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## A Press Clause Right to Cover Protests

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## A PRESS CLAUSE RIGHT TO COVER PROTESTS

Tyler Valeska\*

*“Someday, a court may need to decide whether the First Amendment protects journalists . . . as distinct from the public generally, from having to comply with an otherwise lawful order to disperse from city streets when [they] seek to observe, document, and report the conduct of law enforcement personnel; but today is not that day.”*<sup>1</sup>

### ABSTRACT

As protests have become more frequent, an increasing number of journalists have been targets of harassment and violence. The long-disputed role of the First Amendment’s press clause demands attention now more than ever. This Article demonstrates how a theoretical framework for a revitalized press clause can be operationalized in a particular context: journalists covering protests. Valeska first details the normative and structural justifications for an affirmative press clause right to cover protests. He then considers two proposals for deciding whom the right would protect: first, leaving the determination of who is a journalist to officers on the protest’s ground level, with the decision being subject to a reasonableness standard; second, through a government credentialing process. Valeska concludes by summarizing what the right would accomplish. He argues for media exemptions from related curfew and equipment ordinances, heightened protections against arrest and detainment, and special access to spaces cleared by dispersal orders. This Article demonstrates that we are in a time of intensifying social unrest and that critical prophylactic steps must be taken to shore up protections for one of our most important democratic institutions.

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<sup>1</sup> *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI, 2020 WL 4883017, at \*3 n.3 (D. Or. Aug. 20, 2020) (Simon, J.) (opinion and order granting preliminary injunction against federal defendants), *motion for stay pending appeal denied sub nom* *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817 (9th Cir. 2020).

## INTRODUCTION

There is a long-standing disagreement among scholars, judges, and advocates as to the proper role of the Press Clause in First Amendment jurisprudence.<sup>2</sup> The Supreme Court's decision a decade ago in *Citizens United v. FEC* reignited this debate. The majority opinion insisted that the Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."<sup>3</sup> But the dissent challenged this assertion,<sup>4</sup> and leading scholars have subsequently picked up the thread.<sup>5</sup> These scholars—most extensively Professor Sonja R. West—argue that historical,<sup>6</sup> doctrinal,<sup>7</sup> and normative<sup>8</sup> considerations all support special solicitude for those fulfilling the institutional role of the press.

This article seeks to contribute to that theoretical debate by introducing a practical application. I present an empirical model for evaluating the viability of affirmative Press Clause protections: journalists covering protests. Should the Press Clause be read to provide distinct rights for journalists above and beyond those of the general public? What First Amendment values would be vindicated by doing so? How would courts go about the difficult task of deciding who is or is not a journalist for the purposes of Press Clause protection? And what would the right do? I address these questions through the prism of the recent Black Lives Matter protests and the mistreatment of journalists covering them.

I proceed in four parts. Part I details why we now need affirmative Press

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2. Compare David Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983), and C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955 (2007), and Melvin Nimmer, *Introduction—Is Freedom of the Press a Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975), and Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975), with Michael McConnell, *Reconsidering Citizens United as a Press Clause Case*, 123 YALE L. J. 412 (2013), and Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. PA. L. REV. 459 (2012). The former set of articles generally advocates for an interpretation of the Press Clause that provides the press, as an institution, with protections meaningfully independent of those afforded by the Speech Clause. The latter pair interprets the Press Clause as a corollary of the Speech Clause that protects only the right to use mass communications technology to disseminate speech.

3. *Citizens United v. FEC*, 558 U.S. 310, 352 (2010).

4. *Id.* at 474 n.75 (Stevens, J., concurring in part and dissenting in part).

5. See, e.g., Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91 (2018).

6. See, e.g., Sonja R. West, *The "Press," Then & Now*, 77 OHIO ST. L.J. 49 (2016).

7. See, e.g., Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729 (2014).

8. See, e.g., Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434 (2014).

Clause rights at protests, highlighting the press's diminished social status, law enforcement's increased hostility toward journalists, and the proliferation of protests nationwide. Part II considers the normative justifications for such protections, focusing on the structural roles that the press plays in our constitutional system and how media coverage of protests furthers those roles. Part III examines the definitional question, exploring two options for determining who might be entitled to Press Clause protections at protests. Part IV concludes by looking at particular applications of Press Clause rights: heightened requirements for arrests or detentions of journalists at protests, and exemptions from local ordinances like curfew orders and police regulations of protest crowds like dispersal orders and kettlings.<sup>9</sup> By targeting the press and interfering with vital newsgathering efforts, law enforcement officers have undercut the important constitutional roles fulfilled by the Fourth Estate. The First Amendment's guarantee of freedom of the press cannot be reconciled with these abuses.

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9. Kettling is a police technique in which large groups of protestors are cordoned off by officers and eventually corralled into a small, contained area where they are arrested. See Stephanie Sugars, *Journalists Covering Protests in US Risk Getting Caught Up in Police Kettling Tactic*, COMM. TO PROTECT JOURNALISTS (Mar. 15, 2018, 3:18 PM), <https://cpj.org/2018/03/journalists-covering-protests-in-us-risk-getting-c/> [<https://perma.cc/9X6C-L4NL>].

## I. WHY IS IT NECESSARY?

Protests are “the most dangerous place to be a journalist in America.”<sup>10</sup> The recent Black Lives Matter protests in response to George Floyd’s killing are a stark reminder. Journalists across the country were repeatedly targeted by police for harassment and violence.<sup>11</sup> Journalists of color felt particularly threatened, as many were subjected to discriminatory abuses.<sup>12</sup> One press advocate described conditions at the protests as the worst for journalists since 1968.<sup>13</sup> Others went further: “I’ve really never seen anything like this,” lamented one;<sup>14</sup> “What we are seeing is an unprecedented attack [against] journalists,” decried another.<sup>15</sup> In sum,

10. Jonathan Peters, *The Modern Fight for Media Freedom in the United States*, 18 FIRST AMEND. L. REV. 60, 75 (2020).

11. David Folkenflik, *As Protests Continue Nationwide, Some Say Police Are Hurting Journalists*, NPR (June 3, 2020, 5:03 AM), <https://www.npr.org/2020/06/03/868469744/as-protests-continue-nationwide-some-say-police-are-hurting-journalists> [<https://perma.cc/PW3B-ZE88>]. Said one journalist covering the protests in Minneapolis, Molly Hennessy-Fiske of the LA Times: “Multiple officers broke off and came specifically over to us and started shooting at us. They had rubber bullets, tear gas. . . . We were not caught in the crossfire. They pursued us. And they knew that we were reporters and photographers.” *Id.*

12. See Tracie Potts, *Journalists of Color Are Part of the Story of Racism in America. That Raises Tough Questions on the Job*, UNIV. OF S. CAL. ANNEBERG CTR. FOR HEALTH JOURNALISM (June 22, 2020), <https://www.centerforhealthjournalism.org/2020/06/19/journalists-color-are-part-story-racism-america-raises-tough-questions-job> [<https://perma.cc/5FGU-YZHC>]; Xenia Shih Bion, *Journalists Covering Protests Sabotaged by Police Violence, Harassment*, CAL. HEALTH CARE FOUND. (June 15, 2020), <https://www.chcf.org/blog/journalists-covering-protests-sabotaged-police-violence-harassment/> [<https://perma.cc/AA86-26BD>]; Elahe Izadi & Paul Farhi, ‘The Terror of Wearing Both a Press Badge and Black Skin’: Black Journalists Are Carrying Unique Burdens, WASH. POST (June 1, 2020, 6:26 PM), [https://www.washingtonpost.com/lifestyle/media/the-terror-of-wearing-both-a-press-badge-and-black-skin-black-journalists-are-carrying-unique-burdens-right-now/2020/06/01/2266a258-a414-11ea-b473-04905b1af82b\\_story.html](https://www.washingtonpost.com/lifestyle/media/the-terror-of-wearing-both-a-press-badge-and-black-skin-black-journalists-are-carrying-unique-burdens-right-now/2020/06/01/2266a258-a414-11ea-b473-04905b1af82b_story.html) [<https://perma.cc/6TFW-4JQQ>].

13. Kenneth Li, *Open Season on the Free Press: Journalists Targeted in Attacks as U.S. Protests Rage*, REUTERS (May 31, 2020, 6:37 PM), <https://www.reuters.com/article/us-minneapolis-police-protests-press/open-season-on-the-free-press-journalists-targeted-in-attacks-as-u-s-protests-rage-idUSKBN2370T5> (quoting Bruce Brown, president of the Reporters Committee for Freedom of the Press).

14. Mark Tracy & Rachel Abrams, *Police Target Journalists as Trump Blames ‘Lamestream Media’ for Protests*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/business/media/reporters-protests-george-floyd.html> [<https://perma.cc/Z23R-U2BP>] (quoting Ellen Shearer, professor at the Medill School of Journalism at Northwestern University and a co-director of its National Security Journalism Initiative).

