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## Protecting the Protectors: Preserving and Enhancing the Rights of Legal Observers

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# PROTECTING THE PROTECTORS: PRESERVING AND ENHANCING THE RIGHTS OF LEGAL OBSERVERS

Erica D. Lunderman\*

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## INTRODUCTION

Green hats and name badges are the uniforms worn at protests, but their names are rarely spoken.<sup>1</sup> Instead leaders, like Martin Luther King, Jr., and victims, like Mike Brown, are names most Americans associate with social movements.<sup>2</sup> Leaders and victims will always have a place in the history of American social movements that have been born out of injustices.<sup>3</sup> Although their lives significantly impact social movements, leaders and victims are not the only people who play a significant role in social movements.

Social movements have played a key role in the history of the United States.<sup>4</sup> Many people have sacrificed their time and lives to ensure that others are afforded various rights. Some of these rights

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1. Legal Observers wear very distinctive clothing to make their visibility known at protests. National Lawyer's Guild, *Legal Observer Training Manual* (2003).

2. See *infra* note 3.

3. Lily Rothman, *How MLK Day Became a Holiday*, TIME (Jan. 19, 2015), <http://time.com/3661538/mlk-day-reagan-history> (noting that former President Reagan signed the bill making MLK Day a national holiday on Nov. 2, 1983; Mariah Stewart, *Michael Brown is Getting a Permanent Memorial in Ferguson*, HUFFINGTON POST (May 20, 2015, 4:31 PM), [http://www.huffingtonpost.com/2015/05/20/michael-brown-memorial\\_n\\_7345690.html](http://www.huffingtonpost.com/2015/05/20/michael-brown-memorial_n_7345690.html) (discussing a permanent plaque that will be displayed to memorialize the like of Michael Brown). See also Matt Compton, *Rosa Parks has a Permanent Place on the U.S. Capitol*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/blog/2013/02/27/rosa-parks-has-permanent-place-us-capitol> (discussing the Rosa Parks statute that is currently displayed in National Statuary Hall inside the U.S. Capitol); Lilly Workneh, *"We're Never Gonna Forget:" Eric Garner's Family Reflects on His Death One Year Later*, HUFFINGTON POST (July 17 2015, 1:08 PM), [http://www.huffingtonpost.com/entry/were-never-gonna-forget-eric-garners-family-reflects-on-his-death-one-year-later\\_55a91617e4b04740a3dfb353](http://www.huffingtonpost.com/entry/were-never-gonna-forget-eric-garners-family-reflects-on-his-death-one-year-later_55a91617e4b04740a3dfb353) (noting the impact the death of Eric Garner, killed by police chokehold, had on Garner's family).

4. Lani Guinner and Gerald Torres, *The Meaning of The Civil Rights Revolution: Changing the Wind: Notes Toward Demoprudence of Law and Social Movements*, 123 YALE L.J. 2740, 2744 (2014).

include the right to vote<sup>5</sup> and the right to a quality education.<sup>6</sup> The public faces of these movements often receive praise and recognition.<sup>7</sup> When legal scholars look past figureheads and their various accomplishments, they focus on the rights of protesters, community organizers, and various organizations that played significant roles in the movement.<sup>8</sup> But what about the rights of the group of people who work to protect the rights of protesters?

The people who work to protect the rights of protesters are known as legal observers.<sup>9</sup> Law students, paralegals, and lawyers act as legal observers; fortunately, this list is not exclusive.<sup>10</sup> Legal observers are present at protests to ensure the legal rights of the protesters and deter law enforcement from infringing on those rights.<sup>11</sup> While present at protests, legal observers, distinctively dressed, document all interactions between law enforcement and protesters.<sup>12</sup>

This Note examines the rights that legal observers have and recommends exceptions and expansion of these rights as legal observers work to protect the rights of protesters. Part II, addresses the importance of protests and social movements in the United States and highlights past social movements and conflicts between police

5. Women worked and fought collaboratively to obtain the right to vote for women; one of the most memorable fight of women's suffrage is known as the Night of Terror. Wanda G. Sobieski, *Votes for Women*, 51 TENN. B.J. 12, 14 (2004). Mary Oberst and Elise Gautier, *Bridge to the Future*, 62 OR. ST. B. BULL. 33, 33 (2002); "I Thought I Saw Death" (discussing the impact of Bloody Sunday on the Civil Rights Movement fight for African Americans' right to vote).

6. See generally Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1496 (2005).

7. For example, there are a host of people outside of Martin Luther King, Jr. who deserve praise for the Civil Rights Movements, but unfortunately they have not received the recognition that they deserve. See generally Emily Deruy, *Meet the Secret Heroes of the Civil Rights Movement*, Fusion.net (Mar. 7, 2015, 7:32 AM) <http://fusion.net/story/59238/meet-the-secret-heroes-of-the-civil-rights-movement/>; Katlyn Joy, *10 Forgotten Martyrs of the American Civil Rights Movement*, LISTVERSE.COM (Mar. 5, 2014) <http://listverse.com/2014/03/05/10-forgotten-martyrs-of-the-american-civil-rights-movement/>

8. See generally, Christopher P. Keleher, *Double Standards: The Suppression of Abortion Protesters' Free Speech Rights*, 51 DEPAUL L. REV. 825 (2002) (discussing the rights of protesters in the abortion context); Jocelyn Simonson, *Copwatching*, 104 CAL. L. REV. (forthcoming 2016) (discussing community organized copwatching); Angela A. Allen-Bell, *A Prescription for Healing a National Wound: Two Doses of Executive Direct Action Equals a Portion of Justice and a Serving of Redress for America and The Black Panthers Party*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 1 (2005)

9. *Legal Observer Training Manual*, *supra* note 1, at 1

10. *Id.* Depending on the National Lawyers Guild chapter, community members are also able to be legal observers. Email from Dr. Jill M. Humphries, , to Margaret Spring (January 15, 2020, 2:51 CST) (on file with author).

11. *Id.* at 1–2.

12. *Id.*

officers and protesters. Part II concludes by explaining why social movements are necessary today, specifically through the lens of the Black Lives Matter Movement. Part III provides background information about legal observers, including who they are and the purpose for their presence at demonstrations and concludes by examining litigation and legal issues specific to legal observers. Part IV explains how mainstream media misrepresent social movements and concludes by examining interactions with police, specific to protesters and legal observers. Part V offers recommendations for heightened rights of legal observers and includes an argument that legal observers should have the ability to post police and protester interactions on social media and be exempt from police dispersal orders. Lastly, this Note suggests that law enforcement officials should receive education about legal observers and provides an example of what this education could look like.

### THE IMPORTANCE OF DEMONSTRATIONS AND PROTESTS IN THE UNITED STATES

In order to understand the importance of legal observers, the importance of social movements must first be understood. The presence of legal observers at protests is necessary to protect protesters and deter police misconduct. This section examines the constitutionality of demonstrations and restrictions, the necessity of social movements, and the present relevance of social movements.

#### *Demonstrations, Law Enforcement, and the First Amendment*

The First Amendment of the United States Constitution provides U.S. citizens the right to freedom of speech.<sup>13</sup> Many people, particularly minority groups, have relied on the exercise of their First Amendment rights to provoke social changes in a system that readily oppresses them.<sup>14</sup> Unfortunately, many protesters have not seen the social change; instead, they are met with opposition from law

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13. U.S. Const. amend. I.

14. See generally *Civil Rights Movement*, HISTORY.COM (2009), <http://www.history.com/topics/black-history/civil-rights-movement> (describing various protests that occurred during the Civil Rights Movement); Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, THE GUARDIAN (19 July 2015) (explaining the rise of the Black Lives Matter Movement and protests that have occurred since the movement's establishment); Michael C. Dorf & Sydney Tarrow, *STRANGE BEDFELLOWS: HOW AN ANTICIPATORY COUNTERMOVEMENT BROUGHT SAME-SEX MARRIAGE INTO THE PUBLIC ARENA*, 39 *Law & Soc. Inquiry* 449, 458-68 (2014) (describing the evolution of same-sex marriage public debate and protests that occurred).

enforcement.<sup>15</sup>

The First Amendment prohibits creation of laws “abridging the freedom of speech.”<sup>16</sup> Protesters in public forums rely on the right to freedom of speech to speak out against various injustices and to demand repercussions for the injustices.<sup>17</sup> The government recognizes streets, sidewalks, parks, and other areas known for public assemblies as public forums for people to assemble and protest.<sup>18</sup> Despite the number of public forums available for protest and assembly, the right to assemble is not absolute.<sup>19</sup> Instead courts have established recognized limits to free speech guaranteed under the First Amendment;<sup>20</sup> the most important limit placed on protesters involves arrest and prohibitions by law enforcement officers. The constitutionality of law enforcement infringement on protesters’ First Amendment rights exercised in public forums is measured by the time, place, and manner test.<sup>21</sup> Under this test, law enforcement agencies may place restrictions when they are content neutral, justified to serve an important governmental interest, and provide alternative channels for protesters to communicate their message.<sup>22</sup> Most often, it is constitutional for law enforcement to intervene with protests in order to promote safety.<sup>23</sup>

While law enforcement may interfere with protests to protect the safety of others, at times law enforcement officers have actually been the cause of violence at protests.<sup>24</sup> One of the most notable examples of police brutality during protests is “Blood Sunday,” a

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15. See generally Corky Siemaszko, *Birmingham Erupted into Chaos in 1963 as Battle for Civil Rights Exploded in South*, NY DAILY NEWS (2012), <http://www.nydailynews.com/news/national/birmingham-erupted-chaos-1963-battle-civil-rights-exploded-south-article-1.1071793> (describing the violence that occurred during protests in Selma, Alabama when Bull Connor was the Commissioner of Safety); Amanda Terkel & Ryan J. Reilly, *Ferguson Police Fire Tear Gas at Protesters Before Curfew*, Huffington Post (Aug. 8, 2014), [http://www.huffingtonpost.com/2014/08/17/ferguson-protests\\_n\\_5686601.html](http://www.huffingtonpost.com/2014/08/17/ferguson-protests_n_5686601.html) (describing use of tear gas by police officers in Ferguson, Missouri); Lily Rotham, *How TIME Covered the Stonewall Riots* (Sept. 25, 2015), <http://time.com/4042859/stonewall-inn-history-time/> (describing the Stonewall Riots)

16. U.S. Const. amend. I

17. William M. Howard, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Manner of Restrictions*, 71 A.L.R. 6<sup>th</sup> 471, §2 (2012).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at § 11

22. *Id.*

23. Williams at §11.

24. Radley Balko, *Justice Department Report: Police Tactics in Ferguson Created Confrontation*, Washington Post (2015), <https://www.washingtonpost.com/news/the-watch/wp/2015/07/02/justice-department-report-police-tactics-in-ferguson-created-confrontation/>

monumental event of the Civil Rights Movement. On March 7, 1965, approximately six hundred marchers headed towards Montgomery, Alabama from Selma, Alabama in hopes of gaining protections for African Americans' right to vote.<sup>25</sup> This protest started out peacefully but ended with blood, injuries, and tear gas.<sup>26</sup> The peaceful protesters participating in Selma-to-Montgomery March were met with law enforcement opposition at the Edmund Pettus Bridge.<sup>27</sup> While crossing the bridge, protesters were met by mounted state troopers, who beat them and set off tear gas bombs.<sup>28</sup> Many of the marchers were hospitalized and police beat John Lewis, current Congressman and Civil Rights hero, to near death.<sup>29</sup>

Despite the unnecessarily violent interaction with police and two marches later,<sup>30</sup> members of the Selma-to-Montgomery March received what they were marching for in 1965 when President Johnson signed the Voting Rights Act of 1965.<sup>31</sup> Unnecessary animosity, violence, and turmoil from law enforcement are not exclusive to the Selma-to-Montgomery March; other peaceful protesters have been face to face with similar opposition.<sup>32</sup> The events on the Edmund Pettus Bridge were horrific and should have never occurred. In order to prevent such infringement on protesters rights, agents like legal observers are necessary to hold law enforcement accountable for their actions.

