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PERSPECTIVE

Can journalists remain after declaration of an unlawful assembly?

By Daniel S. Roberts

The First Amend protects many of our most cherished rights, including not only the right to peaceably assemble and to protest (“petition the Government for a redress of grievances”), but also the freedom of the press to report on such demonstrations. Yet, the First Amendment itself does not provide the press any special right of access to such events beyond that available to the general public.

The U.S. Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665 (1972), held that “the First Amendment does not guarantee the press a constitutional right of access to information not available to the public generally,” and — employing the gendered language of the day — “Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded.”

Thus, when police have determined a demonstration rises to the level of an unlawful assembly, journalists have had the same legal obligation to disburse from the area as the general public or else be guilty of a misdemeanor under Penal Code Section 409.

In 2021, the California Legislature sought to fill this gap with Senate Bill 98. When Gov. Gavin Newsom signed the bill, media groups hailed its passage and reported that it “exempts media professionals from having to comply with dispersal orders while covering protests, marches, and other types of demonstrations.”

The Greater Los Angeles chapter of the Society of Professional Journalists called the bill “a necessary step to safeguard coverage of demonstrations by ensuring that journalists may continue reporting in an area after an unlawful assembly has been declared.”

But does the new law actually permit journalists to remain in an area after an unlawful assembly

or violating Penal Code Section 148(a)(1).

Section 409.7 does not refer at all to Section 409, which addresses unlawful assemblies specifically. Section 409.7 also provides that it “does not prevent a law enforcement officer from enforcing other applicable laws if the person is engaged in activity that is unlawful,” which could include Section 409.

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has been declared? The language of the law, now codified as Penal Code Section 409.7, is not so clear cut.

The new law makes no reference at all to unlawful assemblies. Rather, it confusingly provides that, if law enforcement officers “close the immediate area surrounding any emergency field post or any other command post, or establish a police line, or rolling closure at a demonstration, march, protest, or rally where individuals are engaged in activity that is protected pursuant to the First Amendment” or related protections under the California Constitution, the press may enter such “closed areas” and may not “be cited for the failure to disburse, a violation of a curfew,”

at least ambiguous and likely not the clear protection press groups hoped for.

Assuming that the new law does provide an exception for journalists to remain in an area declared any unlawful assembly, that merely begs another question: Who is entitled to such special treatment?

In an age when nearly everyone carries a video camera everywhere they go, and anyone can tweet, blog, or even broadcast live on various social media platforms their experiences in real time, what differentiates those statutorily entitled to remain at an unlawful assembly from the crowd required to disburse? Clearly there must be some line, since if everyone at a demonstration turned violent who wields a smartphone is exempt from an unlawful-assembly disbursement order is exempt from that order,

Instead of a simple proclamation that journalists may continue reporting in an area after an unlawful assembly has been declared, we have the confusing reference to “closed areas.” The lack of clarity in the law as applied specifically to unlawful assemblies has led at least the Los Angeles Press Club to state in its “Tips for Safely Covering Protests” FAQ response on whether journalists have a right to remain at unlawful assemblies that they “may be protected by Penal Code §409.7.” (Emphasis added.) Perhaps the reference in the new law prohibiting journalists from being “cited for the failure to disburse” will ultimately be interpreted to include an order under Section 409, but the language of the new law is

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the order has no practical effect. But where is that line?

Unfortunately the language of the statute is of little help. By its terms, it applies to a “duly authorized representative of any news service, online news service, newspaper, or radio or television station or network.” Because the law only took effect earlier this year, there is not yet any published case law interpreting the scope of its coverage. While the Legislature directly expressed its

intent “to achieve parity in the access and protections for journalists and news media as those established pursuant to Section 409.5 of the Penal Code,” the seminal case on the scope of that law, *Leiserson v. City of San Diego*, 184 Cal. App. 3d 41 (1986), did not need to determine who is the media, as it involved a news reporter from the local television station and obviously arose decades before our current social media environment.

Moreover, by adding “online news service” to the new law (which is not included in Section 409.5), the Legislature clearly intended to expand the class of those protected from what was included in Section 409.5. Just how far is uncertain.

Whether an individual livestreaming a protest from their smartphone via Facebook live is a “duly authorized representative” of an “online news service” is an open question. While media

groups clearly wanted specific legal protection to ensure their access to demonstrations, and the Legislature sought to oblige, the language of the actual law leaves much ambiguity — both for those claiming protection and for the police seeking to balance the obligation to protect the public from violent gatherings and the ability of the media to cover those events. Unfortunately both groups will need further guidance on these issues from the courts.

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