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S.B. 98 AND THE OUTER LIMITS OF JOURNALISM

*Daniel Lemer**

Senate Bill 98 (S.B. 98), signed into law on October 9, 2021, aims to safeguard the right of journalists in California to cover public protests without police interference. However, the bill is silent as to who qualifies as a journalist and thus falls under its protections. This Note analyzes different approaches to defining the press in the legal, academic, and journalistic fields. In the context of S.B. 98, it advocates for a broad, process-based definition that encompasses a wide range of newsgatherers, from established professionals writing for major publications, to individuals documenting the events unfolding in their communities with nothing more than a phone and a social media platform.

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INTRODUCTION

The summer of 2020 produced striking images of upheaval coming out of cities across the United States, but the journalists who captured those images often paid a price for doing so. Police repeatedly and violently targeted members of the press, beating them, pepper spraying them, shooting them with rubber bullets, and arresting them without cause.¹ The attacks were so widespread that the director of one prominent press organization described the situation as “essentially the abandonment of press freedom as an American value.”²

Many of these incidents occurred in California, and in response, the California Legislature passed Senate Bill 98 (“S.B. 98”).³ This law created new protections for “duly authorized representative[s] of any news service, online news service, newspaper, or radio or television station or network” covering a protest, forbidding law enforcement from interfering with their work and shielding them from arrest for failure to disperse, curfew violations, or obstructing a peace officer.⁴ However, the nature of modern media raises two questions that the text of S.B. 98 does not clearly address: What exactly can be considered an online news service? And how is a person determined to be a “duly authorized” representative of one? This Note addresses each question in turn, arguing that these terms should be defined through a process-based conception of the press that aims to protect journalism as an activity, rather than journalists as a class delineated by employment or institutional affiliation.

I. BACKGROUND

Law enforcement in California has a long history of violence against journalists, with possibly the most notorious incident being the killing of Rubén Salazar by members of the Los Angeles Sheriff’s Department (LASD) in 1970.⁵ Salazar was a journalist for the television

1. 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/GL7W-8KLD>].

2. Marc 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/LJJ5-PNU3>].

3. S.B. 98, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

4. *Id.*

5. Dorany Pineda, *Ruben Salazar: The Making of the Myth*, L.A. TIMES (Aug. 23, 2020), <https://www.latimes.com/projects/chicano-moratorium/ruben-salazar-changed-news-chicano-culture/> [<https://perma.cc/A5HP-W8BN>].

station KMEX and the *Los Angeles Times* who was known for ambitious reporting on issues important to the Mexican American community.⁶ He told close friends in the days preceding his death that he believed he was being followed by police and was in danger⁷ and said to a colleague “they’re following us” in the moments before the two of them ducked into the café where he was killed after being struck in the head by a tear gas cannister that a deputy fired through the window.⁸ Salazar was one of three fatalities resulting from widespread police violence in response to the mass protest and march known as the Chicano Moratorium.⁹ While investigations never found conclusive evidence of any intentional wrongdoing, it is established fact that Salazar was under law enforcement surveillance for much of his career.¹⁰

Another notable incident occurred in 2000, when seven journalists alleged that members of the Los Angeles Police Department (LAPD) deliberately clubbed and shot rubber bullets at them to prevent them from reporting on protests outside of that year’s Democratic National Convention.¹¹ The resulting lawsuit, *Crespo v. City of Los Angeles*,¹² was settled before it could go to trial.¹³ As part of the settlement, the city and the LAPD agreed to recognize the rights of journalists to cover public protests even after police declare an unlawful assembly and issue an order to disperse, to assign a press liaison to such events, and to work with press organizations to set up designated areas at protests from which journalists could observe them.¹⁴ The LAPD still refers to designated media zones at protests as “*Crespo* zones.”¹⁵ However, prior to the passage of S.B. 98, there were disputes

6. Carribean Fragoza, *Truths Unsilenced: The Life, Death and Legacy of Rubén Salazar*, KCET (Aug. 27, 2020, 9:53 AM), <https://www.kcet.org/shows/lost-la/truths-unsilenced-the-life-death-and-legacy-of-ruben-salazar> [<https://perma.cc/HVF4-P4FP>].

7. Pineda, *supra* note 5.

8. Fragoza, *supra* note 6.

9. *Id.*

10. *Id.*

11. Louis Rolfes, *Covering Protests Ties Journalists in with Convention Arrests*, REPS. COMM. FOR FREEDOM PRESS, <https://www.rcfp.org/journals/the-news-media-and-the-law-fall-2000/covering-protests-ties-journa/> [<https://perma.cc/KP52-EU6R>].

12. No. 2:00-CV-08869 (C.D. Cal. Aug. 27, 2001).

13. Jill Leovy, *7 Reporters Settle Suit over LAPD*, L.A. TIMES (Nov. 30, 2001, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2001-nov-30-me-9832-story.html> [<https://perma.cc/SY55-NKVB>].

14. *Id.*

15. L.A. POLICE DEP’T., ECHO PARK REHABILITATION: AFTER ACTION REPORT 53 (2021), http://www.lapdpolicecom.lacity.org/080321/BPC_21-145.pdf [<https://perma.cc/P22T-2AWU>] [hereinafter ECHO PARK REPORT].

between media and the LAPD over whether journalists could be required to stay within the bounds of a *Crespo* zone.¹⁶

In 2007, members of the LAPD beat and fired non-lethal rounds at journalists covering an immigrant rights rally, causing several injuries.¹⁷ A series of lawsuits stemming from that incident went to trial, with a jury ultimately awarding one injured camera operator more than \$1.7 million in damages.¹⁸ An LAPD internal report admitted that the violence was the result of failures in leadership, supervision, personal discipline, and situational awareness on the part of law enforcement.¹⁹

Police violence against journalists in California has not been limited to Los Angeles. In 2015, two photographers alleged in a lawsuit that members of the Berkeley Police Department clubbed and fired tear gas at them during a protest.²⁰ In the resulting settlement, the City of Berkeley agreed to modify its policies to require law enforcement officers to document uses of force during protests.²¹ In 2017, a reporter's finger was broken by police as she filmed them in a Santa Clara courthouse.²² In 2019, a police officer shoved a reporter for the Sacramento Bee to the ground with a bicycle, breaking his camera.²³

16. See Letter from Joel Bellman, Advoc. Comm. Chair, Soc'y of Pro. Journalists of L.A., to Members of the L.A. Bd. of Police Comm'rs (Aug. 3, 2021), <https://www.spjla.org/news/spjla-faults-lapd-echo-park-report> [https://perma.cc/F4YF-MY6W].

17. Anna Gorman & Stuart Silverstein, *Police Action Against Journalists Assailed*, L.A. TIMES (May 3, 2007, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2007-may-03-me-media3-story.html> [https://perma.cc/Y9VZ-LAQS].

18. *Jury Awards Reporter \$1.5M in May Day Melee Case*, KPCC (July 2, 2010, 6:22 PM), <https://www.kpcc.org/2010-07-02/jury-awards-reporter-15m-may-day-melee-case> [https://perma.cc/BM5H-L5YT].

19. L.A. POLICE DEP'T, AN EXAMINATION OF MAY DAY 2007, at 79 (2007), https://lapdonlinestrgeacc.blob.core.usgovcloudapi.net/lapdonlinemedia/2021/12/boc-Final_Report.pdf [https://perma.cc/46VM-FD58].

20. *Protestors, Journalists Suing Berkeley over Police Response*, CBS S.F. (Nov. 23, 2015, 3:50 PM), <https://www.cbsnews.com/sanfrancisco/news/protesters-journalists-suing-berkeley-over-police-response-2/> [https://perma.cc/E2XS-25MZ].

21. Bay City News, *Berkeley Settles Police Force Lawsuit*, SFBAY.CA (Jan. 31, 2017), <https://sfbayca.com/2017/01/31/berkeley-settles-police-force-lawsuit/> [https://perma.cc/BXV5-BBNW].