15. Martin G. Reynolds et al., *Covering Unrest: When Journalists of Color Become the Target*, UNIV. OF S. CAL. ANNEBERG CTR. FOR HEALTH JOURNALISM (June 10, 2020), <https://www.centerforhealthjournalism.org/content/covering-unrest-when-journalists-color-become-target> [<https://perma.cc/32EC-SNZH>] (quote from Carlos Martinez de la Serna, program director for the Committee to Protect Journalists).

observers described the summer of 2020 as an “inflection point.”<sup>16</sup>

The numbers support that claim. Approximately 1,000 aggressions against the press were recorded during the 2020 Black Lives Matter protests.<sup>17</sup> As of October 29, 2020, that included 220 physical attacks (160 by law enforcement), 120+ arrests, 102 tear gassings, 67 pepper sprayings, 202 rubber bullet/projectile hits, 91 equipment damages, and 10 equipment searches or seizures.<sup>18</sup> These incidents took place across seventy-seven American cities and were not confined to major metropolises or certain regions.<sup>19</sup> They marked a steep acceleration of the years-long deterioration of protections for press covering protests.<sup>20</sup> Arrests of journalists climbed in 2020 by over 1200% from 2019.<sup>21</sup> In one week spanning the end of May to the beginning of June, more reporters were arrested (71) than in the previous three years combined.<sup>22</sup>

There are reasons to think that the problem will only worsen. One is expanded opportunity. Political protests worldwide have become more frequent in the last few years. The number of mass protests has increased globally by over ten percent annually since 2009.<sup>23</sup> Researchers expect this trend to continue, projecting that the number and intensity of global protests will likely increase in coming years due to slowing global economic growth, worsening effects of climate change, and increased foreign interference in elections.<sup>24</sup>

The United States is no exception. During Donald Trump’s presidency, America alone saw over 27,000 protests against the administration, attended

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16. Courtney Douglas, *Amid Black Lives Matter Protests, a Crushing Moment for Journalists Facing Attacks, Arrests at the Hands of Law Enforcement*, REPS. COMM. FOR FREEDOM PRESS (Sept. 4, 2020), <https://www.rcfp.org/black-lives-matter-press-freedom/> [<https://perma.cc/JG4H-6Y8J>].

17. See RTDNA (@RTDNA), TWITTER (Dec. 18, 2020, 1:15 PM), <https://twitter.com/RTDNA/status/1340012805731344384> (citing U.S. Press Freedom Tracker).

18. U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/george-floyd-protests/> (last visited September Oct. 29, 2020). This database was established in 2017 and does not house data from before its establishment.

19. *Id.*

20. See Douglas, *supra* note 16.

21. U.S. PRESS FREEDOM IN CRISIS, FREEDOM OF THE PRESS FOUNDATION, 4 (2020), <https://freedom.press/news/2020-report-journalists-arrested-us/?123>.

22. *Id.*

23. SAMUEL J. BRANNEN, CHRISTIAN S. HAIG & KATHERINE SCHMIDT, CTR. FOR STRATEGIC & INTL. STUD., *THE AGE OF MASS PROTESTS: UNDERSTANDING AN ESCALATING GLOBAL TREND 1* (2020), [https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200303\\_MassProtests\\_V2.pdf](https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200303_MassProtests_V2.pdf) [<https://perma.cc/E6KT-TAC4>].

24. *Id.* at Part IV.

by 13.6 million protestors.<sup>25</sup> Even before the 2020 Black Lives Matter protests, these included the five largest demonstrations in U.S. history and higher participation (accounting for population growth) than the mass movements for Civil Rights and against the Vietnam War.<sup>26</sup> But the Black Lives Matter protests led a massive uptick. The summer of 2020 alone saw over 10,600 demonstrations nationwide, approximately 75% of which were linked to the Black Lives Matter movement.<sup>27</sup> Media coverage has increased correspondingly.<sup>28</sup>

Another reason is growing hostility toward the media by the American public. A 2019 Gallup poll found that only 41% of Americans had a great or fair amount of trust in newspapers, television, and radio to fully, accurately, and fairly report the news.<sup>29</sup> A 2018 Gallup/Knight Foundation survey found that 69% of Americans had lost trust in the news media in the preceding decade; only 4% reported an increase in trust.<sup>30</sup> And a recent Morning Consult analysis found the credibility rating of leading news outlets at a new low of only 51.2%, down nearly 10% from December 2016.<sup>31</sup>

Worryingly, our civic institutions are not immune to these trends. For example, observers have noted an increased skepticism of media defendants by the federal judiciary in recent years, particularly among younger judges.<sup>32</sup> One obvious culprit for the media's diminishing public stature is

25. COUNT LOVE, <https://countlove.org/statistics.html> (last visited Feb. 19, 2021).

26. BRANNEN, HAIG & SCHMIDT, *supra* note 24 at 1–2.

27. ROUDABEH KISHI & SAM JONES, ARMED CONFLICT LOCATION & EVENT DATA PROJECT, DEMONSTRATIONS & POLITICAL VIOLENCE IN AMERICA: NEW DATA FOR SUMMER 2020 (2020), [https://acleddata.com/acleddatanew/wp-content/uploads/2020/09/ACLED\\_USDataReview\\_Sum2020\\_SeptWebPDF\\_HiRes.pdf](https://acleddata.com/acleddatanew/wp-content/uploads/2020/09/ACLED_USDataReview_Sum2020_SeptWebPDF_HiRes.pdf) [<https://perma.cc/L2XU-E8TR>]. This data tracks the period from May 24–August 22, 2020.

28. Michael T. Heaney, *The George Floyd Protests Generated More Media Coverage Than Any Protest in 50 Years*, WASH. POST (July 6, 2020, 6:00 AM), <https://www.washingtonpost.com/politics/2020/07/06/george-floyd-protests-generated-more-media-coverage-than-any-protest-50-years/> [<https://perma.cc/AEW7-N2RQ>].

29. Megan Brenan, *Americans' Trust in Mass Media Edges Down to 41%*, GALLUP (Sept. 26, 2019), <https://news.gallup.com/poll/267047/americans-trust-mass-media-edges-down.aspx> [<https://perma.cc/6NU7-79FJ>].

30. GALLUP/KNIGHT FOUND., INDICATORS OF NEWS MEDIA TRUST 3 (2018), [https://kf-site-production.s3.amazonaws.com/media\\_elements/files/000/000/216/original/KnightFoundation\\_Panel4\\_Trust\\_Indicators\\_FINAL.pdf](https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/216/original/KnightFoundation_Panel4_Trust_Indicators_FINAL.pdf) [<https://perma.cc/PG8F-Q99Z>].

31. Joanna Piacenza, *News Media Credibility Rating Falls to a New Low*, MORNING CONSULT, (Apr. 22, 2020, 12:01 AM), <https://morningconsult.com/2020/04/22/media-credibility-cable-news-poll/> [<https://perma.cc/V4TB-BGG9>].

32. See Josh Gerstein, *Media's Legal Defeats Trouble First Amendment Advocates*, POLITICO

the previous presidential administration. Trump's enemy construction of the press and the threats it posed are well documented.<sup>33</sup> And it does not require a leap of logic to connect Trump's framing of the media as the "enemy of the people" with increased police aggressions toward journalist covering protests.<sup>34</sup> Indeed, reporters, photographers, scholars and press advocates have linked the harassment to "an erosion of trust in the news media that [] seeped into law enforcement under President Trump."<sup>35</sup> It was easy to see why, as Trump explicitly blamed media coverage of the protests for intensifying divisions and accused journalists of acting with untoward motives:

The Lamestream Media is doing everything within their power to foment hatred and anarchy. As long as everybody understands what they are doing, that they are FAKE NEWS and truly bad people with a sick agenda, we can easily work through them to GREATNESS!<sup>36</sup>

But the problem is more deeply rooted than the previous administration. As Trump took office, a January 2017 Pew Research survey of officers working in departments with 100 or more officers found that 81% already thought that the media generally treated police unfairly, with 42% strongly agreeing with that sentiment.<sup>37</sup> Trump's vociferous attacks against the media on the campaign trail almost certainly contributed to that lack of trust,

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(Sept. 23, 2019, 8:20 PM), <https://www.politico.com/story/2019/09/23/legal-defeats-media-first-amendment-1508565> [<https://perma.cc/P8PB-FDPK>].

33. See RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. REV. 1301 (2018); see also Sonja R. West, *Presidential Attacks on the Press*, 83 MO. L. REV. 915, 916 (2018).

34. A June 2019 poll found that one-third of Americans believed that the media is the "enemy of the people." See Tess Bonn, *Poll: One-Third of Americans Say News Media is the 'Enemy of the People.'* THE HILL (July 2, 2019), <https://thehill.com/hilltv/what-americas-thinking/451311-poll-a-third-of-americans-say-news-media-is-the-enemy-of-the-people> [<https://perma.cc/FZ7D-CFB9>].

35. Tracy & Abrams, *supra* note 14; see also Margaret Sullivan, *Trump Has Sown Hatred of the Press for Years. Now Journalists are Under Assault from Police and Protestors Alike*, WASH. POST (May 30, 2020, 6:41 PM), [https://www.washingtonpost.com/lifestyle/media/trump-has-sown-hatred-of-the-press-for-years-now-journalists-are-under-assault-from-police-and-protesters-alike/2020/05/30/1e6b81ae-a2a3-11ea-81bb-c2f70f01034b\\_story.html](https://www.washingtonpost.com/lifestyle/media/trump-has-sown-hatred-of-the-press-for-years-now-journalists-are-under-assault-from-police-and-protesters-alike/2020/05/30/1e6b81ae-a2a3-11ea-81bb-c2f70f01034b_story.html) [<https://perma.cc/JMJ5-R5DB>].

36. Donald Trump (@realDonaldTrump), TWITTER (May 31, 2020, 12:36 PM), <https://twitter.com/realDonaldTrump/status/1267132763116838913>.

37. John Gramlich & Kim Parker, *Most Officers Say the Media Treat Police Unfairly*, PEW RSCH. CTR. (Jan. 25, 2017), <https://www.pewresearch.org/fact-tank/2017/01/25/most-officers-say-the-media-treat-police-unfairly/> [<https://perma.cc/JX2Z-NER6>].

but likely cannot explain it fully.

## II. HOW WOULD IT BE JUSTIFIED?

The Press Clause<sup>38</sup> is a dead letter under modern Supreme Court jurisprudence. The Court has confined recognition of journalists' First Amendment rights to the Speech Clause, leaving the Press Clause a redundancy.<sup>39</sup> Unsurprisingly then, the Court has long found no constitutional immunity for the press from generally applicable laws.<sup>40</sup> In *Branzburg v. Hayes*, the Court famously rejected reporters' claims that a Press Clause privilege exempted them from responding to grand jury subpoenas.<sup>41</sup> And the *Citizens United* majority minced no words in denying differentiated First Amendment status for media speakers.<sup>42</sup>

Yet the arsenal is not empty for advocates of a more muscular Press Clause. The *Branzburg* majority qualified its holding, emphasizing that its opinion did not "suggest[] that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."<sup>43</sup> And Justice Powell—who delivered the decisive fifth vote—wrote separately to propose a balancing test that would weigh the interests of the press against those of the government.<sup>44</sup> Many lower courts have since recognized constitutional newsgathering protections, at least against disclosure of confidential sources in certain contexts.<sup>45</sup> Some have adopted balancing approaches

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38. "Congress shall make no law abridging . . . the freedom of speech, or of the press . . . ." U.S. CONST. amend. I.