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25. Selma-to-Montgomery March: National Historic Trail & All-American Road, NAT'L PARK SERV., <https://www.nps.gov/nr/travel/civilrights/al4.htm> (last viewed APR. 19, 2019)..

26. *Id.*

27. *Id.*

28. Mary Oberst and Elise Gautier, *Bridge to the Future*, 62 OR. ST. B. BULL. 33 (2002).

29. *I Thought I Saw Death": John Lewis Remembers Police Attack on Bloody Sunday in Selma 50 Years Ago*, DEMOCRACY NOW (Mar. 6, 2015) [http://www.democracynow.org/2015/3/6/i\\_thought\\_i\\_saw\\_death\\_john](http://www.democracynow.org/2015/3/6/i_thought_i_saw_death_john) (quoting Congressman John Lewis, "My legs went out from under me. I felt like I was going to die. I thought I saw Death. All these many years later, I don't recall how I made it back across that bridge to the church.").

30. On March 9, 1965, Martin Luther King Jr. led a "symbolic march" across the Edmund Pettus Bridge two days after "Bloody Sunday." NAT'L PARK. SERV., *supra* note 25. A third full scale march from Selma to Montgomery occurred starting on March 21, 1965 and ending on March 25, 1965. *Id.*

31. *Id.*

32. Police officers also turned violent in the peaceful protest of the death of Oscar Grant, who was killed while unarmed in the Fruitvale BART station. Officers also met protesters of the Civil Rights Movement with violence in Selma, Alabama under the orders of Bull Conner. Casey Gane-McCalla, *The Top 5 Most Violent Protest of all Time*, NEWSONE <http://newsone.com/1558125/the-top-5-most-violent-protests-of-all-time/>.



### *Why Are Social Movements Needed?*

Social change does not always begin or end with the courts.<sup>33</sup> Instead, social change often occurs because of public mobilization through social movements. Without social movements like the Civil Rights Movement, little progress would have been made in our legal system.<sup>34</sup>

The social changes that arise out of social movements are part of a process known as demoprudence. Demoprudence is the “study of the dynamic equilibrium of power between lawmaking and social movements.”<sup>35</sup> Simply, demoprudence focuses on lawmaking that occurs through the public’s participation in enacting social change.<sup>36</sup> Participatory democracy has encouraged public figures to become accountable to their constituencies and has forced legal advocates to examine how social issues are influenced by the legal system.<sup>37</sup>

One of the most notable examples of demoprudence in action is the Civil Rights Movement’s Montgomery Bus Boycott. Dr. King mobilized his community and other grassroots organizations to enact change that later desegregated public transit.<sup>38</sup> Dr. King used his position as the head of the Montgomery Improvement Association and his community’s Christian ties to encourage Black Montgomery citizens to participate in the thirteen-month boycott.<sup>39</sup> Fred Gray, who later litigated the case of segregated buses, on the side of the

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33. See generally Lani Guinner and Gerald Torres, *The Meaning of The Civil Rights Revolution: Changing the Wind: Notes Toward Demoprudence of Law and Social Movements*, 123 YALE L.J 2740 (2014)

34. Without social movements, African Americans would not have the right to vote. Martin Luther King, Jr. and over 500 protesters marched from Selma to Montgomery, Alabama in efforts to gain voting rights. During this protests, the protesters were met with a lot of unrest and police brutality. Despite the violence, the protesters passed another march and eventually the Voting Rights Act of 1965 was passed. See Part II.A. Social movements also played a huge role in the Supreme Court ruling that same-sex marriage is legal in all 50 states. Public protests brought the same-sex marriage to the public and eventually to the Supreme Court. Dorf & Sydney, *supra* note 12, at 458-68 (describing the evolution of same-sex marriage public debate and protests that occurred); Bill Chappel, *Supreme Court Declares Same-Sex Marriage Legal in all 50 States*, NPR (June 26, 2015), <http://www.npr.org/sections/thetwo-way/2015/06/26/417717613/supreme-court-rules-all-states-must-allow-same-sex-marriages> (explaining *Obergefell* decision, in which SCOTUS holds that the Fourteenth Amendment Due Process Clause protects the right to marriage of all couples); *Obergefell v. Hodges*, 576 U.S. \_\_\_\_, 22 (2015).

35. Guinner, *supra* note 32, at 2748.

36. *Id.* at 2749.

37. *Id.* at 2750.

38. *Id.* at 2777

39. *Id.* (“King linked his new community’s ‘right to protest for right’ to a biblical story of divine justice.”)

boycotters, became involved in the boycott.<sup>40</sup> Gray was an attorney who wanted to challenge Montgomery's segregation. However, instead of automatically filing a claim, Gray waited until he had support and approval from the Montgomery Improvement Association.<sup>41</sup> Gray supported, rather than led the bus boycott. Gray's support and later advocacy in federal court, resulted in the Supreme Court declaring that segregated buses were unconstitutional.<sup>42</sup>

As the Montgomery Bus Boycott exemplifies, social change does not always take place in the courtroom. It starts within the communities where the change is wanted and needed.<sup>43</sup> The root of social movements and social change starts with ordinary people bound together through common experiences.<sup>44</sup> The organization and mobilization of concerned citizens prompts lawyers to litigate social issues in the courtroom, which allows the concerns of citizens to strengthen the democracy.<sup>45</sup> In order for communities to mobilize and exercise their First Amendment right to free speech, as they did in the Montgomery Bus Boycott, accountability is needed to ensure that all agents involved in the demonstration do not abuse powers. Legal observers work to hold one group, law enforcement agents, accountable to ensure they do not overstep boundaries and restrict law-abiding protesters from communicating their opinions and exercising their First Amendment rights.

#### THE RELEVANCE OF SOCIAL MOVEMENTS TODAY

Despite incrementally gaining rights and protections, specifically for people of color through social movements, many people are still mobilizing for more change.<sup>46</sup> African Americans' work in demonstrations during the Civil Rights Movements led to the passage of legislation providing African Americans the right to vote,<sup>47</sup>

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40. Gunnier and Torres, 123 Yale L.J. at 2779.

41. *Id.* at 2779 (arguing that Gray's "behind-the-scene preparation" helped in the success of this suit).

42. *Id.*

43. Social change begins with the community it effects. The Civil Rights Movement, Black Lives, and Marriage Reform have experienced success, not because of litigation but because of the organizing of people in communities. Without the actual social movements, litigation which solidified social change would not have occurred. *See generally supra* note 33.

44. *Id.* at 2781.

45. *Id.*

46. See Part II. B.

47. Oberst and Gautier at 33.

the desegregation of public transit,<sup>48</sup> the desegregation of schools,<sup>49</sup> and numerous other rights. However, the fight for equality of African Americans is far from over.<sup>50</sup> Presently, many African Americans are protesting and fighting for equality in the United States criminal justice system. As with past social movements, members of the modern Civil Rights Movement are expected to act lawfully.

### SCOTUS Foundation for Lawful Protests.

The Supreme Court has laid out a foundation for lawful protest and demonstrations in the United States in *Grayned v. City of Rockford*,<sup>51</sup> *Cox v. State of Louisiana*, and *Tinker v. Des Moines*. In *Grayned v. City of Rockford*, the Supreme Court acknowledged that streets and parks can be used for assembly when citizens are exercising their First Amendment rights by protesting and discussing public questions.<sup>52</sup> However, public demonstrations in streets and parks are subject to reasonable regulations placed on time, place, and manner of demonstrations when demonstrations obstruct “significant government interests.”<sup>53</sup> Once a protest becomes violent, the Court held that it loses its protection under the First Amendment.<sup>54</sup>

Although regulations may be placed on protests, the Supreme Court has placed specific limitations on these regulations. In *Cox v. Louisiana*, the Court held that protesters must also have fair notice of the regulations, explaining what is and is not legal during a demonstration. Notice of regulations is necessary, however, all protests do not need government restrictions. In *Tinker v. Des Moines*, the Supreme Court held that silent and non-disruptive protests cannot be restricted by government actions because silent action does not necessarily infringe state interests.<sup>55</sup>

Although government agents have the ability to place

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48. Guinner and Torres at 33.

49. *Brown v. Board of Education*, 347 U.S. 483, 495 (1954)

50. See *About the Black Lives Matter*, Black Lives Matter, <http://blacklivesmatter.com/about/>.

51. See generally *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (holding that regulations may be placed on demonstrations when the protest prevents the fulfillment of “significant government interest”); *Cox v. Louisiana*, 379 U.S. 559 (1965) (holding that legal observers cannot be sanctioned for acting illegally without warning that their actions were illegal); *Tinker v. Des Moines*, 393 U.S. 503 (1969) (holding that unrestrictive protests cannot be restricted by government action).

52. *Grayned v. City of Rockford*, 408 U.S. 104, 115-16 (1972)

53. *Id.*

54. *Id.*

55. *Tinker*, 393 U.S. at 508, 514. Cf. *Ferrell v. Dallas Independent School District*, 392 F.2d 697 (1968); *Pugsley v. Sellmeyer*, 158 Ark. 247, 250 S. W. 538 (1923).

restrictions on protesters, they do not have total discretion in establishing restrictions. Instead, government agents must act within the limitations upheld in *Grayned*, *Cox* and *Tinker*. The restrictions must protect a significant government interest, protesters must have notice of the regulations, and the protests must not be silent or disruptive.