22. *Santa Clara Reporter Has Finger Broken While Filming in Court Records Room*, U.S. PRESS FREEDOM TRACKER (Nov. 14, 2017), <https://pressfreedomtracker.us/all-incidents/santa-clara-reporter-has-finger-broken-while-filming-court-records-room/> [https://perma.cc/9XDR-PCXY].

23. *Sacramento Photojournalist Pushed to the Ground by Police While Covering Protest, His Camera Damaged*, U.S. PRESS FREEDOM TRACKER (Mar. 4, 2019), <https://pressfreedomtracker.us/all-incidents/sacramento-photojournalist-pushed-ground-police-while-covering-protest-his-camera-damaged/> [https://perma.cc/5ZUG-TNKZ].

A. 2020: The George Floyd Protests and Beyond

Violence against journalists by law enforcement in California saw a startling uptick in 2020.²⁴ The majority of this violence occurred during protests that summer following the murder of George Floyd.²⁵ Despite clearly identifying themselves as members of the press, journalists covering the protests were shot with rubber bullets,²⁶ struck with batons,²⁷ tear gassed,²⁸ and arrested without cause.²⁹ The violence against journalists in California was part of a national trend, as there were reports across the country of journalists being targeted.³⁰ In one emblematic incident, a CNN news team was arrested on live television while covering protests in Minnesota.³¹

In California, police targeting of journalists continued past the end of the summer. One case that received substantial coverage was the arrest of Josie Huang, a reporter for the radio station KPCC.³² Huang was covering protests outside of a hospital where two LASD deputies were recovering from surgery after suffering gunshot wounds.³³ As she recorded sheriffs arresting one of the protesters, she

24. The U.S. Press Freedom Tracker recorded forty-six incidents of law enforcement assaulting journalists in California for the year 2020. It recorded three such incidents in the preceding three years combined. *Incident Database*, U.S. PRESS FREEDOM TRACKER, <https://pressfreedomtracker.us/all-incidents/> [<https://perma.cc/PT6Q-6AMM>].

25. *Id.* (showing that twenty-eight of the forty-six law enforcement assaults occurred between May 25, 2020, the date of Floyd's death, and August 31, 2020).

26. Bion, *supra* note 1; Daniel Hernandez, *Police Violence Against Journalists Recalls Slaying of Ruben Salazar*, L.A. TIMES (June 20, 2020, 6:00 AM), <https://www.latimes.com/california/story/2020-06-20/ruben-salazar-george-floyd-protests-journalists-media-attacks-latinos> [<https://perma.cc/WA46-LBUA>].

27. Kevin Rector, *Photojournalists Sue LAPD, L.A. County Sheriff over Alleged Abuses at Protests*, L.A. TIMES (May 5, 2021, 3:11 PM), <https://www.latimes.com/california/story/2021-05-05/photojournalists-sue-lapd-l-a-county-sheriff-over-alleged-abuses-at-protests> [<https://perma.cc/YF4Y-FXC8>].

28. David Folkenflik, *From Kid Gloves to Rubber Bullets: How the LAPD's Ties to News Media Unraveled*, NPR (Mar. 31, 2022, 5:00 AM), <https://www.npr.org/2022/03/31/1089643078/lapd-media-echo-park-history> [<https://perma.cc/5TMT-ND6E>].

29. *United States: Police Detains Reporter Katie Nielsen, Stops Her Coverage*, COAL. FOR WOMEN JOURNALISM (June 6, 2020), <https://www.womeninjournalism.org/threats-all/us-police-detains-reporter-katie-nielsen-stops-her-coverage> [<https://perma.cc/XRH7-4FJV>].

30. Bion, *supra* note 1.

31. *Minnesota Police Arrest CNN Team on Live Television*, CNN, <https://www.cnn.com/videos/us/2020/05/29/minneapolis-protests-omar-jimenez-arrested-newday-vpx.cnn> [<https://perma.cc/F67G-GTDG>].

32. Alex Wigglesworth, *L.A. County Deputies Arrest Radio Reporter Covering Protest Outside Hospital*, L.A. TIMES (Sept. 13, 2020, 4:16 PM), <https://www.latimes.com/california/story/2020-09-13/deputies-arrest-radio-reporter-covering-protest-outside-hospital> [<https://perma.cc/9XF8-CLLS>].

33. *Id.*

was thrown to the ground and handcuffed.³⁴ Video taken by another reporter at the scene showed deputies repeatedly stomping on Huang’s phone in an attempt to destroy it as it continued to record.³⁵ Huang’s press pass was clearly visible around her neck, and she identified herself as a reporter to LASD deputies as she was being arrested.³⁶ She was initially charged with obstructing justice, but those charges were later dropped,³⁷ and in 2023 a Los Angeles Superior Court judge declared her factually innocent.³⁸ The Los Angeles County Board of Supervisors later voted to approve a \$700,000 payment to Huang to preempt a potential lawsuit.³⁹ Huang’s arrest is notable for the attention it received—sixty-six news organizations from across California signed a letter to then-LASD Sheriff Alex Villanueva protesting the incident.⁴⁰

B. *The Veto of S.B. 629*

At the end of the summer of 2020, the California Legislature made a first, ultimately unsuccessful attempt at addressing police targeting of journalists by passing S.B. 629, which would have added section 409.7 to the California Penal Code.⁴¹ The bill aimed to create new protections for “duly authorized representative[s] of any news service, online news service, newspaper, or radio or television station or network” when law enforcement closes off “a demonstration, march, protest, or rally” where individuals are engaged in activity protected by the First Amendment or article I of the California Constitution.⁴² Law enforcement would have been prohibited from intentionally assaulting, interfering with, or obstructing any duly authorized

34. *Id.*

35. Folkenflik, *supra* note 28.

36. *Id.*

37. Aaron Mendelson, *District Attorney Declines to Pursue Case Against KPCC/LAist Reporter Josie Huang*, LAIST (Sept. 24, 2020, 5:21 PM), <https://laist.com/news/da-declines-pursue-charges-josie-huang-kpcc-reporter> [<https://perma.cc/YR68-98PJ>].

38. Keri Blakinger, *L.A. County to Pay \$700,000 to Radio Reporter Arrested While Covering 2020 Protest*, L.A. TIMES (Nov. 8, 2023, 7:59 AM), <https://www.latimes.com/california/story/2023-11-08/l-a-county-to-pay-700k-to-radio-reporter-arrested-while-covering-2020-protest> [<https://perma.cc/63HD-DRXR>].

39. *Id.*

40. Letter from Reps. Comm. for Freedom of the Press to Sheriff Alex Villanueva (Sept. 16, 2020), <https://www.rcfp.org/wp-content/uploads/2020/09/RCFP-LA-County-Sheriff-Letter-Latest-as-of-9-18-20.pdf> [<https://perma.cc/VFV6-42YG>].

41. S.B. 629, 2019–2020 Leg., Reg. Sess. (Cal. 2019). All following references to code provisions refer to the California Penal Code unless otherwise indicated.

42. *Id.*

representative, and representatives were guaranteed entry to closed-off areas.⁴³ Under the bill, duly authorized representatives in a closed-off area also could not be cited for failure to disperse, violation of curfew, or willfully obstructing a peace officer.⁴⁴ S.B. 629 additionally would have established the right for any representative detained by law enforcement to contact a supervisory officer immediately to challenge the detention “unless circumstances [made] it impossible to do so.”⁴⁵ However, section (c) of the bill made clear that a duly authorized representative could still be arrested for engaging in other unlawful activity.⁴⁶

S.B. 629 also defined a “duly authorized representative” as “a person 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 professional broadcasting or recording equipment.”⁴⁷ This language was the reason for Governor Gavin Newsom’s veto of S.B. 629 on September 30, 2020.⁴⁸ While he expressed support for the right of journalists to cover police activities during protests in his veto message, Newsom worried that the bill created security risks because “duly authorized representative” was defined too broadly, potentially allowing “white nationalists, extreme anarchists or other fringe groups with an online presence . . . unfettered access to a law enforcement command center.”⁴⁹

C. *The Arrests at Echo Park Lake*

In 2021, another major incident of police misconduct against journalists occurred at Echo Park Lake in Los Angeles.⁵⁰ During 2020, at the height of the COVID-19 pandemic, a large group of unhoused people formed a community by the lakeside, setting up tents, planting gardens, and even creating rudimentary plumbing systems.⁵¹ In

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Letter from Gavin Newsom, Governor, Off. of the Governor, to Members of the Cal. State Senate (Sept. 30, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/09/SB-629.pdf> [<https://perma.cc/U7HP-EAJD>].

