowery, the two reporters alleged that the police physically assaulted them. *Id.* at 10–11. According to reports, an officer slammed Lowery into a soda machine and Reilly’s head was banged against a window. *Id.* at 11. At least one federal circuit court has indicated that this type of force is in violation of the Fourth Amendment. *Asociacion de Periodistas de P. R. v. Mueller*, 529 F.3d 52, 61 (1st Cir. 2008). The U.S. Court of Appeals for the First Circuit found that FBI agents did not violate the First Amendment when they forced journalists off of private property during the execution of a warrant. *Id.* at 58. The court determined, however, that the officers used excessive force when they hit and used pepper spray on the journalists. *Id.* at 62. The court indicated that “mere obstinance by a crowd, without any evidence of a potential public safety threat or other law enforcement consideration, is insufficient to warrant the show of force that, according to the facts viewed in the light most flattering to the plaintiffs, was exhibited by the law enforcement officers here.” *Id.* at 60 (citing *Headwaters Forest Def. v. Cty. of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002)).

158. *Stelter*, *6 More Journalists*, *supra* note 5.

journalists that was located a significant distance from the protesters.¹⁵⁹ These actions by the Ferguson police department violated the media's constitutional right to gather news. If the Ferguson protesters were legally demonstrating in public areas—areas that are held as open forums for First Amendment purposes—yet law enforcement prohibited media from entering the same public areas in order to gather information regarding the protests, there is a clear constitutional violation. Prohibiting a journalist from legally accessing a public area in Ferguson is hindering the newsgathering process in violation of the First Amendment.

The media's allegations regarding police conduct in Ferguson indicate that law enforcement was, in some instances, making up its own rules and arresting those who did not comply, which is frowned upon by the courts.¹⁶⁰ Because the journalists in Ferguson were in a traditionally public forum and exercising their First Amendment rights, law enforcement would need a compelling interest to restrict free speech rights. Ferguson police officials could argue that journalists were prohibited from accessing violent protest demonstrations because the police were attempting to secure the safety of the public—similar to the reasons why journalists can be prohibited from entering crime scenes.¹⁶¹ Courts have recognized that the media does not have a special right to access areas where the general public is prohibited.¹⁶² That argument would likely fail, however, in instances where the journalists were attempting to cover lawful, peaceful demonstrations in public areas. If the allegations by the media in Ferguson are true, it is arguable that law enforcement officials violated the rights of the press by hindering access to newsworthy material.

Requiring the press to remain in a designated area, known as a “press pen,” is also a First Amendment violation in some circumstances.¹⁶³ The primary concern is the location where the press pen is set up. If the media-designated area allows members of the press to observe the protestors' demonstrations, there would likely be no constitutional issue because the gathering and dissemination of news would not be hindered. On the other hand, if, as alleged, the press pens were in areas far from the demonstrations, where journalists could not see or speak to the protesters, there would be a First Amendment violation of the right to gather news. Traditional public fora is provided a heightened level of protection under

159. PEN AM., *supra* note 48, at 13; Stelter, *6 More Journalists*, *supra* note 5.

160. *See Iacobucci*, 193 F.3d at 24–25.

161. *See Branzburg v. Hayes*, 408 U.S. 665, 684–85 (1972).

162. *Id.*

163. PEN AM., *supra* note 48, at 15.

the Constitution.¹⁶⁴ Without a compelling state interest and narrowly tailored restrictions that allow for alternative communication avenues, the constraints on media would be unconstitutional.¹⁶⁵ It would be difficult for the Ferguson police to show a compelling state interest to keep journalists in press pens that were in a different area than where lawful demonstrations were taking place. Thus, it is likely that establishing designated press pens away from the newsworthy activity is in violation of the First Amendment.

C. Threats Against Journalists

Similar to arrests and restriction of access, threatening conduct by the police toward journalists would also constitute a First Amendment violation. If a threat by a police officer causes a journalist to stop reporting on an issue or stop recording or photographing, then it is likely the officer has violated that journalist's rights to gather news and film police. Moreover, it is possible that such an action could constitute a prior restraint. Specifically, a prior restraint stops the collection and dissemination of information. If a journalist who is video recording a protest stops recording because he or she is threatened by police, there is clearly a restraint on the dissemination of information to the public. Using fear as a tacit to stop journalists from gathering and reporting the news is plainly a prior restraint and in violation of the First Amendment.