### Present Relevance- Black Lives Matter Movement

Based on the Supreme Court's precedent, lawful protests exist when protests are peaceful and do not interfere with a significant government interest.<sup>56</sup> The government is also unable to interfere or restrict protests when protesters are unaware that their actions are illegal.<sup>57</sup> However, when the actions are actually illegal and protesters become violent, protesters have exceeded the protections of the First Amendment.<sup>58</sup> These rights and protections of protesters are still applicable today. However, recent protests, particularly those part of the Black Lives Matter movement, question the application of these protections to all protesters.

Black Lives Matter is a global network that is fighting for the validity of Black lives.<sup>59</sup> This movement can be seen as the modern day Civil Rights Movement.<sup>60</sup> Black Lives Matter was started in 2012 after George Zimmerman was acquitted for the murder of Trayvon Martin.<sup>61</sup> Similar to the Civil Rights Movement, members of Black Lives Matter are demanding for recognition that Black lives should be valued as anyone else's.<sup>62</sup> The Black Lives Matter movement's main

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56. *Grayned*, 408 U.S. at 115; *Tinker*, 393 U.S. at 505; Howard *supra* note 17, at 471.

57. *Cox*, 379 U.S. at 574.

58. *Grayned*, 408 U.S. at 115.

59. About Black Live Matter *supra* note 45; Email from Dr. Jill M. Humphries, to Margaret Spring (January 15, 2020, 2:51 CST) (on file with author).

60. Francis Shor, "Black Lives Matter" Constructing a New Civil Rights and Black Freedom Movement, *New Politics* (2015), <http://newpol.org/content/%E2%80%9Cblack-lives-matter%E2%80%9D-constructing-new-civil-rights-and-black-freedom-movement> (insisting that the Black Lives Matter is the "new" civil rights movement.). Despite referencing the Black Lives Matter movement as a modern day Civil Rights Movement, the author recognizes that the two movements differ, specifically when it comes to respectability and disruptive politics. Email from Dr. Jill M. Humphries, to Margaret Spring (January 15, 2020, 2:51 CST) (on file with author).

61. *Id.*

62. *The Truth of 'Black Lives Matter,'* *New York Times* (Sept. 3, 2015), [http://www.nytimes.com/2015/09/04/opinion/the-truth-of-black-lives-matter.html?\\_r=0](http://www.nytimes.com/2015/09/04/opinion/the-truth-of-black-lives-matter.html?_r=0); email from Dr. Jill M. Humphries to Margaret Spring (January 15, 2020, 2:51 CST) (on file with author). "Anti-black racism is the belief that there's something wrong with black people." See Jorge Newbury, "Anti-Black Racism," *Huffington Post* (March 10, 2016, updated Dec. 6, 2017), [https://www.huffpost.com/entry/anti-black-racism\\_b\\_9421168](https://www.huffpost.com/entry/anti-black-racism_b_9421168), quoting Ta-Nehisi Coates.

mission is to call to action a response to anti-Black racism in the United States.<sup>63</sup> The mission goes beyond bringing an end to the killings of Black Americans by law enforcement officers.<sup>64</sup> However, protests of police murders of Mike Brown, Eric Garner, and Tamir Rice at the hands of police officers have increased the publicity of Black Lives Matter<sup>65</sup>

Social movements are still relevant in the United States. For example, protests erupted in Ferguson, Missouri after the murder of Mike Brown and a state of emergency was declared. Protests in Ferguson after the murder of Mike Brown, sparking unrest in Ferguson, Missouri, shows the present relevance of social movements in the United States. Protests and demonstrations ignited around the city, and eventually a state of emergency was declared.<sup>66</sup> Similar to the leaders of the Civil Rights Movement, members of the Black Lives Matter movement protested and chanted various phrases in the hopes of equality within the criminal justice system.<sup>67</sup> Unfortunately, protesters were met with resistance from law enforcement officers, similar to the Civil Rights Movement.<sup>68</sup> Protesters in Ferguson were met with unnecessary force by law enforcement officers and tear gas.<sup>69</sup> Due to the use of tear gas on protesters, the streets of Ferguson looked like a war zone.<sup>70</sup>

The use of tear gas by police officers begs the question whether or not law enforcement violated the First Amendment rights of protesters in Ferguson. Judge Carol Jackson found that the use of tear gas did violate the First Amendment right to peaceful protest and issued a temporary restraining order on law enforcement in Ferguson.<sup>71</sup> Officers were ordered to respect peaceful demonstrations and provide warnings before detonating chemical agents.<sup>72</sup>

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63. *See supra* note 73.

64. *Id.*

65. *See generally* Blacklivesmatter.com. Although many are familiar with the black men killed at the hand of law enforcement, black women and children have faced the same demise. Email from Dr. Jill M. Humphries to Margaret Spring (January 15, 2020, 2:51 CST).

66. John Eligon and Mitch Smith, "Emergency Declared in Ferguson After Shooting," *New York Times* (Aug. 10, 2015), [http://www.nytimes.com/2015/08/11/us/shooting-ferguson-michael-brown.html?\\_r=1](http://www.nytimes.com/2015/08/11/us/shooting-ferguson-michael-brown.html?_r=1)

67. *See supra* note 74.

68. Under the leadership of Bull Connor, protesters in Alabama were met with violence and police brutality. *See supra* note 15.

69. Alex Altman, *Ferguson Ignites with Violence After Grand Jury Decision*, *TIME* (Dec. 12, 2014), <http://time.com/3631569/ferguson-protesters-try-to-block-use-of-tear-gas/> (noting the use of tear gas at protests in Ferguson, Missouri). Terkel & Reilly, *supra* note 13; *See infra* note 173.

70. *Id.*

71. *Id.*

72. *Id.*

The use of chemical agents at protests highlights the importance of ensuring the rights of protesters. In order to ensure that police do not continue to violate protesters' rights like they did in Ferguson, the use of legal observers at protests has become prevalent. Legal observers' presence at protests is typically used to deter inappropriate law enforcement conduct. However, the role of legal observers is often not publicized. The next section introduces and analyzes the forgotten group of social movements: legal observers.

## LEGAL OBSERVERS

Many Americans are unaware of the significance of legal observers in demonstrations, particularly in more recent social movements. This section will explain who legal observers are, their purpose, and how the courts have dealt with and continue to deal with issues surrounding legal observers.

### *Who are Legal Observers? What is Their Purpose?*

The legal observer program is coordinated by the National Lawyers Guild. However, the National Lawyers Guild is not the only organization that trains legal observers.<sup>73</sup> The main objective of the legal observer program is to safeguard the Constitutional rights of protesters.<sup>74</sup> In other words, legal observers act as the "eyes and ears of the legal team" by recording activities between law enforcement and demonstrators.<sup>75</sup> Some of the activities legal observers document include any arrest, use of force, intimidation, and the denial of public access to parks and sidewalks.<sup>76</sup> In order for legal observers to perform their duties, they must not speak to the media, interfere with arrest, provoke actions, or engage in crowd control.<sup>77</sup> Instead of

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73. *Legal Observer Training Manual*, at 1. The Civil Liberties Defense Center and the ACLU also have Legal Observer programs. *Legal Observer*, CLDC.org (Apr. 24, 2014), <https://cldc.org/organizing-resources/legal-observer/>; Joel Currier, Legal Observer Claims St. Louis Police Illegally Arrested Him After I-70 Shutdown, St. Louis Dispatch (April 2015), [http://www.stltoday.com/news/local/crime-and-courts/legal-observer-claims-st-louis-county-police-illegally-arrested-him/article\\_e5efe8ec-5f81-5def-8775-2fed0e8383fb.html](http://www.stltoday.com/news/local/crime-and-courts/legal-observer-claims-st-louis-county-police-illegally-arrested-him/article_e5efe8ec-5f81-5def-8775-2fed0e8383fb.html) (detailing the arrest of an ACLU legal observer).

74. "The Legal Observer program is part of a comprehensive system of legal support coordinated by the National Lawyers Guild designed to enable people to express their political views as fully as possible, without unconstitutional disruption or interference by the government and with the least possible consequences from the criminal justice system." *Id.* at 1, 3.

75. *Id.* at 1

76. *Id.*

77. "Legal Observers do not engage in crowd control, speak to the media, interfere with an

verbal communication, legal observers must remain visible to protect the rights of protesters.<sup>78</sup>

Legal observer presence during protests is meant to deter unconstitutional behavior by law enforcement. In order to act as a deterrent to unconstitutional law enforcement conduct, legal observers must remain visible.<sup>79</sup> Legal observers should avoid wearing clothing with political messages and must always wear articles of clothing identifying them as legal observers. Some of the identifying clothing includes legal observer hats, badges, and armbands.<sup>80</sup> Such pieces of clothing are meant to inform activists and law enforcement about the presence of legal observers.<sup>81</sup>

Typically, law students, law workers, and lawyers act as legal observers at various demonstrations; this list is not exhaustive.<sup>82</sup> In order to become a legal observer, one must receive training directed by a Guild attorney.<sup>83</sup> Once legal observers receive training, they are ready and expected to serve in this capacity during protests. While at the protests, legal observers document a variety of information in detailed notes that can be used by attorneys in future litigation.<sup>84</sup> The notes include which law enforcement agents are present and the names and badge numbers of the law enforcement agents.<sup>85</sup> Legal observers also note who is in charge, what warnings have been given, and the routes taken by protesters. Despite efforts of legal observers to make themselves visible to deter unconstitutional behavior of police officers, the behavior still occurs.

### *The Law and Legal Observers*

Legal observers are rarely the focus of litigation. However, some litigation has set out rights for legal observers, involving restrictions

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arrest in progress or provoke actions. If asked for legal advice, it is best to refer protesters to Guild lawyers or provide them with Know Your Rights publications. This ensures demonstrators receive information that is accurate in the local jurisdiction, and avoids issues of the unauthorized practice of law." *Legal Observer Training Manual*, at 2.

78. *Id.* at 2.

79. *Id.* (explaining that Legal Observers must remain visible by their appearance and announcing their presence to law enforcement agents).

80. Since legal observers are to remain neutral, they also refrain from wearing shirts or buttons with political slogans; this could question the credibility of the legal observers and the organization that they are working for. *Id.*

81. *Id.*

82. *Legal Observer Training Manual* at 1.

83. *Id.*

84. *Legal Observer Training Manual* at 5.