49. *Id.*

50. David Folkenflik & Marc Rivers, *When Police Cracked Down on Reporters on One Chaotic Night in LA’s Echo Park*, NPR (Mar. 31, 2022, 5:17 AM), <https://www.npr.org/2022/03/31/1087495900/echo-park-protest-lapd-journalist> [<https://perma.cc/62GQ-DDTU>].

51. *Id.*

March 2021, when hundreds of police officers⁵² descended to clear the area, protests erupted.⁵³ As the LAPD moved to forcibly disperse the protesters, sixteen journalists were detained and two were shot with rubber bullets as officers seemed unwilling or unable to distinguish between protesters and press.⁵⁴ While most of those detained were released without charges, three journalists were arrested and charged.⁵⁵ Those charges were later dropped.⁵⁶

The detention and arrest of journalists at Echo Park Lake made national news⁵⁷ and was widely condemned, with one former LAPD Deputy Chief describing it as “a disaster for the police department.”⁵⁸ However, the LAPD refused to admit fault, justifying officers’ actions by noting that the detained journalists had strayed outside of the established *Crespo* zone and describing the journalists who were arrested and charged as “internet bloggers and video streamers” in an apparent attempt to undermine their legitimacy as newsgatherers.⁵⁹ While LAPD Chief Michel Moore said that the agency would reform its press credentialing process in response to the incident, many of the journalists already had credentials that they showed to officers as they were being detained, making it unclear how a reformed credentialing process would have had any impact.⁶⁰

D. *The Passage of S.B. 98*

The arrests at Echo Park Lake reinvigorated the push for increased protections for journalists covering protests, and in September 2021 the California Legislature passed S.B. 98.⁶¹ S.B. 98 was mostly identical to S.B. 629, with two differences. First, S.B. 98 added language stating that section 409.7 cannot be used as a basis for

52. ECHO PARK REPORT, *supra* note 15, at 62.

53. Folkenflik & Rivers, *supra* note 50.

54. *Id.*

55. *Id.*; ECHO PARK REPORT, *supra* note 15, at 53.

56. *See Surprise! We’re Suing the LAPD*, KNOCK LA (May 9, 2022), <https://knock-la.com/jon-peltz-kate-gallagher-sue-lapd-echo-park-lake-arrest/> [<https://perma.cc/C39K-6VH6>].

57. *See, e.g.,* Teo Armus, *L.A. Police Arrest Reporters and Legal Observers at Protests over Homeless Encampment*, WASH. POST (Mar. 26, 2021, 6:43 AM), <https://www.washingtonpost.com/nation/2021/03/26/los-angeles-arrests-echo-park/> [<https://perma.cc/8CB4-6H23>].

58. Folkenflik & Rivers, *supra* note 50.

59. ECHO PARK REPORT, *supra* note 15, at 53.

60. *LAPD Chief Says Credential Process Needs Reform After Journalists’ Detentions*, SPECTRUM NEWS 1 (Apr. 6, 2021, 1:15 PM), <https://spectrumnews1.com/ca/la-east/public-safety/2021/04/06/lapd-chief-says-credential-process-needs-reform-after-journalists--detentions> [<https://perma.cc/8FPN-M4VX>].

61. S.B. 98, 2021–2022 Leg., Reg. Sess. (Cal 2021).

criminal liability.⁶² Second, and most importantly, the section defining a “duly authorized representative” was removed entirely.⁶³ S.B. 98 received widespread support from press and civil rights organizations, which argued that the actions taken by law enforcement against journalists at the George Floyd and Echo Park Lake protests demonstrated the necessity of additional statutory protections for members of the press covering protests.⁶⁴ However, a number of law enforcement associations opposed the bill on the grounds that it could cause unintended consequences that might put officers and the public in danger.⁶⁵ Ultimately, the omission of the language defining a “duly authorized representative” was enough to allay Governor Newsom’s concerns, and he signed S.B. 98 into law on October 9, 2021.⁶⁶ Section 409.7 came into effect on January 1st of the following year.⁶⁷

E. Early Returns

It is difficult to measure the immediate impact of S.B. 98’s passage. In 2022, the U.S. Press Freedom Tracker recorded nine assaults on or arrests of journalists by law enforcement in California, a decrease from seventeen in 2021 and forty-six in 2020.⁶⁸ While the decline is encouraging, it is hard to untangle any possible effect of S.B. 98 from other factors such as the frequency with which major protests have occurred or changes in law enforcement policy not directly brought about by the law’s passage. Almost all of the 2022 incidents occurred at protests in Los Angeles following the Supreme Court’s controversial decision in *Dobbs v. Jackson Women’s Health Organization*,⁶⁹ where there were multiple documented instances of LAPD officers beating, shoving, and otherwise harassing journalists who carried press credentials or clearly identified themselves as members of the press.⁷⁰ LAPD promised to investigate in response, but any

62. *Id.*

63. *Id.*

64. MATTHEW FLEMING, ASSEMB. COMM. ON PUB. SAFETY, BILL ANALYSIS, S.B. 98, 2021–2022 Leg., Reg. Sess., at 6–9 (Cal. 2021).

65. *Id.* at 7, 9.

66. S.B. 98, 2021–2022 Leg., Reg. Sess. (Cal 2021); see Letter from Gavin Newsom, *supra* note 48.

67. CAL. PENAL CODE § 409.7 (2021).

68. *Incident Database*, *supra* note 24.

69. 142 S. Ct. 2228 (2022); *Incident Database*, *supra* note 24.

70. Kevin Rector, *LAPD Treatment of Journalists Denounced, Again, After Abortion Rights Protest Downtown*, L.A. TIMES (June 25, 2022, 2:46 PM), <https://www.latimes.com/california/sto>

findings have yet to be publicly released.⁷¹ The violence at the *Dobbs* protests would seem to indicate that, in Los Angeles at the very least, there is still work to be done in bringing rank and file police officers' conduct into compliance with the law.

II. OTHER LAW ON THE PRESS

Pre-existing law on the press is helpful in attempting to decipher S.B. 98's ambiguities. A significant body of law dealing with the press was already in place both in California and on the federal level prior to the bill's passage.

A. Section 409.5(d)

California Penal Code section 409.7 mirrors the language of section 409.5(d).⁷² This provision operates as an exception to the law allowing peace officers to close off areas impacted by natural disasters. Under section 409.5 generally, public officials may close off a zone around a natural disaster, making it a misdemeanor for anyone who knowingly enters the area to remain after receiving notice to evacuate.⁷³ However, section 409.5(d) guarantees access to a closed-off disaster zone to "a duly authorized representative of a news service, newspaper, or radio or television station or network."⁷⁴ Interestingly, unlike section 409.7, section 409.5(d) does not include "online news service" in its list of covered types of news organizations, despite the fact that its language was amended as recently as 2021.⁷⁵ This could imply that the scope of journalistic actors covered by section 409.7 is broader than that of section 409.5(d).

B. California's Reporter's Shield

The California State Constitution provides strong protections aimed at ensuring freedom of the press. The "Reporter's Shield" provision in article I, section 2 of the state constitution protects any person "connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any

ry/2022-06-25/lapd-treatment-of-journalists-denounced-again-after-abortion-rights-protest-down-town [https://perma.cc/WG55-GA4A].