D. Future Landscape of Activism

Although there were many people and organizations who decried the arrest of journalists in Ferguson, this did not stop police from arresting and prosecutors from charging journalists who were reporting on later protests. Notably, charges against most of the journalists arrested in Ferguson were later dropped; however, it was an uphill battle for some.¹⁶⁶ It was particularly troubling that prosecutors waited a year to charge some of the journalists arrested in Ferguson.¹⁶⁷ This delay suggests that prosecutors were not swayed by those who denounced the arrests of the

164. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (citing *Pleasant Grove City v. Summon*, 555 U.S. 460, 469 (2009)); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980).

165. *McCullen*, 134 S. Ct. at 2529 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

166. See PEN AM., *supra* note 48, at 10.

167. Michael Calderone, *Huffington Post, Washington Post Reporters Charged for Doing Journalism In Ferguson*, HUFFINGTON POST (Aug. 11, 2015, 7:32 PM), http://www.huffingtonpost.com/entry/washington-post-reporter-wesley-lowery_us_55c92866e4b0f1cbf1e61822.

journalists and the arguments that free speech rights were in danger.

Consider, for example, the arrests of Ryan Reilly from the *Huffington Post* and Wesley Lowery from the *Washington Post*, in a McDonald's restaurant in Ferguson¹⁶⁸ The journalists were told that they were arrested for not leaving the restaurant fast enough and were later released with no charges.¹⁶⁹ What followed a year later illustrated how dedicated St. Louis County was to using fear tactics to harass reporters. In August 2015, the county brought charges of trespass against the two journalists.¹⁷⁰ The judge refused to dismiss the case and it dragged on for nine months until the county finally dropped the charges in May 2016.¹⁷¹ Even though the charges were eventually dropped, the lawsuit took a toll on the journalists. Reilly stated that it is likely that he would have given up and tried to plea bargain out if he had been paying for his defense out of his own pocket; instead, his expenses were paid by AOL, *Huffington Post's* parent company.¹⁷² Reilly said that the case was "frustrating, infuriating and time-consuming."¹⁷³ He said it was only because he and Wesley had "the resources of large companies at our disposal that it hasn't come with a huge personal monetary cost."¹⁷⁴ Reilly also indicated that he believed the charges were used as a tactic to head off any litigation the journalists may file against the county.¹⁷⁵ The charges against him and Lowery were dropped in exchange for an agreement that the two reporters would not file a civil suit against the county.¹⁷⁶ This type of prosecution can leave journalists wary of reporting on protests and interacting with police for fear of a long, drawn-out and expensive prosecution with little recourse for those who do not have a large company to offer financial backing.

Unfortunately, this is not the only example of delayed prosecution against a journalist. In September 2016, a warrant was issued for *Democracy Now!* host Amy Goodman a week after she attended and reported on a protest conducted by the Standing Rock Sioux tribe who

168. *Id.*

169. *Id.* As noted previously, there is certainly an argument that the arrest was a prior restraint

170. *Id.*

171. Ryan J. Reilly, *Prosecutors Finally Dropped Their Bogus Charges Against Me for Reporting in Ferguson. Not Everyone Is So Lucky*, HUFFINGTON POST (May 20, 2016), https://www.huffingtonpost.com/entry/ryan-reilly-ferguson-arrest-st-louis-county_us_573cb0eae4b0646cbeebce8a [hereinafter Reilly, *Dropped Charges*].

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. Reilly, *Dropped Charges*, *supra* note 171.

were opposing the installation of an oil pipeline.¹⁷⁷ Goodman's report showed Dakota Access Pipeline security guards attacking protestors using pepper spray and dogs.¹⁷⁸ The North Dakota Attorney General's actions in this matter are made even more concerning in that the charge was changed in an attempt to find an avenue to punish Goodman for her reporting.¹⁷⁹ Initially, she was charged with criminal trespass; however, once the state's attorney's office determined that a trespass action was not viable it changed the charge to "riot."¹⁸⁰ It is not clear why the prosecutor refused to drop the charges against Goodman once it was determined that there was no trespass. Although many people decried the charges against Goodman, the prosecutor was persistent in bringing the matter before a judge. A month later, a North Dakota judge rejected the "riot" charge, finding a lack of evidence.¹⁸¹ Although the judge brought the case to a halt, a state prosecutor stated that they would investigate the issue further to determine whether other charges were warranted.¹⁸² It is unfortunate to see, even after the issues were resolved in Ferguson, that prosecutors continue to be determined to charge journalists who are reporting on protests.