85. *Id.*

placed on legal observers and their work product.<sup>86</sup> This section will outline three subjects where courts have limited and recognized rights of legal observers. These topics include restrictions placed to promote substantial government interests, police dispersal orders, and legal observers' work product.

### Substantial Government Interest

In *Rosenfeld v. Ketter*, the Second Circuit held that restrictions may be placed on legal observers "so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."<sup>87</sup> Rosenfeld, a legal observer and third-year law student, was arrested and charged with third-degree criminal trespassing after ignoring dispersal orders from the director of public safety at SUNYAB.<sup>88</sup> A safety director had warned Rosenfeld that the building where the protest would occur closed at 2:00AM and that all people, including legal observers, who remained in the building after the dispersal order would be arrested.<sup>89</sup> Despite the warning, Rosenfeld remained in the building and was arrested. Rosenfeld argued that the University violated his First Amendment rights.<sup>90</sup> However, the Second Circuit did not agree. Instead, the court explained that Rosenfeld was free to participate in political activity; he just could not do so at the University.<sup>91</sup> Further the University's interest in preventing further disruption was a substantial government interest that caused only an "incidental burden on speech."<sup>92</sup>

The decision in *Rosenfeld*, clarifies that the government can place restrictions on legal observers. However, the restrictions are not limitless. They must be neutral regulations that advance "substantial

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86. See generally *Rosenfeld v. Ketter*, 820 F.2d 38(2nd Cir. 1987); *Dubner v. City of and County of San Francisco*, 266 F. 3d 959 (9th Cir. 2001); *Patel v. Maricopa County*, No. CV 11-01489-PHX-NVW (D. Ariz. 2012); *Cohen v. City of New York*, 255 F.R.D. 110 (S.D. N.Y. 2012).

87. *Rosenfeld v. Ketter*, 820 F.2d at 41; *United States v. Albertini*, 427 U.S. 675, 689 (1985).

88. *Rosenfeld v. Ketter*, 820 F.2d at 39.

89. *Id.*

90. *Id.* at 41.

91. The Court explained that Rosenfeld was only barred from political activity on the University. Rosenfeld did not argue that the University's restriction was unreasonably related to its interest. Thus, the Court could not rule in favor of Rosenfeld. *Id.*; see also *Center for Participation Education v. Marshall*, 337 F.Supp. 126, 134-35 (N.D. Fla. 1972) (discussing First Amendment claim by student who was removed for disrupting class).

92. *Id.* Based on the *Rosenfeld* decision, incidental burdens of speech are not unconstitutional as long as a substantial government interest exists for causing the incidental burden.



government interests that would be achieved less effectively absent the regulation.”<sup>93</sup>

### Police Dispersals

Before stating that a legal observer disregarded a police order to disperse, a court must examine the totality of the circumstances, including the intent of the legal observer to willfully interfere with the protests and impose danger.<sup>94</sup> *Dubner v. City & County of San Francisco* was the first case to acknowledge the totality of the circumstances regarding the arrest of legal observers for ignoring police dispersal orders.

In *Dubner*, an attorney acting as a legal observer, was arrested during a Defense of Animals protest for ignoring a police dispersal order.<sup>95</sup> *Dubner* was arrested after the dispersal order was given and while she was questioning whether the officer was going to ask the person accompanying her to leave.<sup>96</sup> According to the Ninth Circuit, probable cause exists when, “under the totality of the circumstances known to the arresting officers, a prudent person would believe the suspect had committed a crime.”<sup>97</sup> The court reasoned that there was no evidence that *Dubner* was interfering with the convention, where the protest was held, and that she was not involved in “traditional protest activities.”<sup>98</sup> Some of these “traditional protest activities include chanting, carrying a sign, or blocking the entrance of the building.”<sup>99</sup> Thus, there was insufficient evidence to show that a prudent person would believe that *Dubner* violated any laws.<sup>100</sup>

As illustrated in *Dubner*, police officers should not simply arrest legal observers because they are present after officers have given dispersal orders.<sup>101</sup> Instead, officers must consider the totality of the circumstances to assess whether probable cause exists to arrest legal observers.<sup>102</sup> Police officers must not use a subjective standard to

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93. *Id.* at 41; *Albertini*, 472 U.S. at 689.

94. *Dubner v. City of & County of San Francisco*, 266 F. 3d 959, 372 (9th Cir. 2001).

95. *Dubner*, 266 F. 3d at 963

96. *Id.*

97. *Id.* at 966; *See also* *United States v. Garza*, 980 F. 2d 546, 550 (9th Cir. 1992) for more discussion on what constitutes probable cause in the Ninth Circuit).

98. *Id.* at 966-67.

99. *Id.* at 967.

100. The court further explained that there no indication existed that the conversations that *Dubner* had with attendees were intended to intimidate attendees; she was only present to take photographs. The court also found that *Dubner's* actions described were indistinguishable from any other member of the press, a passerby, or a legal observer. *Id.*

101. *Dubner*, F.3d at 967.

102. *Id.* at 966.

determine whether probable cause exists.<sup>103</sup> Instead, they must assess the situation from an objective standard, specifically from the standard of a prudent person.<sup>104</sup> If a prudent person would not find that the legal observer committed a crime or was a danger, then the police officer does not have probable cause for arresting the legal observer.<sup>105</sup>

### Work Product

Legal observers have legal rights to their work product. When legal observers attend protests, they typically document a variety of law enforcement activities and behavior, including the use of force and intimidation by police, the number of arrests, the arrestees, and the name of arresting officer (if known).<sup>106</sup> According to the National Lawyers Guild, legal observer notes documenting the abovementioned activities are subject to work product immunity.<sup>107</sup> The *Legal Observer Training Manual* emphasizes that legal observers do not have to provide any of their notes to officers based on the work product immunity.<sup>108</sup> However, legal observers are also warned that if the information obtained is relevant to a legal claim, the legal observer can be called as a witness.<sup>109</sup> Even though legal observers' work product is privileged, the work can be used in court.

The *Legal Observer Training Manual* emphasizes the work product immunity of legal observers, but exceptions apply to this immunity. For example, in *Cohen v. City of New York*, the court held that legal observer notes are "protected work product unless the City can

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103. Dubner, F. 3d. 266 at 966 ("Probable cause exists when, under the totality of the circumstances known to the arresting officers (or within the knowledge of the other officers at the scene), a prudent person would believe the suspect had committed a crime."); see also *United States v. Smith*, 790 F.2d 789, 792 (1986) (explaining the definition of probable cause).

104. Probable cause is determined from the standpoint of a prudent person. *United States v. Potter*, 895 F.2d. 1231, 1233-34 (9th Cir. 1990) ("Probable cause exists when, 'under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime.'").

105. Probable cause is not based on the opinion of a single officer. Instead, it is based on totality of the circumstances and from the viewpoint of a reasonable person. See *United States v. Hoyos*, 892 F.2d 1387, 1392 (9th Cir. 1989) ("The arresting officer need not have personal knowledge of the facts sufficient to constitute probable cause. Probable cause may be based on the collective knowledge of all of the officers involved in the investigation and all of the reasonable inferences that may be drawn therefrom.")

106. See *supra* Part III. A.

107. See *supra* note 1, at 10.

108. *Id.* at 6.

109. *Id.* at 10.

demonstrate substantial need for their disclosure and the inability to obtain equivalent information elsewhere.”<sup>110</sup> In *Cohen*, the National Lawyers Guild was served a subpoena for any documents used for the training of legal observers during the 2004 Republican National Convention.<sup>111</sup> The National Lawyers Guild argued that legal observer documents are protected from discovery under the work product doctrine.<sup>112</sup> The court agreed that legal observer notes were generally protected under the work product doctrine. However, in this case, the court observed that the material in the notes the City requested could not be replicated. Thus, the court in *Cohen* suggested an exception to the work product immunity of legal observer notes. If a government entity is able to demonstrate “substantial need” for the disclosure of legal observer notes and information cannot be obtained anywhere else, the National Lawyers Guild or any other organization that trains legal observers must disclose the information obtained by the legal observer.<sup>113</sup>

*The Legal Observer Manual* and *Cohen* acknowledges that legal observers’ notes and documents are protected under work product immunity. However, the information in those documents can become available through the testimony of the legal observer and when the government has a “substantial need” for their notes.

#### THE DISPARATE RULES OF PROTESTERS AND LEGAL OBSERVERS

Legal observers and protesters rely on the presence of one another at protest in order to carry out their duties. Protesters exercise their First Amendment rights, and legal observers ensure that law enforcement protect these rights and document when law enforcement does not afford this protection. This complexity is elevated when media frames events and police dispersal orders prevent legal observers from doing their jobs.

#### *Media Depictions of Social Movements*

The media has an ability to frame social movements in a particular way; their framing can be accurate or inaccurate.<sup>114</sup> No matter

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110. *Cohen v. City of New York*, 255 F.R.D. 110, 125 (S.D. N.Y. 2012).

111. *Id.* at 115.

112. *Id.* at 116. Generally legal observer notes are subject work product immunity. See *Legal Observer Training Manual* at 6 (describing that if asked for notes, legal observers should tell police that they are working with attorneys and their notes are subject to privilege).

113. *Id.*

114. Douglas M. McLeod, Symposium, *News Coverage and Social Protest: How the*

the accuracy of the framing, the media influences the public understanding behind the movement.<sup>115</sup> This section will discuss generally how the media frames social movements, solutions to this framing, and conclude with a specific discussion of media framing specific to the Black Lives Matter movement.

### General Media Framing of Social Movements

People view news media as an instrument that informs people of things they need to know, including exposing abuses of power.<sup>116</sup> Unfortunately, this depiction is not realistic. In the early 1990s, the media engaged in an “infotainment” approach to reporting.<sup>117</sup> This shift towards infotainment is notably illustrated in crime stories in the 1990s.<sup>118</sup> Crime stories were sensationalized and racialized.<sup>119</sup> Network news coverage of crime stories tripled between 1990 and 1993.<sup>120</sup> Despite the increase in crime news coverage, the 1990s saw the “largest decline in violent crime rates in more than half a century.”<sup>121</sup> Thus, the news coverage of crime stories in the 1990s was misleading compared to the amount of actual crime.

The reason for the misperception of reality by the media, specifically in regards to protests and social movements is based on the framing, delegitimization, and demonization of protests.<sup>122</sup> News frames focus on making aspects of a perceived reality more salient in a communicating text.<sup>123</sup> Some of the frames associated with the protests include “crime story,” “riot,” “carnival;” neutral frames like

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*Media’s Protest Paradigm Exacerbates Social Conflict*, 1 J. Disp. Resol. 185, 186-87 (2007) (“Evidence of the heavy reliance on official sources by mainstream news media has been long-established. Link to the text of the note The use of official sources gives news stories prestige, increases news production efficiency, and adheres to the rituals of objectivity.”).