71. *Id.*

72. CAL. PENAL CODE § 409.5(d) (2022).

73. *Id.*

74. *Id.*

75. *Id.*; Assemb. B. 1103, 2020–2021 Leg., Reg. Sess. (Cal. 2021).

person who has been so connected or employed” from being held in contempt by any state government body for refusing to disclose sources or for refusing to disclose “any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.”⁷⁶ Persons currently or formerly employed by radio and television stations are similarly shielded from being held in contempt for refusing to disclose sources or unpublished information used for “news or news commentary purposes.”⁷⁷ Unpublished information is protected even if it is not related to any information or communication that was eventually disseminated to the public.⁷⁸ California Evidence Code section 1070 doubles down on the state constitution’s protections, using almost identical language.⁷⁹ California courts’ interpretations of article I, section 2, Evidence Code section 1070, and decisions governing when they apply provide important guidance on the scope of section 409.7’s protections.

C. Federal Protections

At the federal level, there is widespread disagreement over the meaning of the First Amendment’s guarantee of freedom of the press.⁸⁰ Some argue that the Free Press Clause protects the press as an institution—one that serves an essential function within the constitutional structure as one more check on the power of the federal government.⁸¹ Others say that the Free Press Clause refers to the process of gathering news and choosing what is and is not deserving of publication.⁸² Still others take the view that the First Amendment protects the press as a technology, and should thus be considered to guarantee a

76. CAL. CONST. art. I, § 2.

77. *Id.*

78. *Id.*

79. CAL. EVID. CODE § 1070 (1974). Section 1070 makes clear that the protections of the Reporter’s Shield apply within the courtroom context. *Id.* (stating that reporters “cannot be adjudged in contempt by a judicial . . . body, or any other body having the power to issue subpoenas” for refusing to disclose sources)

80. U.S. CONST. amend. I.

81. See Potter Stewart, “*Or of the Press*,” 26 HASTINGS L.J. 631, 634 (1975); Sonja R. West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2443–44 (2014).

82. See Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 757 (1999); Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1412 (2003).

right to the use of technologies that facilitate communication.⁸³ While the U.S. Supreme Court has shied away from definitive rulings on the full scope of the Free Press Clause,⁸⁴ its decisions provide some parameters.

Broadly, the Free Press Clause prevents the government from controlling the content of published speech.⁸⁵ Most obviously, this makes any direct government censorship of the press unconstitutional, but it also precludes government action that would force the press to publish content that it otherwise would not.⁸⁶ The action does not have to directly restrict content to violate the Free Press Clause—for example, in *Grosjean v. American Press Co.*,⁸⁷ the Supreme Court struck down a Louisiana law that assessed a tax on any publisher that sold advertisements in a publication with a circulation above 20,000 copies per week.⁸⁸ The Court ruled that, while the press is by no means immune to general taxation, a tax specifically targeting the press created an unconstitutional restraint on publication.⁸⁹

The Free Press Clause does not provide a Reporter’s Shield like the one in the California Constitution.⁹⁰ In *Branzburg v. Hayes*,⁹¹ the U.S. Supreme Court ruled that a reporter could not refuse to appear and testify before a grand jury to protect a confidential source of information.⁹² In the Court’s view, the acknowledgment of a constitutional “newsman’s privilege” against revealing confidential sources would create unworkable difficulties for the judiciary by forcing judges to make preliminary judgments on issues such as whether it was likely that a reporter had useful information gained in confidence and whether the official interest in that information outweighed the First Amendment privilege.⁹³ The *Branzburg* Court also anticipated the issue raised in this Note, writing that a newsman’s privilege would make it necessary to determine who was or was not a newsman, “a

83. See 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, 462–63 (2012); David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 446–47 (2002).

84. See West, *supra* note 81, at 2439–41.

85. See *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

86. *Id.* at 256.

87. 297 U.S. 233 (1936)

88. *Id.* at 240, 251.

89. *Id.* at 250–51.

90. *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972).

91. 408 U.S. 665 (1972).

92. *Id.* at 667–69.

93. *Id.* at 705–07.

questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher.”⁹⁴ However, the Court made clear that it did not consider the Free Press Clause to be entirely subsumed within the First Amendment’s guarantee of free speech, explicitly describing the First Amendment as protecting “news gathering” and noting that the subpoena of a journalist for purposes of disrupting her relationship with her sources, rather than for purposes of law enforcement, would likely be unconstitutional.⁹⁵

The Supreme Court’s holdings also make clear that the type of content being published is important in determining whether the Free Press Clause applies. In *New York Times Co. v. Sullivan*,⁹⁶ the Court struck down a libel suit brought against the *New York Times* by a Montgomery, Alabama city official for publishing an advertisement describing attacks against civil rights activists by Montgomery police that the *Times* later acknowledged contained some incorrect details.⁹⁷ In holding that the First Amendment protected the *Times*’s editorial decision to publish an advertisement that it reasonably believed to be accurate, the Court placed heavy emphasis on the importance of protecting the open and unrestricted discussion of issues of political importance, even when that discussion includes incorrect statements.⁹⁸ In contrast, in *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*,⁹⁹ an anti-discrimination ordinance construed as restricting a newspaper from sorting job postings under headings indicating that they were intended for male or female workers was allowed to stand.¹⁰⁰ The Court distinguished *Pittsburgh Press* from *Sullivan* because the job postings were purely commercial speech that made no political or social commentary.¹⁰¹ The newspaper’s editorial decision to place the postings in categories delineated by sex, a decision based entirely on the stated preference of the employer, was not significant enough to be deserving of First Amendment protection.¹⁰²

94. *Id.* at 704.

95. *Id.* at 707–08.

96. 376 U.S. 254 (1964).

97. *Id.* at 257–58, 264–65.

98. *Id.* at 269–72, 286.

99. 413 U.S. 376 (1973).

100. *Id.* at 376.

101. *Id.* at 384–85.

102. *Id.* at 387–88.

Beyond the First Amendment, there are some statutory and rule-based protections for journalists at the federal level. Federal law enforcement is statutorily forbidden from searching for or seizing work product or documentary materials “possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication.”¹⁰³ This law clearly privileges journalistic materials over most others and would seem to imply a broad, process-based definition of the press. On the executive branch side, Department of Justice regulations generally ban its employees from using compulsory legal process to obtain information or records from “members of the news media acting within the scope of newsgathering.”¹⁰⁴ The regulations define newsgathering as “the process by which a member of the news media collects, pursues, or obtains information or records for purposes of producing content intended for public dissemination.”¹⁰⁵ They do not make any attempt to set a definition of a “member of the news media” but do provide that, in cases where a close or novel question as to a person’s status as a member of the news media is presented, any determination of that status must be approved by the Assistant Attorney General for the Criminal Division.¹⁰⁶

Examined alongside most of the other state and federal protections for journalists, S.B. 98 is different in a key way. Where most other protections are focused either on restricting access to journalistic materials after news has already been gathered or preventing government interference with the content that the press eventually chooses to publish, S.B. 98 governs interactions between law enforcement and the press that occur as news is being gathered in real time. This

103. 42 U.S.C. § 2000aa. This statute contains a series of nested exceptions. Federal law enforcement cannot seize journalists’ work product unless it is proof of a crime the journalist has committed, but the crime committed must not simply be the possession or withholding of the work product unless it contains information that is classified, relates to the national defense, or involves the trafficking or sexual exploitation of children. *Id.* § 2000aa(a)(1). There is also an exception where there is reason to believe that the immediate seizure of materials is necessary to prevent the death of, or serious bodily injury to, a human being. *Id.* § 2000aa(a)(2). Additionally, documentary materials (but not work product materials) may be seized when there is reason to believe the serving of a subpoena would result in their destruction or alteration, or a subpoena has been served and ignored. *Id.* § 2000aa(b)(3)–(4). Despite these exceptions, the statute still provides substantial protections for journalistic materials that are generally unavailable to non-journalists.

104. Policy Regarding Obtaining Information from or Records of Members of the News Media, 87 Fed. Reg. 66240 (Nov. 3, 2022) (to be codified at 50 C.F.R. pt. 50). This regulation contains exceptions similar to those within 42 U.S.C. § 2000aa.