39. See Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1028 (2011).

40. *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937).

41. 408 U.S. 665, 703–04 (1972).

42. *Citizens United v. FEC*, 558 U.S. 310, 352 (2010).

43. 408 U.S. at 681. The Court later hedged on this language, clarifying that it "in no sense implied a constitutional right of access to news sources[.]" meaning that the right to gather news cannot be used to compel the government or private parties to supply information. *Houchins v. KQED, Inc.*, 438 U.S. 1, 10–11 (1978) (plurality opinion).

44. *Branzburg*, 408 U.S. at 709–10 (Powell, J. concurring).

45. *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir. 1977); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *opinion supplemented on denial of reh'g*, 628 F.2d 932 (5th Cir. 1980) (per curiam); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975).

similar to the Powell approach.<sup>46</sup> Moreover, a robust lineage of dicta<sup>47</sup> and favorable treatment<sup>48</sup> by the Court suggests a preferred position for the press not yet realized under the Press Clause. And some justices have specifically advocated for press exemptions from generally applicable laws in situations where exemptions were necessary to report on matters of public concern.<sup>49</sup> Taking all this together with the clause's text,<sup>50</sup> a foundation for affirmative Press Clause rights emerges.

The question, then, is why the Press Clause is the necessary vehicle for such protections. Why doesn't the Speech Clause suffice, given the Court's expansive interpretation of it? Or perhaps even enhanced "speech plus" rights, as some courts have designated speech implicating other First Amendment freedoms (namely religion)?<sup>51</sup> The justification for affirmative Press Clause rights is rooted in the critical roles that journalists serve in our constitutional structure: gathering and disseminating news to the public and checking the government.<sup>52</sup> Traceable back to the founding,<sup>53</sup> these functions enhance our democracy by improving deliberative discourse and by serving as a bulwark against concentrations of self-interested power.<sup>54</sup> The press is "indispensable to the workings of our democratic society"<sup>55</sup> because it is uniquely situated to fulfill these roles.<sup>56</sup>

Thus, the proper framework for understanding special press treatment is not the privileging of one speaker vis-à-vis another, but the cultivation of

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46. See, e.g., *Auersperg ex rel. von Bulow v. von Bulow*, 811 F.2d 136 (2d Cir. 1987); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

47. See RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 Ga. L. Rev. 705 (2014).

48. See *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels.*, 413 U.S. 376, 383 (1973) ("[T]he Court has recognized on several occasions the special institutional needs of a vigorous press by striking down laws taxing the advertising revenue of [larger newspapers], requiring a license for the distribution of printed matter, and prohibiting the door-to-door distribution of leaflets.") (citations omitted).

49. See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 677 (1991) (Souter, J., dissenting); *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001) (Breyer, J., concurring).

50. For an argument as to why separate clauses for the freedom of speech and the freedom of the press implies separate panoplies of rights, see Nimmer, *supra* note 2.

51. See, e.g., *Illinois Republican Party v. Pritzker*, 973 F.3d 760, 764 (7th Cir. 2020).

52. West, *supra* note 7, at 749–55.

53. Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1102 (2016) ("[T]here can be no serious doubt that the institutional function of freedom of the press has always been understood to be to preserve democracy and check government tyranny." (emphasis omitted)).

54. West, *supra* note 5, at 94.

55. *Associated Press v. United States*, 326 U.S. 1, 28 (Frankfurter, J., concurring).

56. See West, *supra* note 5, at 94.

a healthy system of free expression that better protects all speakers' rights vis-à-vis the government.<sup>57</sup> The harm in failing to recognize affirmative Press Clause rights “comes from our failure to recognize the unique constitutional interest we all share in the protection of the press’s public-serving functions.”<sup>58</sup> This interest is categorically distinct from the liberty interests of individual expression served by the Speech Clause.<sup>59</sup> Recognition of that distinction is thus recognition of the special structural significance that press functions serve in our democracy.

Such recognition is also a practical necessity in many cases. Indeed, the very need for a Press Clause right to cover protests hinges on the impracticability of allowing, for example, all members of the public to remain behind police lines following a dispersal order.<sup>60</sup> Whereas the Speech Clause’s protections are guided by an equality principle—“the essential postulate that all persons within public discourse should be equally free to say or not say what they choose”<sup>61</sup>—the Press Clause’s protections ought be reserved for the “category of cases where it might not make sense to recognize a particular First Amendment right for all speakers, yet where our failure to recognize the right for the press harms our collective interest in a well-informed populace and a monitored government.”<sup>62</sup> As explained below, protest coverage falls squarely within this category.

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57. *Id.* at 94–95.

58. Sonja R. West, *The Majoritarian Press Clause*, 2020, 13 UNIV. OF CHICAGO LEGAL FORUM, 311, 322 (2020).

59. *Id.*

60. *See infra* Part IV.B.2.

61. *See* ROBERT POST, *DEMOCRACY, EXPERTISE, & ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE*, 22 (2012).

62. West, *supra* note 59, at 322. It is for this basic reason that the right-of-access framework applied by the majority in the *Index Newspapers* case discussed *infra* is ill-suited to the problem of press exemptions from dispersal orders. *See Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 835 (9th Cir. 2020). As the dissent notes, the right of access applies equally to everyone—it thus cannot sustain the necessary differential treatment for journalists required by chaotic situations such as dispersal orders. *See id.* at 56–58 (O’Scannlain, J. dissenting).

*A. Information Dissemination*

The press's first function in our democratic system is informational. Modern First Amendment theory draws heavily on the notion that effective self-government requires an open exchange of ideas and a free flow of information.<sup>63</sup> The basic idea is that political decision making—the act of forming common judgments—is contingent upon shared knowledge and opinions that have been collectively considered, debated, and tested.<sup>64</sup> This discursive decision-making process improves outcomes by fostering “democratic competence.”<sup>65</sup> A related but distinct aspect of the informational function relates to individual autonomy. Under an autonomy theory, government is only legitimate if it allows citizens to express themselves, regardless of whether that expression leads to better democratic outcomes.<sup>66</sup> Government must not unduly impede the dissemination of news and ideas that serve as prerequisites for meaningful expression.<sup>67</sup>

Empirical studies demonstrate how protest journalism performs the informative function by promoting “the cognitive empowerment of persons within public discourse.”<sup>68</sup> Most protests worldwide fail to capture widespread attention; those that succeed do so via the press.<sup>69</sup> Journalists convey to citizens the knowledge needed to form and express opinions about protests and their underlying issues.<sup>70</sup> This proliferation of informed opinions propels shared decision making. A rough proxy for how protest coverage enriches democratic competence is the extent to which it drives legislative response. Protests have minimal direct impact on policy.<sup>71</sup> But

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63. See generally ALEXANDER MEIKELJOHN, *POLITICAL FREEDOM* (1960).

64. *Id.*

65. See Steve Vladeck, *Democratic Competence, Constitutional Disorder, and the Freedom of the Press*, 87 WASH. L. REV. 529, 540 (2012).

66. Andrea Butler, *Protecting the Democratic Role of the Press: A Legal Solution to Fake News*, 96 WASH. U. L. REV. 419, 426 (2018).

67. See *id.* at 425–26.

68. See POST, *supra* note 62 at 34.

69. See William A. Gamson & Gadi Wolfsfeld, *Movements and Media as Interacting Systems*, 528 ANNALS AM. ACAD. POL. & SCI. 114, 116 (1993) (describing protests “with no media coverage at all” as “nonevents”); see also Ruud Koopmans & Susan Olzak, *Discursive Opportunities and the Evolution of Right-Wing Violence in Germany*, 110 AM. J. SOCIOLOGY 198, 224 (2004).

70. See Ruud Koopmans, *Movements and Media: Selection Processes and Evolutionary Dynamics in the Public Sphere*, 33 THEORY & SOC’Y 367, 379 (2004).

71. MARCO GIUGNI, *SOCIAL PROTEST AND POLICY CHANGE: ECOLOGY, ANTINUCLEAR, AND PEACE MOVEMENTS IN COMPARATIVE PERSPECTIVE*, 144 (2004).

news coverage of protests increases general media attention on the underlying issues, sparking broader societal conversations which in turn lead to increased legislative activity on those issues.<sup>72</sup> The press thus serves as an informational intermediary, facilitating dialogues among citizens and between constituents and representatives.<sup>73</sup>

### *B. Checking Governmental Behavior*

Media coverage of protests also serves the checking function, “the paradigm First Amendment activity.”<sup>74</sup> Justice Stewart described checking as the Press Clause’s “primary purpose,” designed “to create a fourth institution outside the Government as an additional check on the three official branches.”<sup>75</sup> The Supreme Court has explained that this function derives from the realities of quotidian life: because the average citizen has limited time and resources to devote to observing her government, it is incumbent upon journalists to do so, and to synthesize their observations into easily digestible news reports.<sup>76</sup> In other words, the press keeps the government honest by keeping the people apprised.<sup>77</sup> The First Amendment recognizes the structural significance of the press’s watchdog role.<sup>78</sup>

Media coverage of protests fulfills this role in self-evident ways. One example is the neutral monitoring of how law enforcement uses its regulatory authority to control protests. As federal district court judge Michael Simon recently explained:

[T]he point of journalists observing and documenting government action is to record whether the “closing” of public streets (*e.g.*, declaring a riot) is lawfully originated and carried out. Without journalists . . . there is only the government’s side of the story to explain why a “riot” was

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72. Rens Vliegenthart et al., *The Media as Dual Mediator of the Political Agenda-Setting Effect of Protest. A Longitudinal Study in Six Western European Countries*, 95 SOC. FORCES 837, 854 (2016).