115. See generally, Perry L. Moriatry, *Framing Justice: Media, Bias, and Legal Decisionmaking*, 69 Md. L. Rev. 849 (2010).

116. *Id.* at 860

117. *Id.* In an attempt to broadcast more infotainment, new coverage shifted toward soft news. *Id.* at 860; see also Lisa Brown, *Dead but Not Forgotten: Proposals for Imposing Liability for the Defamation of the Dead*, 67 TEX. L. REV. 1525, 1567 n.109 (1989). (describing soft news as news focusing on culture and “human interest stories”). For more information regarding infotainment and soft news, see Richard T. Karcher, *Tort Law and Journalism Ethics*, 40 Loy. U. Chi. L.J. 781, 797-98 (explaining what is infotainment).

118. Moriatry at 861 (“Between 1990 and 1993, for example, network news coverage of crime tripled to an average of nearly five stories per broadcast, as crime leapt from the fifth to the first most covered topic on the evening news.<sup>66</sup> The second was the media’s seemingly insatiable thirst for violent crime stories.”).

119. *Id.*

120. *Id.*

121. *Id.* at 868.

122. McCleod. at 186-87.

123. *Id.* at 186.

“debate” are not used.<sup>124</sup> The negative frames often lead to the delegitimization of protests. Journalists’ failure to adequately portray the meaning behind social movements causes the public to perceive protests as pointless and futile.<sup>125</sup> As a result of inaccurate portrayals, social movements become demonized. Often, the media create moral panics by portraying protests negatively.<sup>126</sup> The exaggerated threats of protest, including property damage, violence, and use of community resources, often cause the public to view social protests and protesters negatively.<sup>127</sup> A better understanding of social protesters and the meaning behind protests could reduce the demonization of protests.

The media grasps onto the actions of a small group to portray social movements, which lead to often inaccurate and negative views of various social movements and protests. Despite the negativity exemplified by the news, members of social movements are able to counteract the negativity through the utilization of social media.<sup>128</sup> Social media can be a powerful tool for social change because it allows people to be united by one cause, no matter their location, and to work collaboratively towards a singular goal.<sup>129</sup> Posting on social media is a quick way to share messages, an accessible method for expressing First Amendment rights, and inexpensive.<sup>130</sup> The accessibility of social media provides protesters and other activists with the opportunity to counteract mainstream media’s depiction of the movement.<sup>131</sup> Activists can use social media outlets to post pictures and videos of protests and frame the meaning of their movement without interference from the mainstream media. Technology plays a significant role in the lives of many activists, as they are now able to rely on social media to counter the mainstream media.

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124. *Id.* (“News framing is ‘to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and / or treatment recommendation for the item described.’”). See generally Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. OF COMM. 51,52 (1993).

125. *Id.*

126. *Id.* (Media coverage includes content that identifies potential threats and negative consequences of protests. For many radical protest groups, the media may create “moral panics” by exaggerating threats.)

127. McCleod at 187.

128. See generally Stacy A. Smith, Note, *If Dr. Martin Luther King, Jr. had a Twitter Account: A Look at Collective Action, Social Media, and Social Change*, 12 Seattle J. Soc. Just. 165 (2013)

129. *Id.* at 183.

130. *Id.* at 201 (“Social media is thus far proving to be a useful tool for sharing a message, and this is what the First Amendment right to freedom of speech is all about. Whether you agree with another’s message, everyone should and does have a voice.”).

131. *Id.* at 183.

### Black Lives Matter and Social Media

Recently, the protests paradigm has been used in the media's portrayal of the Black Lives Matter movement. Fortunately, activists have used social media to counter the paradigm. Over the past few years the Black Lives Matter movement has held demonstrations declaring the validity of Black lives.<sup>132</sup> The Black Lives Matter movement has been met with all of the characteristics of the protest paradigm.<sup>133</sup> The media have framed members of the Black Lives Matter movement as "thugs," "cop killers," and members of a "hate group."<sup>134</sup> Although the Black Lives Matter movement is a call to action regarding the anti-Black racism that occurs in the United States,<sup>135</sup> when President Obama and others met with members of the Black Lives Matter movement, images of riots and violence that broke out in Ferguson, Missouri were the images shown.<sup>136</sup> The Black Lives Matter movement is a nonviolent group, yet the media's depiction signals otherwise.<sup>137</sup> The media's negative and violent frame of the Black Lives Matter movement is detrimental to the public's perception of the movement.<sup>138</sup> Instead of a group focused on improving the validity of Blacks in the United States, the group is often portrayed as a hate group.<sup>139</sup> Fortunately, the Black Lives Matter movement has been able to use other tools to spread its message.

Most notably, members active in the Black Lives Matter movement have turned to social media to ensure that their voices are

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132. See *supra* note 65 for a discussion regarding the role social media has played in the Black Lives Matter movement.

133. *Supra* Part IV.A.1

134. German Lopez, *Media Coverage of Protests Sure Looks Different When Demonstrators are White*, VOX <http://www.vox.com/2016/1/3/10705610/oregon-terrorists-racism-race> (Jan. 4, 2016); Media Matters Staff, *Fox News Graphic Calls Black Lives Matter Movement The "Murder Movement,"* MEDIA MATTERS (Aug. 31, 2015), <http://mediamatters.org/video/2015/08/31/fox-news-graphic-calls-black-lives-matter-the-m/205260> (explaining how Fox correspondent referred to Black Lives Matter Movement as a movement out to kill cops); Khury Petersen-Smith, *Black Lives Matter: A Movement Takes Shape*. THE INTERNATIONAL SOCIALIST REVIEW, <http://isreview.org/issue/96/black-lives-matter> (explaining the media's depiction of protesters as looters and gangsters).

135. See *supra* note 65

136. Dayanita Ramesh, *CNN's Brian Stelter Calls Out Fox's "Insidious Use of Video" In Portrayal Of Black Lives Matter*, MEDIA MATTERS (Feb. 19, 2016), <http://mediamatters.org/blog/2016/02/19/cnns-brian-stelter-calls-out-foxs-insidious-use/208699>

137. See *About the Black Live Matter Network supra* note 45 (stating that Black Lives Matter is working to "(re)build the Black liberation movement"); see also *supra* note 155 (describing negative critiques of the Black Lives Matter movement by the media).

138. See *supra* note 139.

139. *Id.*

heard and the public is getting an accurate portrayal of the movement.<sup>140</sup> Members of the Black Lives Matter movement found that social media could be a source for live, “raw information,” summon people to demonstrations, and push back against “spurious media narratives.”<sup>141</sup> Black Lives Matter has been prolific in its utilization of social media posting a variety of information including protest dates, photographs, and news about the Movement.<sup>142</sup> Members of the Black Lives Matter movement have exposed violence, pressured the federal government into investigations of Ferguson and Baltimore police, and pressed for the removal of the confederate flag in South Carolina.<sup>143</sup> These actions have countered the images of the Black Lives Matter movement as a hate group and has helped to publicize the purpose of the movement, despite the media’s attempt to use the protest paradigm.

In spite of efforts to use social media, these results have not always been positive for the Black Lives Matter movement. Instead, many activists are harassed, often anonymously, and threatened regularly on various social media platforms.<sup>144</sup> Members of the movement are met by violent and negative comments, the exact same violence that media uses to portray the violence. So far the only way to avoid harassment from some opponents, is to block users who send harassing messages; activist Deray McKesson has blocked more than 15,000 people on Twitter.<sup>145</sup> Another downside in using social media is surveillance.<sup>146</sup> Many Black Lives Matter activists have been under surveillance by a number of federal law enforcement agencies.<sup>147</sup> For example, since protests erupted in Ferguson, Missouri, the

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140. See generally *Tweeting Ferguson: How Social Media Can (and Cannot) Facilitate Protest*, WASHINGTON POST (2014), <https://www.washingtonpost.com/blogs/monkey-cage/wp/2014/11/25/tweeting-ferguson-how-social-media-can-and-can-not-facilitate-protest/>

141. Bijan Stephen, *Social Media Helps Black Lives Matter Fight the Power*, WIRED (2015), <http://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power/>.

142. *Id.*

143. *Id.*

144. Harassment is a risk that many people take by participating in online activity. However, harassment is more pervasive when the discussion is around race. Stephen, *supra* note 160.

145. *Id.*

146. *Id.*

147. *Id.*; see also Ellie Kaufman, *Social Media Surveillance Could Have a Devastating Impact on Free Speech. Here's Why.*, MIC (January 19, 2016), <http://mic.com/articles/132756/social-media-surveillance-could-have-a-devastating-impact-on-free-speech-here-s-why#.idWBehth2> (explaining how law enforcement surveillance of activists causes certain individuals be viewed as targets, undermining the ability of people to use social media to exercise their First Amendment right to freedom of speech)

Department of Homeland Security has been monitoring the Black Lives Matter movement and its activists.<sup>148</sup> The Department of Homeland Security has monitored emails, prayer vigils, and various social media hashtags.<sup>149</sup> Despite the threats and surveillance, the Black Lives Matter movement continues to use social media to spread its message.<sup>150</sup>

Social media, despite its downsides, can be used to counter traditional journalist depictions of social movements. The Black Lives Matter movement is an important illustration of this. The movement, portrayed as thugs by mainstream media, has been able to make great strides by using social media. As society becomes heavily technology dependent, the fight for social change will likely become increasingly prevalent on social media.

### **Legal Observers as Counterweights to Media Misrepresentations**

The presence of legal observers is to ensure the rights of protesters are not being violated at protest by police officers.<sup>151</sup> However, deterring police misconduct is not the only role that legal observers can have during protests. Legal observers also have the capability to counter the media's misrepresentations of social movements.

Similar to advocates, legal observers are in the forefront during protests. Legal observers are alongside police officers and protestors when they interact, documenting what they observe. Although, legal observer notes are protected work-product,<sup>152</sup> legal observers have the choice of expressing to the public what they saw at protests.

Legal observers have a great vantage point during protests. Their accounts and depictions of activities during protests can help counter the media's misrepresentations and misunderstandings of social movements.

### ***Police Interactions***

People often view police officers as a group that works to ensure public safety. However, this is not always the case at protests. This section will discuss lawful police powers and how officers have

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148. Brandon Patterson, *Homeland Security is Tracking Black Lives Matter. Is that Legal?* (July 30, 2015), <http://www.motherjones.com/politics/2015/07/homeland-security-surveillance-black-lives-matter>.