105. *Id.*

106. *Id.*

difference in context brings to the fore the two questions raised in this Note, which must be addressed to reach an understanding of how the law should function in practice.

III. WHAT IS AN ONLINE NEWS SERVICE?

S.B. 98's protections extend to representatives of any "news service, online news service, newspaper, or radio or television station or network."¹⁰⁷ While newspapers, radio stations, and television networks are easily definable types of media organizations, the boundary between an online news service and any other type of website can be much more nebulous. In attempting to draw a line between websites that can be considered news services and those that cannot, there are a number of decisions from California courts that are instructive, most of them dealing with article I, section 2 of the California Constitution, the Reporter's Shield.

A. *Defining the Press in the Courts*

The most on-point case here is *O'Grady v. Superior Court*,¹⁰⁸ decided by the California Court of Appeal for the Sixth District in 2006. In that case, Apple filed suit against a group of tech websites that published articles about an Apple product that had yet to be announced to the public, alleging misappropriation of trade secrets.¹⁰⁹ When Apple sought to force by subpoena the disclosure of the sources from which the websites had received the information they based their articles on, the authors of the articles claimed the protection of the Reporter's Shield.¹¹⁰ The court sided with the websites, holding that they were protected from forced disclosure by both the Reporter's Shield and the constitutional guarantee of freedom of the press.¹¹¹

107. S.B. 98, 2021–2022 Leg., Reg. Sess. (Cal 2021).

108. 44 Cal. Rptr. 3d 72 (Ct. App. 2006).

109. The websites at issue in the case tended to publish between seven and twenty articles a week. One, O'Grady's Power Page, had a roster of nine reporters and editors, while another, Apple Insider, seems to have been primarily run by one individual operating under the pseudonym Kasper Jade. *Id.* at 77–80.

110. *Id.* at 81.

111. *Id.* at 77. In *Mitchell v. Superior Court*, the California Supreme Court held that, in a civil suit, the Free Press Clause provides a reporter, editor, or publisher with a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information those sources supplied, subject to a multi-part balancing test. 690 P.2d 625, 635 (Cal. 1984). It was this privilege that the websites invoked in *O'Grady*, alongside the protections provided by the Reporter's Shield. 44 Cal. Rptr. 3d 72 at 105–06.

In reaching its decision, the court dismissed Apple’s contention that the websites were not engaged in “legitimate journalism or news,” writing that a distinction between legitimate and illegitimate journalism is not one for courts to make.¹¹² Even if the websites had, as Apple alleged, simply reprinted the company’s internal information without exercising any editorial discretion, the websites were entitled to protection as newsgatherers regardless of the existence of any editorial oversight.¹¹³ Furthermore, the contention that posting documents in full and unedited represented a lack of editorial oversight stood on shaky ground—the act of choosing to publish a complete document is an editorial decision in itself.¹¹⁴ Ultimately, the websites were entitled to protection under both the Reporter’s Shield and the Free Press Clause because they “gather[ed], select[ed], and prepar[ed], for purposes of publication to a mass audience, information about current events of interest and concern to that audience.”¹¹⁵

With respect to the Reporter’s Shield’s language specifically, which protects “a newspaper, magazine, or other periodical publication,”¹¹⁶ the court held that the tech websites qualified as covered entities.¹¹⁷ Examining the legislative deliberations that accompanied the amendment adding that language to the California Constitution in 1974, the court emphasized the fact that the legislature contemplated the idea that Reporter’s Shield protections might extend to a publication as irregularly published and distant from traditional news organizations as a legislator’s newsletter to constituents.¹¹⁸ In the court’s view, this pointed to an expansive reading of the term “periodical publication” that clearly included the tech websites, even though they may not have been periodicals in a technical sense due to their irregular publication schedule.¹¹⁹ Similarly, while the term “publication” might have traditionally referred to text printed on paper, the websites were too functionally analogous to a printed publication to warrant placing them in a separate legal category.¹²⁰ The court did, however, draw a tentative distinction between the tech websites, which it felt to be

112. *O’Grady*, 44 Cal. Rptr. 3d at 97.

113. *Id.*

114. *Id.* at 97–98.

115. *Id.* at 106.

116. CAL. CONST. art. I, § 2.

117. *O’Grady*, 44 Cal. Rptr. 3d at 99.

118. *Id.* at 102, 104–05.

119. *Id.* at 103–05.

120. *Id.* at 102–03.

“conceptually indistinguishable” from a newspaper, and a post on an open internet forum by a casual visitor, but it only noted in an aside that this second type of online activity might constitute something other than the publication of news.¹²¹

*Delaney v. Superior Court*¹²² is another important case. There, the California Supreme Court found that the Reporter’s Shield applies only to those directly engaged in journalistic activity.¹²³ For example, a person employed as a reporter who witnessed a robbery while walking home from work would not be able to invoke the Reporter’s Shield and refuse to testify about the incident.¹²⁴ This holding was grounded in the language of the Reporter’s Shield itself, specifically its protection of unpublished information “obtained or prepared in gathering, receiving or processing of information for communication to the public.”¹²⁵

Following *Delaney*, the California Court of Appeal for the Second District held in *People v. Von Villas*¹²⁶ that the protections of the Reporter’s Shield covered a freelance journalist who refused to produce materials related to magazine articles he was contracted to write.¹²⁷ Most importantly, the court held that the question of whether those protections applied was not tied to the existence of any contract between the journalist and the publications he wrote the articles for—information gathered both before the contract was signed and after it concluded was covered as well.¹²⁸ The court of appeal agreed with the trial judge, who stated on the record that drawing a distinction between the reporter when he was working alone and when he was under contract with a magazine would present serious equal protection problems.¹²⁹ A person can be considered a journalist under the meaning of the Reporter’s Shield even when not a part of a larger media organization.¹³⁰

Conversely, a person who is employed as a member of a larger media organization may not be entitled to protection as a journalist

121. *Id.* at 99.

122. 789 P.2d 934 (Cal. 1990).

123. *See id.* at 940, n.8.

124. *Id.*

125. *Id.*; CAL. CONST. art. I, § 2.

126. 13 Cal. Rptr. 2d 62 (Ct. App. 1992).

127. *Id.* at 76, 78.

128. *Id.* at 79.

129. *Id.* at 78.

130. *See id.*

when engaged in activity that cannot be considered journalism. In *Anti-Defamation League of B'nai B'rith v. Superior Court*,¹³¹ a group of individuals sued the Anti-Defamation League (ADL) and some of its employees, alleging that they had secretly gathered personal information about those individuals because of their opposition to apartheid regimes in South Africa and Israel and sold it to the governments of those nations.¹³² When the plaintiffs sought discovery, the ADL moved for a protective order establishing that it was a journalistic organization protected from being forced to disclose confidential information or sources.¹³³ The California Court of Appeal for the First District agreed that the ADL, which published magazines and newsletters, could qualify for protection as a press organization.¹³⁴ The court also found that the activism engaged in by almost all of the plaintiffs qualified them as public figures, and accordingly, the ADL's collection of information about them could be considered protected newsgathering.¹³⁵ However, because it had allegedly sold or given the information to agents of foreign governments rather than published it, the ADL and its employees were not acting as journalists and were not entitled to protection as members of the press.¹³⁶ The *B'nai B'rith* court included in its opinion its own definition of journalism, one that is very similar to that in *O'Grady*: "the gathering and editing of material of current interest for presentation through print or broadcast media, or on the Internet, and available to interested members of the public."¹³⁷ Because the ADL never intended to make the information it gathered available to the public, it was not engaging in journalism.¹³⁸

Like the U.S. Supreme Court in cases such as *Sullivan and Pittsburgh Press*, California courts consider the type of content being published in distinguishing between the press and the general public. In *Rancho Publications v. Superior Court*,¹³⁹ Reporter's Shield protection was denied to a newspaper that refused to disclose information related to a series of paid advertisements that it had published.¹⁴⁰

131. 79 Cal. Rptr. 2d 597 (1998).

132. *See id.* at 599–60, 601–02.