73. See Butler, *supra* note 73, at 424.

74. See Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RSCH. J. 521, 609 (1977).

75. Stewart, *supra* note 2, at 634.

76. Cox Broad. Corp. v. Cohn, 420 U.S. 469, 491–92 (1975).

77. See Bhagawat, *supra* note 54.

78. STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 76 (1999).

declared and the public streets were “closed” and whether law enforcement acted properly in effectuating that order.<sup>79</sup>

Effectuation gets at another way protest journalism checks government: cataloging the use of force against protestors. Such cataloging checks law enforcement behavior by disincentivizing violent measures. Recent experience might cause one to question this proposition, as cops around the country repeatedly engaged in aggressive crowd control tactics against protestors and journalists, seemingly undeterred by rolling cameras.<sup>80</sup> But empirical evidence supports an inverse correlation between media attention on protests and repressive police measures.<sup>81</sup> Put another way, press coverage of protests leads to less violence by law enforcement against protestors.<sup>82</sup>

### C. *What a Press Clause Right to Cover Protests Accomplishes*

Media coverage of protests fulfills the dual functions underlying the press’s pivotal role in our constitutional structure. But this is so only when journalists are able to adequately observe and record police behavior at protests.<sup>83</sup> Additional protections are needed to ensure that three basic requirements are met. First, journalists must have access to protests. This becomes an issue if, for example, curfew orders do not include media exemptions for late night demonstrations, precluding coverage of those demonstrations altogether.<sup>84</sup>

Second, journalists must be able to effectively engage in newsgathering. One relevant problem is the hectic nature of protests, which can prevent media members from effectively viewing and documenting law enforcement responses. Special access for journalists is justified “at least in

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79. *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI, 2020 WL 4220820, at \*6 (D. Or. July 23, 2020) (Simon, J.) (order granting temporary restraining order enjoining federal defendants).

80. KISHI & JONES, *supra* note 28, at 7. Nine percent of 2020 Black Lives Matter protests were met with government intervention, and fifty-four percent of those interventions involved the use of force. *Id.* Both numbers represent dramatic increases from recent years. *Id.*

81. Dominique Wisler & Marco Giugni, *Under the Spotlight: The Impact of Media Attention on Police Protesting*, 4 MOBILIZATION 171, 183 (1999).

82. *Id.*

83. See Ronald J. Krotoszynski, Jr., *Whistleblowing Speech and the First Amendment*, 93 IND. L.J. 267, 270 (2018).

84. See *infra* Part IV.

contexts where disruption, overcrowding, and chaos require a winnowing of potential information receivers.”<sup>85</sup> A related issue is that journalists are sometimes obstructed in the type of equipment or tools they can use in their newsgathering.<sup>86</sup>

Third, journalists must not be driven to cease newsgathering or leave protests altogether. One issue on this front is detainments and arrests, as were seen en masse last summer.<sup>87</sup> Even brief detainments hinder newsgathering efforts. More troubling is the problem of law enforcement aggression—whether incidentally or intentionally directed at media—inhibiting coverage. When journalists are subjected to ferocious crowd control measures such as projectiles, tear gas, and physical force, they are forced to stop newsgathering for extended periods of time.<sup>88</sup> Sometimes they are unable to continue covering protests because of injuries inflicted by police.<sup>89</sup> Some have reported leaving protest assignments and refusing to go back after being targeted for harassment by police.<sup>90</sup> Protections are thus necessary to ensure that press are not dissuaded from performing the vital functions laid out above.

One might question whether the First Amendment is the proper source of special newsgathering protections. Consider Justice Burger’s objection in *Houchins v. KQED* that asking courts to grant such protections constitutionally is inherently flawed “because it invites the Court to involve itself in what is clearly a legislative task which the Constitution has left to the political processes.”<sup>91</sup> Some commentators have echoed concerns of institutional competency.<sup>92</sup>

But politically fraught issues surrounding policing, protests, and press coverage are not conducive to robust legislative responses bolstering press protections. Recent experience shows why. Protest activity is spiking while

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85. See West, *supra* note 5 at 131.

86. See *infra* Part IV.

87. *Supra* Part I.

88. *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI, 2020 WL 4883017, at \*16 (D. Or. Aug. 20, 2020) (Simon, J.) (opinion and order granting preliminary injunction against federal defendants).

89. *Id.*

90. *Id.*

91. *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) (plurality opinion).

92. See Vladeck, *supra* note 72, at 545–46; Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 564–65 (1979); Stewart, *supra* note 2, at 634.

conditions for journalists covering protests are simultaneously deteriorating.<sup>93</sup> Yet many states have introduced legislation in recent years directly targeting protests rather than enhancing protections for protestors and journalists.<sup>94</sup> Only California has even attempted a legislative solution in the wake of the Black Lives Matter protests to shore up journalists' ability to gather news at demonstrations without interference, and that legislation was vetoed by Governor Gavin Newsome.<sup>95</sup>

It is thus unsurprising that the United States ranks only 45<sup>th</sup> out of 180 countries in Reporters Without Borders' 2020 World Press Freedom Index.<sup>96</sup> And, if anything, the political influence of media is waning, as the industry's finances and public support have plummeted in recent decades to a degree that leaves legislative recourse unlikely in many states.<sup>97</sup> If media is unable to protect its vital structural role in our constitutional system via the democratic process, the First Amendment is the failsafe.<sup>98</sup> These grim circumstances make the case for affirmative Press Clause rights "especially compelling of late."<sup>99</sup>

The rights of the press are not the only interests at stake. Refusal to protect newsgathering imposes systemic harms that diminish the speech environment for everyone.<sup>100</sup> Treating the press no differently than other speakers even when differential treatment is journalistically necessary thus leaves everyone worse off.<sup>101</sup> Because protests present uniquely chaotic environments in which widespread access is often impractical, journalists must be accommodated as the only surrogates for a watchful public.<sup>102</sup>

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93. *Supra* Part I.

94. See NORA BENAVIDEZ & JAMES TAGER, PEN AMERICA, ARRESTING DISSENT: LEGISLATIVE RESTRICTIONS ON THE RIGHT TO PROTEST 16 (2020), <https://pen.org/wp-content/uploads/2020/05/Arresting-Dissent-FINAL.pdf> [<https://perma.cc/QA99-H97G>].

95. See S.B. 629, 2019–2020 Reg. Sess. (Cal. 2020). The bill is discussed in more detail in Parts III and IV.

96. *Ranking 2020*, RSF: REPORTERS WITHOUT BORDERS, <https://rsf.org/en/ranking> [<https://perma.cc/K2LU-U2TB>].

97. See Christina Koningsor, *The De Facto Reporter's Privilege*, 127 YALE L.J. 1176, 1265 (2018).

98. Lyrisa Lidsky, *After the Golden Age: The Fragility of the Fourth Estate*, PRAWFSBLAWG (Aug. 21, 2020, 5:15 PM), <https://prawfsblawg.blogs.com/prawfsblawg/2020/08/after-the-golden-age-the-fragility-of-the-fourth-estate.html> [<https://perma.cc/SKC5-LUNS>].

99. Erin Carroll, *Promoting Journalism as Method*, 12 DREXEL L. REV. 691, 706 (2020).

100. See West, *supra* note 8, at 2447.

101. *Id.*

102. RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499, 549 (2019).

Giving journalists special legal protections enables them to do this important job. Their contribution to system of free expression—the ways in which they enhance the speech environment for everyone—justifies differential treatment.<sup>103</sup>

### III. WHOM WOULD IT COVER?

Judicial recognition of a Press Clause right to cover protests would necessitate a determination as to whom that right would apply and a system for implementing that determination in practice. The definitional question—who counts as “the press” for the purposes of discrete Press Clause rights—has been deemed “intractable” by many courts and commentators.<sup>104</sup> The Supreme Court has balked at an answer, declining to read into the First Amendment special protections for a select group of speakers identified as “the press” precisely because that group’s boundaries are historically and philosophically malleable.<sup>105</sup> As many scholars have noted, this has created a paradox of over-inclusivity: when effectively everyone is considered “the press,” no one can be singled out for special protections.<sup>106</sup>

There is ample theoretical support in the literature for rejecting an all-encompassing definition that dilutes any protections the Press Clause might provide.<sup>107</sup> Government actors regularly define the press for various purposes across many contexts.<sup>108</sup> Among advocates for an exclusive Press Clause, there is a general consensus that a functional test is the best method

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103. *Id.*

104. *See, e.g.*, LEE C. BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 53 (2010).

105. *See* *Branzburg v. Hayes*, 408 U.S. 665, 703–04 (1972):

The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

106. *See* STEPHEN GILLERS, JOURNALISM UNDER FIRE 51 (2018); Sonja West, *The Problem with Free Press Absolutism*, 50 NEW ENG. L. REV. 191, 199 (2016).

107. *See* West, *supra* note 113, at 199; *see also* Randall P. Bezanson, *Whither Freedom of the Press?*, 97 IOWA L. REV. 1259, 1271 (2012).