149. *Id.*

150. *Supra* note 152.

151. *See generally* Part II.

152. *See generally* Part III. B.3.



abused their discretion while interacting with protesters and legal observers.

### Police and Protesters

There is a common perception that police officers attend protests to ensure the safety of the public and protesters, and to ensure protesters' freedom of speech.<sup>153</sup> However, these goals are compromised when police officers use force or arrest law-abiding protesters.<sup>154</sup> Police using force and arresting protesters has a chilling effect on protesters.<sup>155</sup>

Police officers have a great degree of discretion when making arrests at protests.<sup>156</sup> Arrests must be based on probable cause.<sup>157</sup> Probable cause for an arrest exists when, after looking at the totality of the circumstances, an officer determines that there is a fair probability that the individual committed a crime.<sup>158</sup> Forty-eight hours after an arrest, a judge determines whether probable cause existed under the Fourth Amendment.<sup>159</sup> When a court determines that probable cause for the arrest did not exist, the protester's First Amendment rights have been compromised, usually without redress.<sup>160</sup>

The Fourth Amendment's prohibition against unreasonable seizures and the due process clauses of the Fifth and Fourteenth Amendments govern police use of force.<sup>161</sup> In *Graham v. Connor*, the Court held determining the reasonableness of using force requires balance between the "the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing

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153. Ellyn Angelotti, *During Protests, Police May Balance Journalist' Rights with Public Safety*, POYTNER (Aug. 14, 2014), <http://www.poynter.org/2014/during-protests-police-may-balance-journalists-rights-with-public-safety/263345/> (Aug. 14, 2014) (explaining that police protect public safety and sometimes regulate the timing, place, and manner of speech at the protest). Journalist, who also play a major part in protests have the same rights at protest as the general public. Journalist are not granted any special rights and must disperse when police officers disperse. This focus goes beyond this Note, but should be taken into consideration for future scholarship. *See also* Howard *supra* note 17 at §11(describing restrictions that may be placed on protesters)

154. Alicia A. D'Addario, *Policing Protest: Protecting Dissent and Preventing Violence through First and Fourth Amendment Law*, 31 N.Y.U. REV. L. & SOC. CHANGE 97, 102-10 (2006).

155. *Id.* at 108, 110.

156. *Id.* at 107.

157. U.S. Const. amend. IV.

158. *Illinois v. Gates*, 462 U.S. 213, 230-32 (1983).

159. D'Addario at 107.

160. *Id.* at 108.

161. U.S. Const. amend. IV.; U.S. Const. amend. V.; U.S. Const. amend. VI.

governmental interests at stake.”<sup>162</sup> However, the measures used to disperse protesters, like tear gas, are not subject to the restriction of the Fourth Amendment.<sup>163</sup> When the Fourth Amendment is not applicable, the constitutionality of the use of force is measured by whether it “shocks the conscience.”<sup>164</sup> Similar to arrest, the use of force creates chilling effects for protesters and discourages them from exercising their First Amendment right to freedom of speech.<sup>165</sup>

Police officers do not act lawfully when making unlawful arrests and using force at protests. Sometimes police tactics cause confrontation at protests instead of controlling or preventing protests.<sup>166</sup> In the *After-Action Assessment of the Police Response to the August 2014 Demonstrations in Ferguson*, the Department of Justice found that police officers used excessive force during crowd dispersal during protests.<sup>167</sup> According to the Department of Justice’s assessment, officers must provide adequate warnings before deploying tear gas and officers must ensure that protesters have a safe egress.<sup>168</sup> The Department of Justice found that the Ferguson Police Department inappropriately released tear gas.<sup>169</sup> In Ferguson, no warning nor safe egress were found to exist prior to police deploying tear gas against protesters.<sup>170</sup> Ferguson is just one example of police officers abusing policing powers during protests, but it is not the only place where it has happened. Accountability for police officers is essential to preventing further violations at protests.

### Legal Observers and Police

The presence of legal observers at protests is meant to deter

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162. *Graham v. Connor*, 490 U.S. 386, 396 (1989).

163. *D’Addario* at 109

164. *Id.*; *County of Sacramento v. Lewis*, 523 U.S. 833, 846-47 (1998) (describing the meaning of “shock of conscience”).

165. Sometime the chilling effect of police force at protests prevents people from exercising their First Amendment rights in the future. *D’Addario* at 110. (illustrating how a protester trampled by horse during police dispersal order will be less likely to attend next demonstration).

166. U.S. Dept. of Justice, *After-Action Assessment of the Police Response to the August 2014 Demonstrations in Ferguson, Missouri* (2015).

167. The assessment team from the Department of Justice found a lack of documentation of the use of tear gas; the lack of documentation failed to include justifications, deployment strategies, and outcomes. *Id.* at 123; *see also* Altman, *supra* note 82 (describing Judge Carol Jackson’s decision that Ferguson police mishandled tear gas during protests).

168. U.S. Dept. of Justice, *supra* note 163, at 123. (“Law enforcement agencies should develop an accepted audio recording of a warning that less-lethal weapons, such as tear gas, are about to be deployed in advance of a critical incident”).

169. *Id.*

170. *Id.*

violations and hold police accountable.<sup>171</sup> However, at times legal observers are arrested in the process and are unable to carry out their duties. This section will examine interactions between legal observers and police officers using illustrations from the Black Lives Matter movement.

In November 2014, police officers sprayed tear gas directly at Steve Hoffman, a legal observer in St. Louis.<sup>172</sup> Hoffman was serving as a legal observer at a demonstration in St. Louis City after the death of Mike Brown.<sup>173</sup> When Hoffman arrived on scene everything was peaceful.<sup>174</sup> However, Hoffman was targeted upon police officers arriving in a truck, and had a gun pointed directly at him.<sup>175</sup> One of the officers mentioned Hoffman's status as legal observer.<sup>176</sup> Despite acknowledgement of Hoffman's status, the officers shot a canister directly at him.<sup>177</sup> Hoffman was unable to escape the tear gas canisters and was unable to breathe or see due to the thickness of gas.<sup>178</sup> Unfortunately, Hoffman's experience with officers is not unusual.

For example, police arrested legal observer Mustafa Abdullah in August 2013.<sup>179</sup> Abdullah acted as a legal observer at a protest that shutdown I-70 in St. Louis.<sup>180</sup> After the protest, Abdullah joined other protesters in a parking lot where<sup>181</sup> officers ordered them to leave.<sup>182</sup> While Abdullah and his colleagues were on their way to the car, they were arrested without being given any reason.<sup>183</sup> Abdullah was

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171. Legal Observer Manual, *supra* note 88, at 1

172. Declaration of Steven Hoffman at 2, *Templeton v. Dotson*, Case No. 4:14-CV-2019 (E.D. Mo January 5 2015).

173. "I arrived at the corner of South Grand and Hartford at 12:25 a.m. Things were peaceful. There were people gathered at the corner and some in the street. People told us that larger crowd had been gathered at that location about one hour prior., when windows got broken. By the time I arrived, the event was peaceful. I did not witness any criminal behavior." *Id.* at 2.

174. *Id.*

175. *Id.*

176. *Id.* at 3 ("I heard one of the officers mention my status as a legal observer on the corner just before they shot a canister directly at me. The targeting of me was very frightening.").

177. *Id.*

178. Declaration of Steven Hoffman, *supra* note 190, at 3.

179. *Legal Observer Claims St. Louis Police County Police Illegally Arrested Him After I-70 Shutdown*, STL TODAY (2015), [http://www.stltoday.com/news/local/crime-and-courts/legal-observer-claims-st-louis-county-police-illegally-arrested-him/article\\_e5efe8ec-5f81-5def-8775-2fed0e8383fb.html](http://www.stltoday.com/news/local/crime-and-courts/legal-observer-claims-st-louis-county-police-illegally-arrested-him/article_e5efe8ec-5f81-5def-8775-2fed0e8383fb.html).

180. The protests was part of "Moral Monday," day of protests remembering the one-year anniversary shooting of Michael Brown. *Id.*

181. *Id.*

182. *Id.*

183. Abdullah claims that he did not partake in any criminal behavior and he was not informed of why he was being arrested. *Id.*

pictured in his green legal observer hat as he was being arrested.<sup>184</sup>

Police arrested legal observer Justin Hansford during a protest sparked by the murder of Mike Brown.<sup>185</sup> Hansford was at a protest in a 24-hour Walmart.<sup>186</sup> The police asked the protesters to leave.<sup>187</sup> As the protesters and Hansford were leaving, five to ten feet away from the protests, police handcuffed Hansford.<sup>188</sup> Hansford was the last person walking towards the Walmart exit, but he was the first person arrested, with no warning or reason.<sup>189</sup> Consistent with Huffman and Abdullah's police interactions, Hansford also wore his green legal observer hat.<sup>190</sup>

Huffman, Abdullah, and Hansford all have two things common. First, they were trying to act out their duty as legal observers when they crossed paths with law enforcement; and second, they all had on green hats marking them as legal observers. This may raise the issue of whether legal observers are targets of police officers during protests. Whether the answer is "yes" or "no," protecting and expanding the rights of legal observers is critical to their ability to carry out their duties.

#### A CALL FOR HEIGHTENED RIGHTS FOR LEGAL OBSERVERS

Legal observers work hard and at times sacrifice their freedom

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184. *Id.*

185. Justin Hansford, *I Went to Ferguson to Protect the Protesters. I Got Arrested Instead*, VOX (2014), <http://www.vox.com/2014/10/24/7033567/ferguson-protest-arrested-michael-brown>

186. *Id.*

187. *Id.*

188. *Id.*

189. Hansford recounts his arrest in the following way, "I was the first person arrested. The protesters were chanting and singing and making noise, and the police walked right past them to arrest me first. The only thing that differentiated me from a random customer standing and watching and taking pictures was my green legal observer hat. And there were four other legal observers there. The police walked right past them and arrested me. The only thing that differentiated me from the other observers was the fact that I was black." *Id.*

Mr. Hansford's arrest bring up another question. Are legal observers of color treated differently than white legal observers? The answer to this question is beyond the scope of this Note, but is one that should be explored in future research.