133. *Id.* at 600–01.

134. *Id.* at 601.

135. *Id.* at 608, 610.

136. *Id.* at 610.

137. *Id.* at 609.

138. *See id.*

139. 81 Cal. Rptr. 2d 274 (Ct. App. 1999).

140. *Id.* at 276.

While not fully precluding paid advertisements from being covered by press protections, the *Rancho* court drew a firm line between content related to the newspaper's reporting and editorial functions and any commercial advertisements placed within its pages.¹⁴¹

Examined as a body, California courts' decisions seem to consistently adhere to a process-based definition of journalism. To borrow the language of the Reporter's Shield, a person is a member of the press if they are engaged in "gathering, receiving or processing . . . information for communication to the public."¹⁴² There is no requirement that a person doing so be employed as a reporter, editor, or in another traditionally news-related job, and a person employed as a full-time reporter may not be considered a member of the press if she is not actively engaged in journalistic activity. The only clear restriction beyond this base definition seems to be that the information communicated to the public must not be purely commercial in nature—i.e., the goal of the communication cannot be solely to encourage the public to spend money on a particular product or service.

While the U.S. Supreme Court has made no effort to reach a legal definition of journalism, lower federal courts seem to align with California. Like the California court of appeal in *B'nai B'rith*, the Second Circuit held in *von Bulow v. von Bulow*¹⁴³ that intent to disseminate information to the public is a requirement for any entity wishing to claim protection under the First Amendment's Free Press Clause.¹⁴⁴ The *von Bulow* court also emphasized that prior experience as a professional journalist or any association with the institutionalized press is not necessary to establish qualification for press protections.¹⁴⁵ The Ninth Circuit agreed in *Schoen v. Schoen*,¹⁴⁶ writing, "[w]hat makes journalism journalism is not its format but its content."¹⁴⁷ *Titan Sports, Inc. v. Turner Broadcasting Systems, Inc.*¹⁴⁸ is the closest a federal court has come to a conclusive definition of journalism or the press. There, the Third Circuit created a three-part test to satisfy for anyone claiming protection under the Free Press Clause: the claimant must (1) be engaged in investigative reporting, (2) be gathering news, and (3)

141. *Id.* at 278.

142. CAL. CONST. art. I, § 2.

143. 811 F.2d 136 (2d Cir. 1987).

144. *Id.* at 144.

145. *Id.* at 144–45.

146. 5 F.3d 1289 (9th Cir. 1993).

147. *Id.* at 1293.

148. 151 F.3d 125 (3d Cir. 1998).

have the intent at the inception of the newsgathering process to disseminate this news to the public.¹⁴⁹

The fact that this type of process-based definition of journalism or the press has been consistently applied in the context of both the Free Press Clause and the Reporter's Shield is strong evidence that it should apply to S.B. 98 as well. Taking the definition from the Reporter's Shield, a website would be operating as an online news service when it is gathering, receiving, or processing non-commercial information for communication to the public. Using this definition to clarify what is an "online news service" in the context of S.B. 98 would only apply the same standards to websites that have applied to more traditional forms of media in California courts for decades.

B. *The Press on the Press*

A process-based definition of journalism also finds support within the field of journalism itself. The American Press Institute's definition of journalism is relatively straightforward: "the activity of gathering, assessing, creating, and presenting news and information . . . [and] also the product of these activities."¹⁵⁰ Similarly, the Reporters Committee for Freedom of the Press has advocated for a definition that focuses on the purpose of speech over the profession of the speaker, again privileging journalistic activity over journalism as a class or status.¹⁵¹ While not directly defining journalism, the Society of Professional Journalists in its bylaws describes its members as those "engaged in directing the editorial policy or editing and preparing news and editorial content of independent news media products,"¹⁵² and Investigative Reporters and Editors offers full professional membership to those "substantially engaged in news gathering, presentation or production."¹⁵³

However, the membership criteria for some other journalistic trade organizations reveals an attachment to a definition that sees

149. *Id.* at 131.

150. *What Is Journalism?*, AM. PRESS INST., <https://www.americanpressinstitute.org/journalism-essentials/what-is-journalism/> [<https://perma.cc/9VNK-G44U>].

151. Gregg Leslie, *Who Is a "Journalist?"*, REPS. COMM. FOR FREEDOM PRESS, <https://www.rcfp.org/journals/the-news-media-and-the-law-fall-2009/who-journalist/> [<https://perma.cc/A2JR-T2YN>].

152. *SPJ Bylaws*, SOC'Y PRO. JOURNALISTS (Oct. 29, 2022), <https://www.spj.org/spjbylaws.asp> [<https://perma.cc/4TGA-TBJX>].

153. *Join IRE*, INVESTIGATIVE REPS. & EDS., <https://www.ire.org/join-ire/> [<https://perma.cc/JVA8-AYQJ>].

journalism as more of a profession or institution than a process. The News Leaders Association restricts its membership to those who “receive a majority of their income from or spend the majority of their work time involved in journalistic work.”¹⁵⁴ The American Society of Journalists and Authors, an organization that focuses on freelance writers, divides its members into associate and professional tiers and requires applicants for either level to submit a certain number of articles published in regional or national publications, with most self-published materials expressly excluded from consideration.¹⁵⁵ Both of these organizational approaches privilege applicants who work for or have been published by traditional media institutions and discourage those who work independently or in small local outlets that may not pay enough to support a full-time career in media. While there are some states that privilege professional journalists over others in their press laws,¹⁵⁶ this approach is absent from California law or the U.S. Supreme Court’s Free Press Clause jurisprudence.¹⁵⁷

Scholars who have examined definitions of journalism tend to survey defining characteristics as seen by both the legal and media fields.¹⁵⁸ This often leads to a more abstract approach, but they too tend to give more weight to the journalism-as-profession conception.¹⁵⁹ One of the few papers to reach a concise definition includes professionalization as an important element: “[a] journalist is someone *employed to regularly* engage in gathering, processing, and disseminating news and information to serve the public interest.”¹⁶⁰ Most,

154. *Membership Dues*, NEWS LEADERS ASS’N, <https://members.newsleaders.org/membership-dues> [https://perma.cc/YWU6-QL6Y].

155. *Membership Eligibility*, AM. SOC’Y JOURNALISTS & AUTHORS, <https://www.asja.org/join-asja/eligibility/> [https://perma.cc/443B-MWQZ].

156. See N.Y. CIV. RIGHTS LAW § 79-h (McKinney 2022) (exempting only “professional journalists and newscasters” from contempt); see also FLA. EVID. CODE § 90.5015 (2023) (protecting only professional journalists).

157. See discussion *supra* Sections II.C, III.A.

158. See Jonathan Peters & Edson C. Tandoc, Jr., “*People Who Aren’t Really Reporters at All, Who Have No Professional Qualifications*”: *Defining a Journalist and Deciding Who May Claim the Privileges*, 2013 N.Y.U. J. LEGIS. & PUB. POL’Y QUORUM 34, 39 (2013); Erik Ugland & Jennifer Henderson, *Who Is a Journalist and Why Does It Matter? Disentangling the Legal and Ethical Arguments*, 22 J. MASS MEDIA ETHICS 241, 242 (2007).

159. See Barbie Zelizer, *Definitions of Journalism, in INSTITUTIONS OF AMERICAN DEMOCRACY: THE PRESS* 66, 72, 76 (Geneva Overholser & Kathleen Hall Jamieson eds., 2005) (describing journalism as “a sixth sense, a container, a mirror, a story, a child, a service, a profession, an institution, a text, people, a set of practices”); Mark Deuze, *What is Journalism? Professional Identity and Ideology of Journalists Reconsidered*, 6 JOURNALISM 442, 443–44 (2005) (describing journalism as an “occupational ideology” that has shaped and been shaped by the professionalization of the field).