108. *See* West, *supra* note 40, at 1062–68 (listing examples including, *inter alia*, shield laws, securities regulations, tax policies, postal rates, and broadcasting licenses).

for determining who receives Press Clause protection.<sup>109</sup> A functional test generally considers various factors and can broadly be stated as: whether a newsgatherer regularly engages in the dissemination of information on matters of public concern in accordance with some combination of independent editorial judgment, standards, and training or education.<sup>110</sup> This holistic approach minimizes definitional difficulties by allowing courts to “apply constitutional principles via an organizational process that unfolds over time.”<sup>111</sup> One version is utilized in the federal Freedom of Information Act, which defines the news media for the purposes of fee exemptions.<sup>112</sup>

A functional test helps head off one important objection that some newsgatherers at the margins might be unfairly excluded. This objection is especially salient when cast as an equitable criticism that a tiered system of protections inevitably works to the advantage of entrenched institutions. Line drawing is an inevitable consequence of affording Press Clause protections, and some independent newsgatherers might well be left out in any given scenario. But a functional approach helps alleviate these concerns to a significant degree. By granting special protections to anyone covering protests who fulfills the role of the press—regardless of whether they work for *The Washington Post* or run a nonprofit watchdog blog out of their living room—the functional test mitigates the extent to which an exclusive Press Clause might unduly favor legacy media over citizen journalists.<sup>113</sup>

Other First Amendment rights provide an additional backstop. All speakers enjoy the protections of a robust Speech Clause doctrine.<sup>114</sup> And

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109. See West, *supra* note 8, at 2454 (“Focusing on the functional roles is both constitutionally based and allows for standards to adapt over time.”); see also GILLERS, *supra* note 113, at 64–65; Bezanson, *supra* note 114, at 1271.

110. See West, *supra* note 8, at 2454; see also GILLERS, *supra* note 113, at 64–65; Bezanson, *supra* note 114, at 1271. Note that this is a rough, non-exhaustive amalgamation of the cited scholars’ proposed functional tests. Which criteria should be included, excluded, prioritized, and/or deemphasized is outside the scope of this Article.

111. West, *supra* note 8, at 2453.

112. 5 U.S.C. § 552(a)(4)(ii)(II) (defining “representative of the news media” as “any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.”).

113. See *id.* (noting that “as methods of news delivery evolve (for example, the adoption of the electronic dissemination of newspapers through telecommunication services), such alternative media shall be considered to be news-media entities.”).

114. See West, *supra* note 40, at 1058 (“A narrow definition of the press is not as constitutionally problematic as might first appear because all individuals and entities have extensive communicative rights under the Speech Clause. In other words, our broad free speech rights for everyone justify a narrow regime for the press.”).

the right to attend “demonstrations, protest marches, and picketing” is hallowed.<sup>115</sup> Many of these protections allow any protest attendee (journalist or not) to engage in some basic forms of newsgathering. Consider the widespread recognition of a constitutional right to record. Every federal court of appeals to decide the issue has found a First Amendment right for all speakers to record police activity.<sup>116</sup>

Moreover, Speech Clause protections “appl[y] with particular force” to expressive activity at protests.<sup>117</sup> First Amendment restrictions placed on city streets and sidewalks are “subject to a particularly high degree of scrutiny.”<sup>118</sup> Courts have found that governments must satisfy strict scrutiny for a litany of infringements of protest attendees’ Speech Clause rights,<sup>119</sup> such as blanket searches of attendees,<sup>120</sup> restricting expressive activity in certain areas,<sup>121</sup> and removal of attendees.<sup>122</sup> Beyond these expansive Speech Clause protections, the rights of association and assembly might serve as additional shields, although like the Press Clause the Assembly Clause’s protections are underdeveloped in modern jurisprudence.<sup>123</sup>

With this high baseline of strong protections for all individuals attending protests, the detrimental impact of exclusionary Press Clause rulings in some borderline cases is dampened. Most cases will be easy.<sup>124</sup>

115. See *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996).

116. See *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011); *Fields v. City of Philadelphia*, 862 F.3d 353, 360 (3d Cir. 2017); *Turner v. Lieutenant Driver*, 848 F.3d 678, 688 (5th Cir. 2017); *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 608–09 (7th Cir. 2012); *Fordyce v. City of Seattle*, 55 F.3d 436, 442 (9th Cir. 1995); *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11th Cir. 2000). New York recently codified similar protections. See NYS Civil Rights Section 79-P (eff. July 2020), available at <https://www.nysenate.gov/legislation/laws/CVR/79-P>.

117. See *Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression & Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 797 (9th Cir. 2008) (quoting *United States v. Baugh*, 187 F.3d 1037, 1042 (9th Cir. 1999)).

118. *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, No. 2:20-CV-00887-RAJ, 2020 WL 3128299, at \*3 (W.D. Wash. June 12, 2020); *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996) (quoting *NAACP W. Region v. City of Richmond*, 743 F.2d 1346, 1355 (1984)).

119. See INST. FOR CONST. ADVOC. & PROT., *PROTESTS AND PUBLIC SAFETY: A GUIDE FOR CITIES AND CITIZENS* 8 (2020), [https://constitutionalprotestguide.org/ICAP-Protest\\_and\\_Public\\_Safety-Toolkit-072720.pdf](https://constitutionalprotestguide.org/ICAP-Protest_and_Public_Safety-Toolkit-072720.pdf) [<https://perma.cc/9WAY-YNB6>].

120. *Bourgeois v. Peters*, 387 F.3d 1303, 1320 (11th Cir. 2004).

121. *Grider v. Abramson*, 180 F.3d 739, 749 (6th Cir. 1999).

122. *Bible Believers v. Wayne Cnty.*, 805 F.3d 228, 247 (6th Cir. 2015).

123. See generally Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009).

124. See *Abrams*, *supra* note 99, at 580 (“In the great preponderance of cases, a court has little difficulty knowing a journalist when it sees one.”).

The low costs and high rewards thus counsel in favor of recognition. There are two options for implementation that warrant consideration: an officer discretion standard and a centralized credentialing process. Each is considered in turn.

*A. Officer Discretion, Subject to a Reasonableness Standard*

The first approach leaves the determination of who is a journalist to officers on the ground at protests. Such determinations would be subject to a reasonableness standard. A federal district court in Portland, OR recently adopted a version of this approach. In *Index Newspapers, LLC v. City of Portland*, Judge Simon enjoined adverse law enforcement actions against “any person whom [officers] know or reasonably should know is a Journalist.”<sup>125</sup> Judge Simon provided criteria for who should reasonably be considered a journalist, including anyone wearing “visual identification as a member of the press, such as by carrying a professional or authorized press pass or wearing a professional or authorized press badge or other official press credentials or distinctive clothing that identifies the wearer as a member of the press.”<sup>126</sup> Judge Simon also noted that “standing off to the side of a protest, not engaging in protest activities, and not intermix[ing] with persons engaged in protest activities” are additional indicia, although not requirements.<sup>127</sup> He added that the enumerated indicia were “not exclusive, and a person need not exhibit every indicium to be considered a Journalist.”<sup>128</sup> Officers would not be liable under the order for unintentional violations against attendees not displaying visible indicia.<sup>129</sup> The Ninth

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125. No. 3:20-cv-1035-SI, 2020 WL 4883017, at \*27–\*29 (D. Or. Aug. 20, 2020) (Simon, J.) (opinion and order granting preliminary injunction against federal defendants). Although the court relied upon the First Amendment right of access—an inclusive right belonging equally to the press and the public—the effect of the ruling is to grant additional privileges to journalists (and legal observers). The approach is thus a useful model for how a Press Clause right might be applied in the same way in the same context. The Ninth Circuit stayed the injunction pending full consideration on the merits. Order at 2, *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI (9th Cir. Aug. 27, 2020). Upon President Biden’s inauguration, the new administration requested that the case be held in abeyance, which the court granted on February 12, 2021. *Id.* at Docket No. 74.

126. *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI, 2020 WL 4883017, at \*27–\*29 (D. Or. Aug. 20, 2020) (Simon, J.) (opinion and order granting preliminary injunction against federal defendants).

127. *Id.*

128. *Id.*

129. *Id.* Although the captioned defendant is the City of Portland, the Department of Homeland

Circuit sanctioned this approach.<sup>130</sup>

The California legislature adopted a similar but somewhat more limited approach in SB 629 (which, as noted above, was ultimately vetoed by Governor Newsome). The bill afforded heightened protections to anyone at protests “who appears to be engaged in gathering, receiving, or processing information, who produces a business card, press badge, other similar credential, or who is carrying a professional broadcasting or recording equipment.”<sup>131</sup>

These approaches are laudably inclusive, allowing for both official and unofficial indicia to suffice in determining who should reasonably be considered a journalist. The fact that Judge Simon’s enumerated indicia are non-exclusive is significant: the test should provide coverage to all who exhibit clear signs of engaging in the function of newsgathering, including those carrying journalistic equipment, or those who can produce documentation or other evidence of past journalistic work and an assignment to cover the present protest.<sup>132</sup> It should be broad enough to include, for example, an undercover freelance journalist carrying a notepad and recording on her phone, who is able to show officers previous stories she’s published (such as by pulling articles up on a web browser) and documentation showing that she is on assignment at the protest (such as emails confirming the assignment from an editor at a media organization).<sup>133</sup> Examples of past work plus evidence of reporting activity (taking notes/videos/and pictures) should generally suffice.<sup>134</sup>

But the test would not cover someone like John Sullivan, the subject of a recent profile in *The New Yorker*.<sup>135</sup> Sullivan was arrested for participating

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Security was added as a defendant after the Trump administration directed federal troops to guard the federal courthouse in Portland against potential property damage resulting from the protests. The preliminary injunction cited here applies to the federal defendants, although an earlier order with similar terms was entered against the local defendants.

130. See *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817, 835 (9th Cir. 2020).

131. S.B. 629, 2019-2020 Reg. Sess. (Cal. 2020).

132. See 5 U.S.C. § 552(a)(4)(ii) (“A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity.”).

133. *Id.* (“A publication contract would present a solid basis for such an expectation.”).

134. *Id.* (“[T]he Government may also consider the past publication record of the requester in making such a determination.”).