190. Hansford also wore his legal observer hat while in jail. Hansford was met with these comments while in jail: "You're a lawyer, how did they arrest you!?' 'You've still got your green legal observer hat on, ha. That hat didn't save you did it?' 'Were they any other legal observers who were arrested? I guess not, all of the others weren't black!'" *Id.*

Mr. Hansford had never been arrested prior to acting as legal observer. Mr. Hansford is a law professor who decided to engage in activism in Ferguson. The decision to act as a legal observer and help protect rights of the protesters landed him a night in jail for "trespassing." Hansford, *supra* note 203.

to ensure that the Constitutional rights of protesters are protected during demonstrations. However, the legal community has failed to discuss legal observer rights. Litigation against legal observers have revolved around the issues of substantial government interest,<sup>191</sup> police dispersal orders,<sup>192</sup> and work product of legal observer notes.<sup>193</sup> While it is important that courts have issued findings regarding these issues, it is not enough. Instead, legal observer rights should be expanded. This section addresses three groups and the changes each can make to expand the rights of legal observers. First, litigators and the judiciary should advocate for a legal observer exemption from police dispersal orders. Second, legal observer coordinators can argue for legal observers use of social media at protests. Finally, law enforcement agencies should ensure that their agents are educated on the role and rights of legal observers. This section will explore all the recommended exemptions and expansions of legal observer rights as well as a proposal for how police officers should be educated about legal observers.

***To Litigators and the Judiciary: Police Dispersal Orders Should Not Apply to Legal Observers***

Litigators and the judiciary should work together in creating legal observer exemptions from police dispersal orders. Police officers have the right to order dispersals when protesters become violent or the government has a substantial government interest in doing so.<sup>194</sup> However, protesters are not the only group affected by police dispersals at demonstrations. Generally, legal observers are not exempt from dispersal orders, but they should be. The inability to stay beyond dispersal orders prevents legal observers from doing their designated tasks. Litigators should advocate for a legal observer exemption to dispersal orders, so that legal observers are able to document interactions between police officers and protesters after dispersal orders have been given.

The totality of circumstances must be examined in order to

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191. See generally *Rosenfeld v. Ketter*, 820 F.2d 38 (2nd Cir. 1987).

192. See generally *Dubner v. City of and County of San Francisco*, 266 F. 3d 959 (9th Cir. 2001).

193. See generally *Patel v. Maricopa County*, No. CV 11-01489-PHX-NVW (D. Ariz. 2012); *Cohen v. City of New York*, 255 F.R.D. 110 (S.D. N.Y. 2012).

194. In the past, various courts have found law enforcement actions stifling people's First Amendment right to freedom of speech necessary for various reasons. Some of these reasons include protesters failing to move to a designated protest area when asked and when protesters purposefully block the entry of a public building. Howard *supra* note 17, at §11; see generally *Tetaz v. D.C.*, 976 A.2d 907 (D.C. 2009); *Marcavage v. New York*, 2010 WL 3910355 (S.D. N.Y. 2010).

determine if police have probable cause to arrest legal observers after officers announce dispersal orders.<sup>195</sup> Probable cause exists if, when looking at the totality of the circumstances, a prudent person would find that the legal observer committed a crime.<sup>196</sup> The key phrase is “committed a crime.”

If the criminality of legal observers is the key to determining probable cause, what is the basis for arresting Mustafa Abdullah and Justin Hansford?<sup>197</sup> Both Abdullah and Hansford were acting in their capacities as legal observers and both were arrested after dispersal orders were given.<sup>198</sup> More importantly, both Abdullah and Hansford were arrested while complying with dispersal orders; Abdullah was headed to his car, and Hansford was exiting the Walmart, where the protests took place.<sup>199</sup> These two illustrations show that, in reality, criminality is disregarded when officers arrest legal observers after dispersal orders have been given.

In order to prevent such police overreach, courts should create a legal observer exemption from police dispersal orders. Often, criminality plays a huge role in the totality of circumstances in determining probable cause.<sup>200</sup> The role of legal observers does not involve any criminal activity. Legal observers are present at protests to deter Constitutional violations and hold police accountable, not engage in any potential criminal activities that protesters may partake in. In holding police accountable, legal observers are to document “arrests, use of force, and intimidating displays of force.”<sup>201</sup> None of these responsibilities involve criminal activity. Thus, it is hard to imagine when police officers would have probable cause for arresting legal observers after dispersal orders have been given.

Based on this lack of criminal activity, police dispersals should not apply to legal observers. Legal observers pose no risks of danger

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195. In *Dubner*, the court was unable to determine what the arresting officers knew at the time. Thus, the court had to “piece together the totality of the circumstances known to the officers at the scene based on their testimony, and the undisputed facts at trial.” *Dubner*, 266 F.3d at 966.

196. “Probable cause exist when, under the totality of the circumstances known to the arresting officers (or within the knowledge of other officers at the scene), a prudent person would believe the suspect had committed a crime). *Id.*; see also *United States v. Garza*, 980 F.2d 546, 550 (9th Cir. 1992).

197. Both Abdullah and Hansford were arrested during protest related to the death of Mike Brown. See Part IV. B. (explaining the arrests of Mustafa Abdullah and Justin Hansford).

198. *Id.*

199. *Id.*

200. See generally *Illinois v. Gates*, 462 U.S. 213 (1983)

201. *Legal Observer Manual supra* note 1, at 1.

by staying beyond police dispersals.<sup>202</sup> In fact, exempting legal observers from police dispersal orders allow legal observers to carry out their duties of documenting law enforcement and protester interactions. Since some protester are likely to ignore dispersal orders, legal observers would be able to document any interactions between those protestors and law enforcement. As such, in order for legal observers to be able to perform their duties throughout protests, observers should be exempt from dispersal orders.

### ***To Legal Observer Coordinators: Legal Observers' Ability to Post on Social Media***

In order to counter negative images of protests and social movements, legal observers need the ability to post their observations on social media. The media often mispresent activities and goals of social movements.<sup>203</sup> In order to counter misrepresentations, social media has played a significant role in current social movements, specifically, the Black Lives Matter movement.<sup>204</sup> Activists have the ability to document social movements on various social media platforms; legal observers should be able to do the same. Currently, the *Legal Observer Manual* is outdated and does not discuss the use of social media by legal observers. Instead, the *Legal Observer Manual* focuses mainly on interactions with mainstream media.<sup>205</sup> Legal observer coordinators should work to expand legal observers' rights by allowing legal observers the ability to post interactions between protesters and law enforcement on social media platforms. This section discusses how legal observers could use social media platforms and how their use would counter journalistic depictions of protests. It also acknowledges the cons of allowing legal observers to utilize social media.

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202. See generally Part IV. B.2. While looking at the totality of the circumstances, it is unlikely that legal observers were involved in any criminal behavior or behavior that a prudent person believes to be prudent. If anything, legal observers document criminal behavior of law enforcement when they stay beyond police dispersals. Without the ability to document unlawful law enforcement actions, many officers will continue to act beyond their power without any accountability.

203. "When public officials are the predominant source of information for news stories, stories tend to be told from the perspectives of the powerful, downplaying perspectives that challenge that power." McLeod *supra* note 129, at 187.

204. See Part IV. A.2.; see generally *Tweeting Ferguson supra* note 148; Stephen *supra* note 50.

205. Legal observers are expected to limit their interactions with the media. However, if legal observers do elect to speak to the media they should appoint a media coordinator to make comments to the media. The less legal observers speak to the media, the more attentive legal observers will be at observing police and protester interactions. *Legal Observer Manual* at 8, 13.

### Social Media Platforms

Legal observers are present at protests to document interactions between law enforcement officers and protesters;<sup>206</sup> social media can be used as another method of documenting these interactions. Although legal observer notes describing these interactions can be referenced by attorneys during trial, legal observers should also be able to display these interactions to the public before mainstream media has the ability to skew interactions between law enforcement and protesters.<sup>207</sup> The ability to continue to document and post in real-time allows legal observers to continue to do their job while informing the public of occurrences as they happen.

Many activists have various social media accounts that are used to post pictures and videos, giving real-time updates of protests.<sup>208</sup> Black Lives Matter activists have seen major success by posting information.<sup>209</sup> Legal observers could increase these benefits by posting what they see at protests. Despite the benefits that activists have seen due to the utilization of social media, they have also faced a variety of threats and harassment from their opposition.<sup>210</sup> However, if legal observers gain access to social media platforms, they would also likely face similar threats and harassment.

Due to the risk of threats and harassment, legal observers' use of social media should be different than that of activists. Instead of having individual social media accounts, the National Lawyers Guild, ACLU, and other organizations with legal observers could create accounts solely for legal observers to use while they are present at demonstrations. By having pages designated by the organization, the chance of individual legal observers being threatened is likely to decrease.

Universal legal observer social media accounts not only decrease individual threats, they also provide legal observers the

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206. National Lawyers Guild *supra* note 81, at 1.

207. *Id.* at 10 (describing how legal observers can be affected by decisions to litigate occurrences at protests). If legal observer notes contain information about a unique situation, the legal observer can be called as a witness to testify. A legal observer's notes also have the possibility of being subpoenaed by the government. *Id.*

208. *See generally* [blacklivesmatter.com](https://blacklivesmatter.com) for their various social media accounts, including Facebook, Twitter, Tumbler, and Instagram; Stephen *supra* note 50 (describing the how social media allowed Black Lives Matter activists to post protests occurrences in real-time).

209. *Id.* (explaining how Black Lives Matter activists use of social media helped expose police brutality, launch federal investigations into police departments, and urged the removal of the federal flag in South Carolina).

210. *Id.* (explaining how one activists has admitted to having to block more than 15,000 people from Twitter based on the constant harassment and threats).



opportunity to carry out their duties more efficiently. Instead of compiling notes after protests are complete, legal observers would be able to post the activities they document, including videos and pictures, in real-time. The threat of real-time documentation may deter police officers from acting unlawfully more than the traditional note-taking method utilized by legal observers. When hand-written notes are the only way for legal observers to document interactions, the notes generally are not used unless litigation against police officers occurs.<sup>211</sup> However, if real-time posts are available, the public is more aware of officers' unlawful conduct at protests.

Ultimately, the use of universal accounts for various legal observer groups could allow legal observers to more efficiently document protest and police interactions with lower risk of threats. Adding this information to the *Legal Observer Manual* will formalize the use of social media by legal observers and explain how social media platforms should be used by legal observers.

### Countering Journalistic Depictions of Social Movements

Mainstream media often misrepresents protesters and social movements.<sup>212</sup> Instead of publicizing the meaning and message behind social movements, the mainstream media frame them negatively.<sup>213</sup> Social movement activists have been able to counter mainstream media by using social media, and legal observers should be able to do the same.

The mainstream media depict protesters as lawless, which often delegitimize social movements.<sup>214</sup> Social media allows legal observers to counter mainstream media's depictions of protests, specifically in regard to the relationship between police officers and protesters. The media's portrayal of events in Ferguson illustrates how legal observers' use of social media can counter mainstream's depictions.