160. Peters & Tandoc, *supra* note 158, at 61 (emphasis added).

though, shy away from providing a definition that can be boiled down to a single sentence.¹⁶¹ In doing so, Erik Ugland and Jennifer Henderson make an important point: the motives in reaching a definition differ depending on the context.¹⁶² In law, the goal is generally to incentivize debate on issues of public importance, leading to a preference for an expansive definition. In contrast, members of the media are often using the term “journalist” as an indicator of credibility and attempting to delineate between those the public should listen to and those it should not.¹⁶³ This observation provides a plausible explanation for the prominence of the professional/institutional definition in the press’s conception of itself and—if one agrees that incentivizing public debate is the right aim—weighs in favor of not extending that prominence to the legal sphere.

Still, the absence of any professional or institutional element to California’s legal definition of the press seems to be at least partly behind Governor Newsom’s veto of S.B. 629 and law enforcement’s general opposition to both that bill and S.B. 98. In his veto message, the Governor worried that S.B. 629’s broad, mostly process-based definition of a journalist might create a security risk by extending press protection under the law to individuals adhering to fringe political ideologies.¹⁶⁴ Similarly, in opposing S.B. 98 the California Police Chiefs Association claimed that the bill would create an unsafe situation for officers by allowing “any person claiming to be a representative from a news service . . . access to . . . restricted area[s].”¹⁶⁵ Implicit in both concerns is the idea that allowing anyone engaged in journalistic activity to be a protected member of the press—without requiring them to be a professional or have some link to an established institution—is dangerous. Assessing whether these concerns are well-founded calls for a look at S.B. 98’s second major ambiguity.

IV. WHO IS DULY AUTHORIZED?

S.B. 98 protects “duly authorized” representatives of the press but provides no guidance as to who provides that authorization or how it

161. See Seth C. Lewis, *Journalism*, in 2 THE INTERNATIONAL ENCYCLOPEDIA OF JOURNALISM STUDIES 797, 797–98 (Tim P. Vos et al. eds., 2019); Ugland & Henderson, *supra* note 158, at 259–60.

162. See Ugland & Henderson, *supra* note 158, at 242–43.

163. *Id.* at 243.

164. Letter from Gavin Newsom, *supra* note 48.

165. FLEMING, *supra* note 64.

can be shown in real time at the scene of a protest.¹⁶⁶ Depending on what is considered proper authorization, the bill's protections could be so narrow that it protects only established reporters carrying credentials who regularly cover protests and other scenes of public unrest or so broad that it covers anyone engaged in documenting events and claiming to be a member of the press.

A. Law Enforcement Credentials

Many law enforcement organizations have established processes for providing credentials to members of the press. Most of these passes are used by journalists to gain passage across police and fire lines.¹⁶⁷ For example, the LAPD offers "media identification cards" to applicants who submit a form and provide proof of their media work.¹⁶⁸ The San Diego Police Department requires less documentation, asking for a form signed by a supervisor, in the case of applicants working for a single media organization, or a form containing a list of references, in the case of freelance applicants.¹⁶⁹ In contrast, the LASD's process is much more onerous, requiring submission of a "passport-style" photo, copies of government identification and a business license, and two recent publications pertaining to law enforcement or fire stories.¹⁷⁰ In general, the decision to grant or deny a press pass seems to be entirely at the discretion of the issuing department.¹⁷¹

166. S.B. 98, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

167. See S.F. POLICE DEP'T, MEDIA RELS. UNIT, APPLYING FOR A SAN FRANCISCO POLICE DEPARTMENT PASS (May 2016), https://www.sfmta.com/sites/default/files/reports-and-documents/2018/12/press_pass_credential.pdf [<https://perma.cc/HC2D-C2SK>].

168. *Media/Press Pass Policy*, L.A. POLICE DEP'T, <https://www.lapdonline.org/public-communications-group/media-relations-division/press-pass-policy/> [<https://perma.cc/G439-6X3X>]. For members of a "department-identified" news organization, this proof consists of a letter from a supervisor stating that the applicant is an employee of the organization who regularly covers news events where police or fire lines are established. For all other applicants three such letters are required, or three samples of work credited to the applicant in the last six months that show he or she performed work that "required access passed [sic] established police or fire lines." *Id.*

169. SAN DIEGO POLICE DEP'T, MEDIA IDENTIFICATION CARD APPLICATION (Jan. 2021), https://www.sandiego.gov/sites/default/files/media_credential_application_revised_august_14.pdf [<https://perma.cc/2XHX-9YXZ>]; SAN DIEGO POLICE DEP'T, MEDIA IDENTIFICATION CARD APPLICATION (INDEPENDENT) (Jan. 2021), https://www.sandiego.gov/sites/default/files/independent_application.pdf [<https://perma.cc/S3GH-4PP4>].

170. *Press Pass Portal*, L.A. SHERIFF'S DEP'T, <https://lasd.org/press-pass/> [<https://perma.cc/98VY-FHLY>]. The business license requirement would seemingly act to bar any journalist working on a freelance basis from consideration without the help of a sponsoring organization.

171. See *Media/Press Pass Policy*, *supra* note 168; *City of San Diego Media Guide*, CITY SAN DIEGO, <https://www.sandiego.gov/communications/city-san-diego-media-guide> [<https://perma.cc/RU2X-YVXV>].

For the purposes of S.B. 98, the variation in application requirements and wide discretion afforded to police departments in approving or denying applicants make departmental press passes a poor method of authorization. There are hundreds of independent law enforcement agencies in California, and forcing media members to obtain credentials from whichever agency is overseeing the police response to a particular incident would radically restrict the ability of the press to cover it.¹⁷² Even if press credentials from any accredited law enforcement agency were accepted, interpreting “duly authorized” to encompass only those carrying law enforcement press credentials would create an open invitation for police to discriminate in favor of members of the media who provide favorable coverage because departments have wide latitude to approve or deny applicants.¹⁷³ Law enforcement agencies themselves seem to acknowledge the limited usefulness of the credentials they issue, as their policies tend to allow journalists to identify themselves by other means.¹⁷⁴

There is some precedent that might suggest law enforcement has the power to decide who is duly authorized. In *Los Angeles Free Press, Inc. v. City of Los Angeles*,¹⁷⁵ the LAPD refused to issue credentials to employees of the *Free Press* because it was not a publication regularly engaged in reporting on “spot, hard core police-beat and fire news.”¹⁷⁶ After the *Free Press* sought an injunction requiring the issuance of credentials, the California Court of Appeal for the Second District ruled in favor of the LAPD, holding that regular coverage of police and fire news was a reasonable basis of classification for persons seeking to cross police lines.¹⁷⁷ However, the holding in *Los Angeles Free Press* was based entirely on constitutional grounds, making no mention of the statutory right of access embodied first in California Penal Code section 409.5(d), and now in section 409.7.¹⁷⁸ It does not apply

172. *California Law Enforcement Agencies*, COMM’N ON PEACE OFFICER STANDARDS & TRAINING, <https://post.ca.gov/le-agencies> [<https://perma.cc/ZFF7-8P3Z>].

173. See *Media/Press Pass Policy*, *supra* note 168; *City of San Diego Media Guide*, *supra* note 171.

174. See SAN DIEGO POLICE DEP’T, PROCEDURE NO. 1.31: MEDIA IDENTIFICATION CARDS (Nov. 8, 2019), <https://www.sandiego.gov/sites/default/files/131.pdf> [<https://perma.cc/SRX8-3ZNU>]; L.A. CNTY. SHERIFF’S DEP’T, POLICY NO. 5-06/000.35—NEWS MEDIA (2023), <https://pars.lasd.org/Viewer/Manuals/12024/Content/19179?showHistorical=True> [<https://perma.cc/8EVX-GD6M>].

175. 88 Cal. Rptr. 605 (Ct. App. 1970).

176. *Id.* at 608.

177. *Id.* at 610.