135. Andrew Marantz, *When Reporting Becomes a Defense for Rioting*, THE NEW YORKER (Feb. 3, 2021), <https://www.newyorker.com/news/us-journal/when-reporting-becomes-a-defense-for-rioting>.

in the January 6, 2021 insurrection at the U.S. Capitol.<sup>136</sup> He defended his presence as a forceful entrant by claiming he was there as a journalist: “I was not there to be a participant. I was there to record,” he claimed.<sup>137</sup> He pointed to his attendance at previous protests in a quasi-journalistic capacity.<sup>138</sup> Moreover, the footage he captured inside the Capitol was immensely valuable as evidence, as an artifact of what transpired, and as commercial news footage for which he was paid over \$70,000 by CNN and NBC.<sup>139</sup>

Nonetheless, Sullivan would fail the reasonableness test because he was unquestionably an active member of the riot. He captured himself on camera repeatedly asserting as much, proclaiming after breaching the Capitol terrace, “[t]his shit’s ours! We accomplished this shit. We did this shit together! Fuck, yeah!”<sup>140</sup> He also repeatedly claimed to have a knife, instructed a Capitol police officer to leave the scene so as not to get hurt, encouraged other rioters to push through security lines, and repeatedly suggested arson.<sup>141</sup> No reasonable standard would extend protection to someone so plainly engaged in violent criminal behavior, notwithstanding the journalistic value of any concurrent newsgathering efforts.

Even excluding those engaged in criminal violence, one downside of inclusivity is that it exposes the approach to manipulation. This is most readily apparent with self-styled identifiers such as homemade labeling on clothes. As scholars have noted, incentives for abuse emerge where merely self-identifying as the press can entitle one to preferential treatment.<sup>142</sup> In fact, the government alleged that exactly this problem arose in response to the *Index Newspapers* temporary restraining order in Portland. A few protestors and purported vandals masqueraded as members of the press by emblazoning PRESS lettering on their clothes to circumvent dispersal

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rioting [<https://perma.cc/4JJZ-B4DT>].

136. *Id.*

137. *Id.*

138. *Id.*

139. See Josh Gerstein, *Judge refuses to ban Capitol riot suspect from Twitter and Facebook*, POLITICO (Feb. 16, 2021, 8:42 PM), <https://www.politico.com/news/2021/02/16/judge-ban-riot-twitter-and-facebook-469219> [<https://perma.cc/25YC-WDQF>].

140. Marantz, *supra* note 142.

141. *Id.*

142. See RonNell Andersen Jones, *Press Definition and the Religion Analogy*, 127 HARV. L. REV. F. 362, 363 (2014).

orders and officer scrutiny.<sup>143</sup> Imposters of this sort highlight how affording protections on the basis of self-labeling alone strays away from the goals underlying the functional test. Anyone at a protest can tape PRESS on their shirt, regardless of whether they seek to check police misconduct by informing the public of how officers are treating protestors. The more restrictive SB 629 approach heads off some of these concerns, but at the price of inclusivity.

An objection to either approach might be that such an assessment would be onerous on officers, particularly in a chaotic, potentially hostile environment. But experts have testified that “trained and experienced law enforcement personnel can differentiate press from protestors in the heat of crowd control.”<sup>144</sup> Sufficient training by police departments should further enable officers to make these determinations on the scene. Again, the majority of the journalists covering protests will be easily and immediately identifiable as such.

The benefit of this approach is that it is, at least in theory, favorable to journalists. A reasonableness test encourages officers to take a wide latitude in making determinations. And it eases the newsgathering burden on journalists. After all, journalists usually wear clear visible demarcations of press status such as lettering on clothes, vests, or helmets and will generally have professional equipment or similar indices of newsgathering activity. A reasonableness approach should afford them protection simply by showing up and doing their jobs.

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143. *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI, 2020 WL 4883017, at \*12 (D. Or. Aug. 20, 2020) (opinion and order granting preliminary injunction against federal defendants). Note, however, that the government pointed to only a handful of purported examples of press impersonation, and upon review of the submitted videos the Court found “persuasive evidence” of only two such instances. *Id.*

144. *Index Newspapers LLC v. United States Marshals Serv.*, 977 F.3d 817 (9th Cir. 2020).

### *B. Governmental Credentialing*

If an officer discretion approach is deemed unworkable, the most feasible alternative would be to only recognize protection for individuals bearing government-issued credentials to cover protests. Some metropolitan police departments already grant official press passes to journalists who routinely cover breaking city news, and there are plausible benefits to this approach.<sup>145</sup> A credential application process would remove concerns about chaotic, on-the-spot determinations. Formal passes could help officers working protests make quick and easy assessments as to who is entitled to Press Clause protections. In addition to having more time to review applications than on-the-job officers, a credentialing body may have a deeper subject matter knowledge of what indicia should be relevant to a functional test. A centralized system might be more likely to produce consistent, uniform determinations than an ad hoc network of individual decision makers. And requiring journalists to apply beforehand allows time for an appeals process to play out in the event of an adverse determination.

But this option also suffers from several comparative defects relative to an officer discretion approach. It is an extra hoop (and a potentially burdensome one) for journalists to jump through. This extra work entrenches the advantage of institutional media, who generally have the knowledge, resources, and reputation that make it easier to navigate such processes. This is compounded by complaints that credentials are denied with disproportionate frequency to smaller, community-based, and/or ethnic-focused publications.<sup>146</sup>

Another issue is one of timing: protests often spring up unannounced, forming rapidly in response to unforeseen events. This compresses the amount of time available to apply for credentials. It also leaves applicants subject to the capacity constraints (or worse) of credentialing organizations—during recent protests in New York City, the police

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145. See, e.g., L.A. POLICE DEP'T, [https://www.lapdonline.org/inside\\_the\\_lapd/content\\_basic\\_view/2026#:~:text=A%20one%20time%20%2416.00%20fee,and%20issued%20a%20Media%20Pass](https://www.lapdonline.org/inside_the_lapd/content_basic_view/2026#:~:text=A%20one%20time%20%2416.00%20fee,and%20issued%20a%20Media%20Pass) [https://perma.cc/3QMU-P4G6].

146. See, e.g., *Comptroller Stringer Calls on Mayor de Blasio to Transfer Press Credentials Away from NYPD and Create New Application Standards that Reflect the Diversity of New York City Reportage*, OFF. OF SCOTT STRINGER, N.Y.C. COMPTROLLER (June 6, 2020), <https://comptroller.nyc.gov/newsroom/press-releases/comptroller-stringer-calls-on-mayor-de-blasio-to-transfer-press-credential-issuance-away-from-nypd-and-create-new-application-standards-that-reflect-the-diversity-of-new-york-city-reportage/> [https://perma.cc/X32S-Z86S].

department entirely ceased issuing new press credentials to any applicants.<sup>147</sup> These hurdles might exclude journalists who get an unexpected assignment or make a spontaneous decision to cover a protest.

There are also concerns regarding responsibility for issuing credentials. Given that media coverage of protests sometimes focuses on the police response (and sometimes casts that response in a negative light), there are clear conflicts of interest if police departments or even city officials are given unfettered discretion to award credentials. While decisions to deny credentials would be subject to Press Clause constraints (and thus to judicial review), it is easy to envision officials slow-rolling or denying applications for media deemed hostile to police. Indeed, such criticisms were recently levied in New York City<sup>148</sup> and against the Trump administration, which revoked certain reporters' White House press passes in arbitrary ways that suggested political motives.<sup>149</sup> If such a system is required, credentialing should be done by an independent board or agency not directly accountable to police or related political officials.<sup>150</sup> The New York City Comptroller recently proposed that credentialing authority be transferred from the police to the Office of the Mayor.<sup>151</sup> City Council subsequently introduced legislation that would transfer the authority to the Department of Citywide Administrative Services.<sup>152</sup> It's unclear how an independent credentialing process might work outside of major cities, where local resources are typically less plentiful.

Of course, the primary benefit of credentialing is that, in theory, it facilitates on-the-ground determinations made in real time by officers

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147. *Id.*

148. See Michael Gartland, *NYC Journalists, Media Orgs, and Politicians Demand Changes to NYPD Supervision of Press Credentials*, NY DAILY NEWS (Aug. 17, 2020, 5:43 PM), <https://www.nydailynews.com/news/politics/ny-press-credentials-press-pass-siegel-nigro-stringer-brewer-20200817-lnmwvdrd7jg4pdydxyjx4niryi-story.html> [<https://perma.cc/EQJ4-NGDR>].

149. See, e.g., *Karem v. Trump*, 960 F.3d 656 (D.C. Cir. 2020).

150. One option that would likely not work can be drawn from the suggestion Judge Simon made during a hearing in the Portland case: allowing the ACLU to determine who is a journalist for the purposes of determining protest protections. See Karina Brown, *Judge Proposes ACLU Define Who is a Journalist at Portland Protests*, COURTHOUSE NEWS SERV. (July 31, 2020), <https://www.courthousenews.com/whos-a-journalist-in-portland-judge-says-aclu-might-decide/> [<https://perma.cc/EVB9-2H9H>]. Such a determination would have to be made by the government. It is axiomatic that a private party cannot confer constitutional authority to another private party.

151. N.Y.C. COMPTROLLER, *supra* note 153.

152. New York City Council Int 2118-2020, available at <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4668120&GUID=3A72C651-8B6D-4BBA-9ACB-A8B025C376C2&Options=&Search=> [<https://perma.cc/F7U5-QGXC>].

working protests: either someone has a credential, or they don't. But this rationale is undercut if identifying credentials is difficult in protest conditions. In the *Index Newspapers* case, the government argued that, "under the chaotic circumstances of the protests, it is difficult for the officers, who are often wearing gas masks and laser protective goggles, to verify small indicia of press membership that may be present on certain members of crowds. It is particularly difficult for officers to make these determinations while remaining a safe distance away from crowds to employ crowd control devices in a manner that is safe for both the crowd and the officers."<sup>153</sup> The government also raised the specter of forged credentials.<sup>154</sup> The potential for abuse goes both ways: numerous journalists in New York City reported that they faced threats of confiscation of their credentials by officers while covering recent protests.<sup>155</sup> These practical problems suggest that formal credentials would not alleviate many of the ease-of-determination issues that the reasonableness test supposedly engenders.