In January 2017, six journalists were arrested and charged with rioting, a felony offense with up to ten years in prison and a \$25,000 fine, while filming unrest at Donald Trump's inauguration in Washington D.C.¹⁸³ During the inauguration, there were several demonstrations near the nation's capital resulting in destruction of property, and Washington D.C.'s metropolitan police arrested more than 200 people.¹⁸⁴ One of the arrested journalists, Jack Keller, alleged that he was detained for approximately thirty-six hours and that police kept his cellphone after he

177. Amy Goodman & Denis Moynihan, *North Dakota vs. Amy Goodman: Journalism Is Not a Crime*, DEMOCRACY NOW! (Sept. 15, 2016), https://www.democracynow.org/2016/9/15/north_dakota_vs_amy_goodman_journalism.

178. *Id.*

179. See Sam Levin, *Judge Rejects Riot Charges for Journalist Amy Goodman After Oil Pipeline Protest*, GUARDIAN (Oct. 17, 2016), <https://www.theguardian.com/us-news/2016/oct/17/amy-goodman-north-dakota-oil-access-pipeline-protest-arrest-riot>.

180. *Id.*

181. *Id.*

182. Erin McCann, *Judge Rejects Riot Charge Against Amy Goodman of 'Democracy Now' over Pipeline Protest*, N.Y. TIMES (Oct. 17, 2016), <https://www.nytimes.com/2016/10/18/us/judge-rejects-riot-charge-against-amy-goodman-of-democracy-now-over-pipeline-protest.html>.

183. Jon Swaine, *Four More Journalists Get Felony Charges After Covering Inauguration Unrest*, GUARDIAN (Jan. 24, 2017), <https://www.theguardian.com/media/2017/jan/24/journalists-charged-felonies-trump-inauguration-unrest>.

184. *Id.*

was released.¹⁸⁵ The journalists stated that they were simply covering the demonstrations and did not take part in any rioting or vandalism.¹⁸⁶ Prosecutors dropped most of the charges against journalists in the weeks and months following the protests.¹⁸⁷ However, Aaron Cantu, who works for the *Santa Fe Reporter* and has published with other well-known news organizations, including the *Guardian*, continues to face charges.¹⁸⁸ In June 2017, prosecutors added new felony charges against Cantu that could result in more than 70 years in prison.¹⁸⁹ Cantu's trial is set for October 2018.¹⁹⁰ Independent photojournalist Alexei Wood, who was also arrested while covering the inauguration demonstrations, faced similar charges, which prosecutors also refused to drop.¹⁹¹ In December 2017, a jury found Wood not guilty of the seven charges against him stemming from the inauguration.¹⁹² Wood faced a variety of charges including incitement of a riot. If he had been found guilty, he could have been sentenced to up to seventy years in prison.¹⁹³ This further illustrates that the future landscape for journalists reporting on protests is not a pretty sight. Although police did release some reporters from a cordoned area while making arrests during the inauguration, it is troubling that other journalists were arrested. Furthermore, prosecutors refused to drop charges, meaning that some of the journalists actually faced trial and the threat of possible jail time.¹⁹⁴

These types of arrests and prosecutions do not bode well for the media. The atmosphere surrounding journalists remains turbulent, and it appears that the current administration is not helping matters. President Trump has been quick to lash out at media outlets who he believes are

185. Emma Lux, *Journalists Face Charges in Inauguration Arrests; One Sees Charges Dropped*, REPS. COMM. FOR FREEDOM PRESS (Jan. 27, 2017), <https://www.rcfp.org/browse-media-law-resources/news/journalists-face-charges-inauguration-arrests-one-sees-charges-dropp>.

186. *See, e.g.*, Swaine, *supra* note 183.