After the killing of Mike Brown, protests erupted in Ferguson.<sup>215</sup> Most of the coverage was so concerned with diminishing the protesters' credibility that it failed to acknowledge the reasons behind the

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211. See National Lawyers Guild *supra* note 81, at 10.

212. McLeod *supra* note 129, at 186; *see generally* Moriarty, *supra* note 120.

213. "According to the protest paradigm, news stories often pay considerable attention to the appearance and behaviors of protesters in a way that draws attention to their deviance from social norms. Similarly, news stories about radical protest pay particular attention to violations of law in a way that point out that the protesters oppose mainstream values." McLeod *supra* note 119, at 186.

214. *Id.* at 186-87.

215. Alex Altman, "Ferguson Protesters Try to Block Use of Tear Gas," *Time* (July 2, 2015), <http://time.com/3631569/ferguson-protesters-try-to-block-use-of-tear-gas/>.

protests and the Black Lives Matter movement.<sup>216</sup> Captions like “Emergency Declared in Ferguson After Shooting” only exacerbated the already negative images displayed in the media.<sup>217</sup> The media labeled protesters as “thugs,” “looters,” and even said that the Black Lives Matter movement was targeted at the death of police officers.<sup>218</sup>

Despite the negative images of protesters portrayed in the media during the Ferguson protests, the Department of Justice determined that police officers acted unlawfully at protests by inappropriately deploying tear gas.<sup>219</sup><sup>220</sup> However, these unlawful acts of the police were not publicized until the Department of Justice released its *After-Action Assessment of the Police Response to the August 2014 Demonstrations in Ferguson, Missouri* in 2015.<sup>221</sup> The negative images and categorization of protesters in Ferguson went on for too long, stopping only when the federal government acknowledged abuses by police.<sup>222</sup> The use of social media by legal observers could have countered the protest paradigm immediately if legal observers had been able to post what they were observing.<sup>223</sup> The ability to post on social media would have been an effective way to counter the stigma placed on protesters in Ferguson.

Mainstream media stigmatizes protest.<sup>224</sup> Fortunately, in the 21<sup>st</sup> century, people look beyond mainstream media for information to provide accurate information. Legal observers are present at protests to hold police officers accountable for their actions.<sup>225</sup> The use of universal social media should be part of legal observers’ training and manuals as a method to document police and protester interactions while also helping to counter the protest paradigm.

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216. See Part II. C.4. (explaining the meaning and message behind the Black Lives Matter movement).

217. Altman *supra* note 235.

218. Lopez *supra* note 145 (explaining how Black protesters, including those in Ferguson were classified as thugs by the media); Media Matters Staff *supra* note 145 (explaining how Fox correspondent referred to Black Lives Matter movement as a movement out to kill cops); Petersen-Smith, *supra* note 145 (explaining the media’s depiction of protesters as looters and gangsters).

219. See generally Altman *supra* note 235.

220. U.S. Dept. of Justice *supra* note 184 (explaining how officers in Ferguson unlawfully dispersed tear gas by not giving warning or ensuring the existence of a safety egress).

221. “There were instances where CS gas (tear gas) was deployed inappropriately, including without proper warnings, without sufficient attention paid to safe egress, without consideration for environmental conditions, and without documentation that justified and tracked its use.” *Id.* at xvi.

222. *Id.*

223. *Id.*; See Balko *supra* note 24.

224. See generally McLeod *supra* note 129; Moriarty *supra* note 120.

225. *Legal Observer Manual*, *supra* note 1, at 1.

### Social Media: Helpful or Incriminating

Although expanding the right of legal observers to document observations would allow legal observers to convey information to the public quickly, this expansion is not without risks. Legal observers' main goal is to ensure that law enforcement agents are not violating the First Amendment rights of protesters.<sup>226</sup> This goal is very narrow and specific. Legal observers act as a deterrent to unlawful behavior by law enforcement agents and holding law enforcement accountable generally.<sup>227</sup> Expanding the ability of legal observers to post on social media platforms could potentially go beyond the scope of this mission. Even though the intent is to document unconstitutional behavior of law enforcement officers, there is a chance that legal observers could actually cause the criminalization of protesters.<sup>228</sup> Unintentionally, legal observers could record protesters committing illegal acts, which could lead to criminal charges and penalties.<sup>229</sup> Not all protesters act lawfully and, by recording unlawful interactions, legal observers may reinforce the mainstream media's image of protesters.

#### *To Law Enforcement: Law Enforcement Agents Should Be Educated on the Importance of Legal Observers.*

Law enforcement agents are aware of the presence of legal observers.<sup>230</sup> However, simply being able to identify legal observers is not enough. The number of arrests of legal observers suggests a disconnect between legal observers and law enforcement agents.<sup>231</sup> In order to reduce the number of legal observer arrests, law enforcement agents should be educated on the Legal Observer Program. A lawyer or legal observer from the National Lawyers Guild could

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226. *Legal Observer Manual supra* note 1, at 1.

227. "The presence of legal observers serves as a deterrent to unconstitutional behavior by law enforcement during protests. *Id.* at 2

228. Although legal observers could record and post police acting unlawful towards protesters at various demonstrations, legal observers can also inadvertently catch protesters acting unlawfully on camera. Jill-Humphries, National Lawyers Guild Legal Observer, *Law In Action: A Legal Observation Training to Support Local Movements* (Nov. 12, 2015).

229. Legal Observers are at protests to protect the rights of legal observers, not deprive legal observers of rights, which could happen if protesters are recording illegal actions. Social media can be good for legal observers and protesters, but it can also be detrimental to the cause. *Id.*

230. Legal observer must remain visible to activists and law enforcement. They remain visible though their clothing. *Legal Observer Manual, supra* note 1, at 2.

231. See *supra* Part IV.B.2. (discussing the arrest of legal observers Steven Hoffman, Mustafa Abdullah, and Justin Hansford).

provide the training and a better understanding of the role of legal observers to law enforcement agents.<sup>232</sup> A better understanding of the role of legal observers may lead to police officers being more receptive of observer rights.

The length of legal observer training varies, but it is often completed within 2 hours.<sup>233</sup> The education for law enforcement should be held annually and touch on the law as it pertains to legal observers. It is important for the training to inform law enforcement agents about why the presence of legal observers is necessary at protests. The presence of legal observers serves as a deterrent to unlawful behavior; the goal of ensuring lawfulness is similar to the goal of law enforcement agents.<sup>234</sup> Both legal observers and law enforcement agents are viewed as groups who work to enforce the law; this commonality could help law enforcement agents better understand legal observers and allow them to carry out their tasks at protests.

Despite the commonalities between law enforcement and legal observers, law enforcement agents may view legal observers as their opposition. Legal observers could be met with more resistance once law enforcement agents gain more information about legal observers.<sup>235</sup> Law enforcement agents may misconstrue the purpose of legal observer presence and find them as a threat to law enforcement. Instead of seeing legal observers as agents working to protect guaranteed rights of protesters, law enforcement agents may see legal observers as agents working to discredit law enforcement agents.<sup>236</sup> As with anyone who is perceived as a threat, legal observers may be met with opposition and become targets of unconstitutional law enforcement behavior. Instead of reducing arrests and improving relationships among law enforcement agents, protesters, and legal observers, the relationships could become worse and arrests could increase.

Furthermore, monetary fears should not prevent legal education because the impact of the course is likely to outweigh the costs, if one exists. Law enforcement agencies have experienced budget cuts and work-furloughs.<sup>237</sup> These budget cuts can be used as an

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232. *Legal Observer Training Manual* (noting the training process and explaining the Legal Observer process in general); See Part III.A.

233. On November 12, 2015, legal observer, Dr. Jill M. Humphries, trained a new group of legal observers in approximately two hours, informing them of all the important aspects of the National Lawyers Guild Legal Observer Program.

234. *Id.* at 2 (explaining how the presence of legal observers acts a deterrent for unlawful behavior)

235. This con was discussed at legal observer training program at The Ohio State University Michael E. Moritz College of Law on Nov. 12, 2015. Humphries, *supra* note 248.

236. *Id.*

237. "An estimated 28,000 officers and deputies have faced week-long furloughs in 2010. An estimated 53 percent of counties are working with fewer staff today than just one

excuse as to why the legal observer education program cannot happen. However, the fiscal problems of law enforcement agencies should not prevent the legal observer education from occurring. National Lawyers Guild or the ACLU may provide this education at no cost to the public. Instead of looking at the potential criticism of legal observer education, law enforcement agents should focus on the positive outcome of such education: a better relationship between legal observers and law enforcement agents.

Despite possible resistance to legal observer education, the education of law enforcement agents is imperative. A better understanding between law enforcement agents and legal observers can improve relationships, allowing both law enforcement and legal observers a better opportunity to carry out their responsibilities at protests.

### CONCLUSION

Legal observers play an important role in social movements and should be recognized for their dedication to ensuring that protesters' First Amendment rights are protected. One way to provide legal observers with the recognition that they deserve is to begin discussions around the rights that legal observers should have. Some of these rights include the right to post on social media and the ability to be exempt from police dispersals. First, allowing legal observers to post on social media enables them to counter the protest paradigm. Instead of the public relying on skewed narratives by mainstream media, the public can rely on actual footage to see how protesters and law enforcement are interacting at protests. Second, legal observer exemptions allow legal observers to carry out their tasks and document interactions when police officers order protesters to disperse. Lastly, in order to ensure that these heightened rights of legal observers are protected, law enforcement officials should be educated on the Legal Observer Program so that law enforcement agents have a better understanding of legal observers and allow legal observers the opportunity to carry out their duties at protests.

Legal observers sacrifice their time to ensure that rights of protesters are protected. Yet, the rights of legal observers often go unprotected. Courts have acknowledged the rights that protesters and law enforcement agents have at protests.<sup>238</sup> Courts have also issued a few decisions regarding legal observers, but these decisions offer

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year ago." The Impact of the Economic Downturn on American Police Agendas, COPS, <http://www.cops.usdoj.gov/Default.asp?Item=2602> (last visited Mar. 19, 2016).

238. See *supra* Part II.C.

insufficient protections to legal observers and insufficient guidance to law enforcement agents.<sup>239</sup> Legal observers document arrests and interactions between protesters and law enforcement. However, many of the acts legal observers document go unnoticed unless issues are litigated in court. Despite legal observers working to protect the interests of protesters, many legal observers lose their freedom, if only momentarily, when they are arrested while acting in their capacity as legal observers. The time has come to recognize and protect the rights of legal observers

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239. *See supra* Part III.B.