Neither option is a perfect solution. The flaws of each might hamper a fulsome implementation of a functional test, perhaps in ways that disfavor citizen journalists. Notwithstanding the drawbacks of each approach, however, it is clear that both options would afford significant new benefits to large swaths of journalists. Taking into consideration the Speech Clause's fallback protections outlined above, it is evident that an imperfect definitional regime that affords additional protections above and beyond what journalists presently enjoy is preferable to the status quo.

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153. Motion, *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI, 2020 WL 4883017 at 6.

154. *Id.* at 9.

155. Gartland, *supra* note 155.

## IV. WHAT WOULD IT DO?

*A. Local Protest Regulations*

Cities nationwide issued a variety of ordinances regulating the 2020 Black Lives Matter protests.<sup>156</sup> For example, Las Vegas instituted a prohibition on items of a certain size (including backpacks, laptop bags, and camera bags) but excepted essential media equipment.<sup>157</sup> In the past, cities have enacted similar equipment prohibitions without such an exception.<sup>158</sup> Included in these prohibitions were gas masks, “sticks, poles, ladders, monopods, bipods, and tripods.”<sup>159</sup>

More prominently, nearly 150 cities instituted curfew orders in response to the 2020 Black Lives Matter protests.<sup>160</sup> Media are usually exempted from these orders.<sup>161</sup> But a few cities—including Atlanta, GA; Cleveland, OH; Fort Lauderdale, FL; and Kenosha, WI—failed to include such exemptions.<sup>162</sup> After significant backlash from media entities and advocates, these cities eventually added a media exemption.<sup>163</sup> Nonetheless, several journalists nationwide were charged with breaking city curfews.<sup>164</sup>

156. See, e.g., Brett McGinness, *Las Vegas Protests: City Council Bans Large Bags, Strollers, Carts at Protests*, RENO GAZETTE J. (June 3, 2020, 1:24 PM), <https://www.rgj.com/story/news/2020/06/03/las-vegas-protests-clark-county-consider-ban-bags-other-items-protests/3134465001/> [<https://perma.cc/JQ7R-KLNY>].

157. Las Vegas, Nev., An Emergency Ordinance Relating to Demonstrations, Rallies, Protests, and Similar Events; Temporarily Adding to the List of Items Already Prohibited at Those Events a Number of Containers of a Certain Type and Size and Certain Wheeled Vehicles or Devices, and Providing for Other Related Matters, Bill No. E-2020-1 (June 3, 2020), <https://files.lasvegasnevada.gov/council/Bill-No.E-2020.pdf> [<https://perma.cc/57ND-B5GH>].

158. Mickey Osterreicher, *Practical Advice About Covering High Profile News Stories During Protests and Upcoming Elections*, NAT’L PRESS PHOTOGRAPHERS ASS’N (July 16, 2020), <https://nppa.org/news/practical-advice-about-covering-high-profile-news-stories> [<https://perma.cc/JQ9R-88FU>] (citing Tampa and Charlotte in 2012 and Philadelphia and Cleveland in 2016).

159. *Id.*

160. *Protest Curfew Order Tracker*, REPS. COMM. FOR FREEDOM PRESS (June 2, 2020), [https://docs.google.com/spreadsheets/d/1dVQ\\_pm9U5fxD\\_KT43D9Xy3xOZSA7NeM8FUIGwPwjN0o/edit#gid=0](https://docs.google.com/spreadsheets/d/1dVQ_pm9U5fxD_KT43D9Xy3xOZSA7NeM8FUIGwPwjN0o/edit#gid=0) [<https://perma.cc/DFT2-8GL9>].

161. *Id.*

162. *Id.*

163. Jim Kuhnhehn, *Curfew Orders Add to Potential Tension Between Journalists and Police*, NAT’L PRESS CLUB JOURNALISM INST. (June 2, 2020), <https://www.pressclubinstitute.org/curfew-orders-add-to-potential-tension-between-journalists-and-police/> [<https://perma.cc/67UK-VDFR>].

164. *Charges Remain Against Journalists Arrested During George Floyd Protests*, COMM. TO PROTECT JOURNALISTS (Aug. 17, 2020, 4:05 PM), <https://cpj.org/2020/08/charges-remain-against->

The constitutionality of exemption-less curfew orders has not been litigated.<sup>165</sup>

A Press Clause right to cover protests would mandate media exemptions from curfew and equipment ordinances. Such exemptions are consistent with the values the Press Clause should be construed to vindicate. The dissemination of news to the public and the checking function on the government are both served when the press is allowed to use essential equipment and document late night assemblies, which are often less peaceful and more contentious than protests taking place before curfews start. And as political hostilities toward media exacerbate, it is easy to imagine curfew and equipment exemptions becoming less commonplace.

Absent recognition of a controlling Press Clause right, how might a court treat a challenge to an exemption-less ordinance? Some press advocates maintain that such ordinances violate the First Amendment as a presumptively unconstitutional prior restraint,<sup>166</sup> or as an impermissible time, place, and manner restriction on newsgathering.<sup>167</sup> Under the Supreme Court's decision in *Ward v. Rock Against Racism*, time, place, and manner restrictions must: (1) be content neutral; (2) be narrowly tailored; and (3) leave open ample alternative channels for expression.<sup>168</sup> Advocates contend that an exemption-less ordinance is not narrowly tailored because the governmental interest implicated is public safety, and members of the media do not constitute threats of violence or property destruction.<sup>169</sup> They further argue that exemption-less ordinances do not leave open ample alternative channels for expression, as no one is legally permitted to engage in speech or newsgathering related to late night assemblies.<sup>170</sup> Should either argument prevail in court, orders without exemptions would be unconstitutional as applied to journalists. There would be no need to resort to a Press Clause right to cover protests.

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journalists-arrested-during-george-floyd-protests/ [https://perma.cc/2KFD-YNJ7].

165. See Sasha Peters & Linda Moon, *Curfew Orders Without Media Exemptions May Be Unconstitutional Under First Amendment*, REPS. COMM. FOR FREEDOM PRESS (June 12, 2020), <https://www.rcfp.org/curfew-order-special-analysis/> [https://perma.cc/9UP7-TM7X].

166. *E-mail to Bill de Blasio and Dermot F. Shea*, REPS. COMM. FOR FREEDOM PRESS (June 6, 2020), <https://www.rcfp.org/wp-content/uploads/2020/06/6-6-20-New-York-Press-Letter.pdf> [https://perma.cc/D25W-YDFK] (discussing law enforcement targeting journalists during protests).

167. Peters & Moon, *supra* note 172.

168. 491 U.S. 781, 791 (1989).

169. Peters & Moon, *supra* note 172.

170. *Id.*

But there are some doctrinal complications. Exempting press from curfew orders might render the ordinances no longer content neutral. If so, the ordinances would be subject to strict scrutiny.<sup>171</sup> Under the Court's 2015 decision in *Reed v. Town of Gilbert*, "strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based."<sup>172</sup> A media-hostile city attorney might argue that media exemptions fit within these parameters. For example, one curfew order issued by the City of Los Angeles exempted "credentialed media representatives engaged in news gathering."<sup>173</sup> Even if the Los Angeles order's exemption is not read as facially discriminatory in favor of certain speech topics (news coverage), the law's purpose and justification are seemingly to protect news coverage while not protecting other speech.

This is not to say that *Reed* necessarily renders curfew exemptions unconstitutional. Applying strict scrutiny to exemption-containing ordinances would represent a significant expansion of the content discrimination rule, which has long been understood as a safeguard against governmental efforts "to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion."<sup>174</sup> As explained above, a media exemption works in concert with that safeguard, not against it. Exemptions help media disseminate information and strengthen public debate by amplifying criticisms of government. Moreover, post-*Reed* fears of a doctrine-swallowing content distinction have thus far proven unfounded, as lower courts of appeal have mostly construed *Reed* narrowly.<sup>175</sup>

Another potential problem is that a legislative press exemption is a speaker-based distinction. In *Citizens United*, the Court held that "restrictions distinguishing among different speakers, allowing speech by some but not others" are "[p]rohibited."<sup>176</sup> The Court has since hedged on this language, recently clarifying that "laws favoring some speakers over

171. See *Reed v. Town of Gilbert*, 576 U.S. 155, 162 (2015).

172. *Id.*

173. Order Setting Curfew During Existence of a Local Emergency, 3 L.A. Admin. Code § 8.29 (May 31, 2020), <https://www.stnc.org/productphotos/Mayor%20Order%20Curfew%2005-31-20%20REVISED.pdf> [<https://perma.cc/7R6U-LUZ5>].

174. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

175. See Dan V. Kozlowski & Derigan Silver, *Measuring Reed's Reach: Content Discrimination in the U.S. Circuit Courts of Appeal after Reed v. Town of Gilbert*, 24 COMM. L. & POL'Y 191 (2019) (surveying cases).

176. *Citizens United v. FEC*, 558 U.S. 310, 340 (2010).

others demand strict scrutiny when the legislature's speaker preference reflects a content preference."<sup>177</sup> This approach to speaker-based distinctions would simply reincorporate the content discrimination analysis above. But a court applying the *Citizens United* principle rigidly might hold that curfew exemptions for journalists discriminate on the basis of speaker, disfavoring non-media individuals who wish to disseminate speech about curfew-violating gatherings.<sup>178</sup> Such a finding would trigger strict scrutiny.<sup>179</sup>

As with *Reed*, *Citizens United* is not an insuperable obstacle for curfew exemptions. Scholar Michael McConnell has noted that strictly applying a "no speaker-based distinctions" principle to any situation in which some speakers are treated differently than others would be "an overreading" of *Citizens United*.<sup>180</sup> Media entities are already favored in a broad number of contexts not usually considered constitutionally suspect: press passes, shield laws, tax policies, postal rates, and broadcasting licenses, among others.<sup>181</sup> And speaker-based distinctions abound in First Amendment jurisprudence more generally, like limits on federal employee electioneering and the use of communicative channels in schools.<sup>182</sup> Curfew exemptions would not trigger heightened scrutiny under McConnell's reading because they provide an affirmative benefit to media above and beyond the current constitutional baseline.<sup>183</sup> He also argues that laws related to newsgathering (as opposed to publication) do not trigger speaker-based concerns, which would likewise leave curfew exemptions unscathed.<sup>184</sup> There is some precedent for this distinction. In *Branzburg*, the Court specifically stated

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177. *Barr v. American Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020) (quoting *Reed*, 576 U.S. at 170).