187. *See, e.g.*, Steven Nelson, *Journalist Arrested During Trump Inauguration Faces New Felonies that Carry Decades in Jail*, U.S. NEWS & WORLD REP. (June 9, 2017, 4:42 PM), <https://www.usnews.com/news/national-news/articles/2017-06-09/journalist-arrested-during-trump-inauguration-arraigned-on-new-felonies-carrying-decades-in-jail>.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Alex Zielinski, *SA Photojournalist Alexei Wood Found Not Guilty on All 7 Inauguration Day Charges*, SAN ANTONIO CURRENT (Dec. 21, 2017), <https://www.sacurrent.com/the-daily/archives/2017/12/21/sa-photojournalist-alexei-wood-found-not-guilty-on-all-7-inauguration-day-charges>.

193. *Id.*

194. Nelson, *supra* note 187.

treating him unfairly.¹⁹⁵ There have been numerous instances where he has voiced anti-media views. A prime example occurred on July 2, 2017 when Trump tweeted a video of a World Wrestling Entertainment (WWE) broadcast where he is shown wrestling a man to the ground and repeatedly punches him.¹⁹⁶ The video had a CNN logo superimposed over the man's face, and the tweet had #FraudNewsCNN and #FNN inserted above the video.¹⁹⁷ The @POTUS account retweeted the tweet later the same day.¹⁹⁸ While some people laughed off the tweet as a joke, others argued that it "encourages violence against reporters."¹⁹⁹ These types of instances suggest that the atmosphere surrounding journalism is not likely to improve in the future. Furthermore, it is concerning that the official presidential twitter account is retweeting anti-journalism messages, as this could be viewed as an intimidation tactic taken by the government in order to silence speech. The press's ability to work as a watchdog over the government is hindered significantly if journalists have to contend with pressure from the executive branch to stop publishing stories that are critical of the President. There is no indication that the arrests and prosecutions of journalists will end in the future. Furthermore, if the arrests and prosecutions continue, there is a concern that some journalists will stop covering protests to avoid legal consequences. The danger is that even if journalists know they have a constitutional right to cover a demonstration, they may still choose not to because they fear arrest. The result is worrisome because, as the Supreme Court said in *Richmond Newspapers v. Virginia*, there is a risk that the marketplace of ideas will be negatively affected, and society would be harmed, if the press ceased from protected speech out of fear of repercussions from the government.²⁰⁰

CONCLUSION

On November 24, 2014, the grand jury decided not to indict Officer Darren Wilson on a variety of charges, including first and second-degree murder as well as voluntary and involuntary manslaughter, and protesters

195. Brian Stelter, *Trump Punches CNN in a Juvenile Tweet*, CNN (July 2, 2017, 4:57 PM), <http://money.cnn.com/2017/07/02/media/president-trump-cnn-video/index.html> [hereinafter Stelter, *Trump Punches CNN*].

196. *Id.*

197. Donald J. Trump (@realDonaldTrump), TWITTER (July 2, 2017, 6:21 AM), <https://twitter.com/realdonaldtrump/status/881503147168071680?lang=en>.

198. Stelter, *Trump Punches CNN*, *supra* note 193.

199. Brian Stelter (@brianstelter), TWITTER (July 2, 2017, 7:32 AM), <https://twitter.com/brianstelter/status/881521068078505985>.

200. 448 U.S. 555, 578 (1980).

began amassing across the country.²⁰¹ Along with the increased protests came more arrests.²⁰² While police are both necessary and welcome during times of unrest in order to protect the public, there are times when officers exceed their authority. The First Amendment bestows in journalists the rights to gather news and record law enforcement officials. While police are doing their jobs, they should allow journalists to do the same. Arresting, threatening and harassing reporters, along with restricting access to public areas, is unconstitutional and should not, under any circumstances, be tolerated.

201. Amanda Terkel, *Thousands Protest Nationwide After Ferguson Grand Jury Decision*, HUFFINGTON POST (Nov. 24, 2014, 11:56 PM), http://www.huffingtonpost.com/2014/11/25/ferguson-protests_n_6216234.html; Dana Ford, *What Charges did Ferguson Grand Jury Consider in the Death of Michael Brown?* CNN (Nov. 19, 2014, 7:35 AM), <https://www.cnn.com/2014/11/18/justice/ferguson-grand-jury-charges/index.html>.

202. See Steve Almasy & Holly Yan, *Protesters Fill Streets Across Country as Ferguson Protests Spread Coast to Coast*, CNN (Nov. 26, 2014, 7:26 AM), <http://www.cnn.com/2014/11/25/us/national-ferguson-protests/index.html>.