178. See Bezanson, *supra* note 114, at 1263 ("[L]egislative discrimination (against non-media or non-news corporations) would constitute discrimination on the basis of the identity or class of speakers and thus be flatly unconstitutional under *Citizens United* itself—unless the free-press guarantee means something different from the speech guarantee, which the Court denies.").

179. *Citizens United*, 558 U.S. at 340.

180. McConnell, *supra* note 2, at 442 n.140.

181. West, *supra* note 40, at 1062.

182. McConnell, *supra* note 2 at 448–49 (citing *U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)).

183. McConnell, *supra* note 2, at 441 n.4 ("Extension of benefits is not the same, constitutionally, as restriction of rights."). Exemptions from generally applicable regulations are typically viewed as benefits to the exemptee, not burdens on the regulated. West, *supra* note 5, at 122.

184. McConnell, *supra* note 2, at 442 n.140.

with regard to newsgathering that state legislatures are “free, within First Amendment limits, to fashion their own standards in light of the conditions and problems with respect to the relations between law enforcement officials and press in their own areas.”<sup>185</sup> A more media-friendly reading of the case law is that preferential press treatment is not constitutionally suspect regardless of benefits/burdens or means/ends distinctions.<sup>186</sup>

The state of equipment and curfew exemptions absent a Press Clause right to cover protests is thus in something of a constitutional limbo. There are good arguments that exemption-less ordinances fail under *Ward*. Neither *Reed* nor *Citizens United* can be said to definitely control in cases involving such exemptions. And, if they do, the exemptions might well satisfy strict scrutiny, given the compelling interest in allowing news coverage of significant expressive gatherings. But the specter of unconstitutionality looms. A ruling striking down exemptions would be within the bounds of the frameworks set forth in *Reed* and *Citizens United*. The prospect of a media-adverse decision thus cannot be discounted, particularly in a media-adverse climate. An affirmative Press Clause right to cover protests would resolve the issue in favor of the media in all jurisdictions, giving coherence to the currently unsettled constitutional status of exemptions.<sup>187</sup> At the very least, the Press Clause should be construed as permitting favorable legislative treatment for the press.<sup>188</sup>

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185. *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972); see also *Houchins v. KQED, Inc.*, 438 U.S. 1, 10–11 (1978) (plurality opinion).

186. See West, *supra* note 5, at 123–26.

187. See Bezanson, *supra* note 114, at 1268 (“The obvious—and, indeed, the only possible—justification for this beneficence is that under the Constitution, the press fulfills a special role in our democracy that justifies granting it rights and privileges denied to others.”) (discussing special press treatment generally).

188. See West, *supra* note 5.

## *B. Law Enforcement Directives*

### *1. Discretionary Arrests/Detainments*

Most arrests or detainments of journalists are based on vague charges<sup>189</sup> or on failure to obey dispersal orders.<sup>190</sup> An affirmative right to cover protests would address both. First, it would require heightened factual showings of probable cause for nebulous charges. Such heightened showings have been previously considered, though ultimately rejected, in other First Amendment contexts.<sup>191</sup> But the Supreme Court has required more exacting standards for police procedure when core First Amendment are implicated.<sup>192</sup> In *Marcus v. Search Warrant*, the Court found a conclusory affidavit insufficient to justify seizure of allegedly obscene publications where police “were provided with no guide to the exercise of informed discretion.”<sup>193</sup> A heightened showing would require police to state in charging documents, with particularity, conduct beyond newsgathering activity justifying any arrest of journalists covering protests.

Even the Department of Justice has acknowledged the need for judicial skepticism in response to such prosecutions of journalists engaged in newsgathering:

[T]he United States is concerned that discretionary charges, such as disorderly conduct, loitering, disturbing the peace, and resisting arrest, are all too easily used to curtail expressive conduct or retaliate against individuals exercising their First Amendment rights. The United States believes that courts should view such charges skeptically to ensure that individuals’ First Amendment rights are protected.<sup>194</sup>

A heightened showing requirement is particularly prudent in light of the

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189. Peters, *supra* note 10, at 75–76.

190. U.S. PRESS FREEDOM IN CRISIS, *supra* note 21, at 11.

191. See *Roaden v. Kentucky*, 413 U.S. 496 (1973) (no heightened probable cause standard for securing warrant to seize obscene material).

192. See, e.g., *Marcus v. Search Warrant*, 367 U.S. 717, 730–31 (1961).

193. *Id.*

194. Statement of Interest of the United States, *Garcia v. Montgomery Cnty.*, No. 8:12-cv-03592-JFM (D. Md. March 4, 2013) (submitted in case of a freelance journalist arrested for disorderly conduct while recording police activity at a protest).

Supreme Court's recent decision in *Nieves v. Bartlett*. The Court held that First Amendment retaliation claims cannot be sustained where probable cause for an arrest exists, even if the vindication of First Amendment rights was a but-for cause of the arrest.<sup>195</sup> The decision precludes an important means of recourse for journalists whose rights are violated at protests. By requiring a more robust showing by arresting officers for the discretionary charges most frequently used to arrest journalists covering protests, an affirmative Press Clause right would help keep journalists on the street reporting instead of in handcuffs. Doing so would also minimize the chilling potential of the *Nieves* decision on vital newsgathering activity by subjecting officers who arrest journalists at protests without legitimate reason to civil liability under 42 U.S.C. § 1983.

Additional procedural safeguards are likewise necessary for journalists who are detained but not arrested, as frequently happens at protests. The California legislature's proposed response to this problem in SB 629 required that any detained journalist be permitted to immediately contact a supervisory officer to challenge the detention.<sup>196</sup> Journalists should likewise be allowed to exit kettles when caught up in them.<sup>197</sup> Even temporary detentions can negatively impact vital journalistic functions by keeping newsgatherers off the streets and by dissuading other journalists from aggressively reporting.

## 2. Dispersal Orders

A separate but related issue is dispersal orders. Several journalists are still facing charges for failure to disperse stemming from the 2020 Black Lives Matter protests.<sup>198</sup> An affirmative Press Clause right would exempt journalists engaged in newsgathering from such orders. Preferential treatment of this type would not be without precedent. Special press access is regularly granted to, *inter alia*, government buildings, press conferences/pools, executions, crime and disaster scenes, and military operations.<sup>199</sup>

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195. 139 S. Ct. 1715, 1722 (2019).

196. S.B. 629, 2019-2020 Reg. Sess. (Cal. 2020).

197. See U.S. PRESS FREEDOM IN CRISIS, *supra* note 21, at 7.

198. *Id.* at 11.

199. West, *supra* note 5, at 119.

Courts, police departments, and state legislatures have recently experimented with press exemptions for protest dispersal orders. Judge Simon’s preliminary injunction enjoined officers on First Amendment grounds from requiring journalists to disperse.<sup>200</sup> The City of Oakland mandates similar protections as a matter of police department policy. Recognizing that “[t]he media has a right to cover demonstrations,” the policy states that:

The media shall be permitted to observe and shall be permitted close enough access to the arrestees to record their names. Even after a dispersal order has been given, clearly identified media shall be permitted to carry out their professional duties in any area where arrests are being made unless their presence would unduly interfere with the enforcement action.

SB 629 would have enshrined similar protections into California law. It required that journalists be allowed to enter any areas at protests closed off by police and prohibited officers from interfering with the newsgathering and broadcasting activities of journalists in such areas.<sup>201</sup>

One hurdle with an exemption from dispersal orders is that journalists frequently intermingle with protestors, making it difficult to disperse protestors without dispersing the journalists too.<sup>202</sup> A possible solution is to require journalists not to intermingle, providing protections only for journalists who stand off to the side and do not directly embed with protestors.<sup>203</sup> But even this type of compromise position may not be necessary. Experts have testified that it is “workable and feasible” to disperse protestors generally but not journalists, and that these practices have been implemented and operated successfully by police departments in the past.<sup>204</sup>

A second hurdle is a concern about interference with law enforcement activities if journalists are allowed to remain behind police lines after a

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200. *Index Newspapers LLC v. City of Portland*, No. 3:20-cv-1035-SI, 2020 WL 4883017 (D. Or. Aug. 20, 2020) (opinion and order granting preliminary injunction against federal defendants).

201. S.B. 629, 2019-2020 Reg. Sess. (Cal. 2020).

202. *See Index Newspapers LLC*, 2020 WL 4883017, at \*12 (opinion and order granting preliminary injunction against federal defendants).

203. *See id.*

204. *Id.* at \*20.

dispersal order. But this concern is unfounded. Journalists would still be required to comply with all laws, meaning they could not impede, block, or interfere with officers with impunity. As in government buildings or at crime and disaster scenes, an access right via exemption from a dispersal order would not give journalists carte blanche in the name of newsgathering.

### CONCLUSION

This Article attempts to demonstrate how affirmative constitutional newsgathering rights might work in a particular context. The proposed right to cover protests shows that the theoretical framework for a revitalized Press Clause can be operationalized. While definitional questions may be difficult, they are not unanswerable. And while the right in application may seem relatively modest, it affords important protections for vital First Amendment activity. These protections are more important now than in at least a generation, as police and public hostility toward media spikes in tandem with levels of protest activity nationwide. If we now find ourselves at the precipice of an era of intensifying social unrest, it is critical that we take prophylactic steps to gird our democratic institutions. A summer of violence and interference painfully reminded us that “when wrongdoing is underway, officials have great incentive to blindfold the watchful eyes of the Fourth Estate.”<sup>205</sup> The Press Clause can help keep those eyes uncovered.

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205. *Id.* at \*1 (quoting *Leigh v. Salazar*, 677 F.3d 892, 900 (9th Cir. 2012)).