178. *Id.* at 610–11.

here because the rights created by S.B. 98, which go beyond those protected by the First Amendment, did not exist at the time it was decided.¹⁷⁹

In fact, *Los Angeles Free Press* illustrates the danger of giving law enforcement total control over press authorization. The longer version of the reason for the LAPD's denial of credentials was that the *Free Press* primarily published feature articles and essays on events such as "riots, demonstrations, assassinations, [and] news conferences . . . focused largely on sociological considerations."¹⁸⁰ In another formulation, the emphasis of the *Free Press* was "not on crime news between individuals . . . [but on] civil riots, peace demonstrations, and 'conflicts between the individual and the state.'"¹⁸¹ While these distinctions may have survived rational basis review in the estimation of the court of appeal,¹⁸² they amount to an open admission that the *Free Press* was denied credentials based on the political bent of its content. Allowing law enforcement to exercise complete control over who is authorized gives them a measure of power over who covers them and how, which is deeply problematic in any system with the goal of promoting the free and open exchange of ideas and information.

B. Authorization by Media Organizations

In a memo endorsed by a number of California news organizations, a group of attorneys with expertise in First Amendment and media law, many of whom were involved in the passage of S.B. 98, lay out their perspective on the authorization question.¹⁸³ The memo suggests a wide array of possible indicia of authorization, including news organization employee identification or letters of assignment, press credentials issued by trade groups or law enforcement, or even evidence of past bylines on a news organization's website.¹⁸⁴ Understandably given its sponsors, the memo focuses on organizations rather than

179. *Id.* at 610 (holding that the First Amendment does not provide the publisher of a weekly paper with a right of access superior to that of the general public); CAL. PENAL CODE § 409.7 (2021).

180. *L.A. Free Press*, 88 Cal. Rptr. at 608.

181. *Id.*

182. *Id.* at 609–10.

183. Memorandum from Susan Seager et al. on Definition of Protected Journalist for Penal Code Section 409.7(a), at 1 (Nov. 3, 2021), <https://mediaworkers.org/wp-content/uploads/2021/11/JournalistDefinitionPC409.7.pdf> [<https://perma.cc/3ARX-UTA5>].

184. *Id.* at 1–2.

individuals, but it does note that the law “can cover certain solo journalists” without elaborating further.¹⁸⁵ However, it is notable that all of the proposed indicia would require some level of endorsement from an established media organization.¹⁸⁶

The idea that “duly authorized” means authorized by a media organization is also endorsed in an opinion published by the office of the California Attorney General.¹⁸⁷ That opinion forcefully rejects the idea that law enforcement should be the arbiter of the authorization question.¹⁸⁸ Instead, the authorizer is the covered entity that has designated an individual as its representative at a particular location.¹⁸⁹ While this opinion was published in response to questions about the proper interpretation of Penal Code section 409.5(d), the similar language used in section 409.7 makes it reasonable to think that the Attorney General’s opinion would apply to that section as well.¹⁹⁰

Interpreting “duly authorized” to mean authorized by a media organization would align S.B. 98 more with the institutional definition of journalism. If the way to show authorization is through bylines on established news websites, employer credentials, or letters of assignment, well-established media organizations become the gatekeepers of who qualifies for the law’s press protections. This approach could have its advantages—the institutional media is likely to screen out the “white nationalists, extreme anarchists or other fringe groups” that concerned Governor Newsom¹⁹¹—but it also privileges those with institutional backing over the “lonely pamphleteer” lionized by the U.S. Supreme Court in *Branzburg*.¹⁹²

C. Pure Process

In a recent case, *Index Newspapers LLC v. City of Portland*,¹⁹³ a federal district court endorsed a definition of the press not requiring any official credentials, but instead using visual identifiers and certain types of activity as indicators of press status.¹⁹⁴ That case arose out of

185. *Id.* at 6.

186. See discussion *supra* Section IV.A. This includes law enforcement press credentials, as most require some proof of employment or past media work as part of the application process. *Id.*

187. 67 OPS. CAL. ATT’Y GEN. 535, 539 (1984).

188. *Id.*

189. *Id.*

190. *Id.* at 536–37; CAL. PENAL CODE § 409.7 (2021).

191. Letter from Gavin Newsom, *supra* note 48.

192. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

193. 480 F. Supp. 3d 1120 (D. Or. 2020).

194. *Id.* at 1156.

protests during the summer of 2020 in Portland, Oregon, at which federal law enforcement was observed violently targeting members of the press.¹⁹⁵ In response to the ensuing suit, the district court granted a preliminary injunction restraining federal authorities from arresting, threatening to arrest, or using physical force against journalists.¹⁹⁶ As a way of facilitating the identification of journalists, the district court gave a list of indicators: “carrying a professional or authorized press pass, carrying professional gear such as professional photographic equipment, 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.”¹⁹⁷ Also an indicator of press status was “standing off to the side of a protest, not engaging in protest activities, and not intermixed with persons engaged in protest activities,” although the court stressed that “these are not requirements.”¹⁹⁸ While the district court’s criteria included official press passes as valid indicators, it notably did not require them—“distinctive clothing that identifies the wearer as a member of the press” could presumably be homemade.¹⁹⁹

S.B. 629’s definition of a duly authorized representative bears some similarities to the press status indicators from *Index Newspapers*, but it leaned more heavily towards identifying the press by their activities. The S.B. 629 definition allowed for identification of members of the press through either credentials or process, encompassing anyone “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 professional broadcasting or recording equipment.”²⁰⁰ That definition, specifically the protection of those engaged in “gathering, receiving, or processing information,” tracked the exact language of the California Reporter’s Shield.²⁰¹ The passage defining a duly authorized representative was removed from the version of the bill that became S.B. 98, but it was not replaced.²⁰² An analysis

195. *Id.* at 1129–35.

196. *Id.* at 1155.

197. *Id.* at 1156.

198. *Id.*

199. *Id.* In fact, the district court noted that one of the plaintiffs, a freelance photographer and photojournalist, identified himself by wearing a shirt with “PRESS” printed in block letters on both sides as well as a helmet emblazoned with the same. *Id.* at 1128.

200. S.B. 629, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

201. CAL. CONST. art I, § 2.

202. S.B. 98, 2021–2022 Leg., Reg. Sess. (Cal. 2021).

of S.B. 98 by the State Assembly’s Committee on Public Safety noted that S.B. 629’s definition was criticized as too broad, potentially allowing “a person with an iPhone and an internet blog” to qualify as a duly authorized representative.²⁰³ That analysis concluded that the removal of the S.B. 629 definition would make S.B. 98 more aligned with existing law in terms of who would qualify as protected press.²⁰⁴

The Committee on Public Safety’s analysis seems to imply that becoming aligned with existing law would entail doing away with the process-based element of S.B. 629’s definition, but existing law suggests the reverse. In the absence of any language at all defining a duly authorized representative, it is reasonable to look to court decisions dealing with who can be considered a member of the press for guidance. In California, most of those decisions interpret the Reporter’s Shield.²⁰⁵ As discussed above, the jurisprudence interpreting that constitutional clause indicates that a person engaged in journalistic activity but not carrying any kind of press identification from a media outlet or law enforcement organization would be protected under the Reporter’s Shield, while a person carrying identification from an authorizing organization but not engaged in such activity would not.²⁰⁶ If court decisions are the guide, removing S.B. 629’s definition of a duly authorized representative would actually get rid of its institutional element—a “business card, press pass, [or] other similar credential”²⁰⁷ is largely irrelevant where the sole question is whether a person is gathering information with the intent to disseminate it to the public. The Committee on Public Safety’s “person with an iPhone and an internet blog” would still be covered.²⁰⁸

Ultimately, the Committee on Public Safety’s concerns are overblown, and so are Governor Newsom’s worries about “white nationalists, extreme anarchists or other fringe groups.”²⁰⁹ The law protects those it covers from arrest only for failure to disperse, violation of curfew, or obstructing a peace officer (and there only where the obstruction takes place while “gathering, receiving, or processing information,” again using the language of the Reporter’s Shield).²¹⁰ It

203. FLEMING, *supra* note 64, at 5.

204. *Id.* at 6.

205. *See* discussion *supra* Section III.A.

206. *See* discussion *supra* Section III.A.

207. S.B. 629, 2019–2020 Leg., Reg. Sess. (Cal. 2019).

208. FLEMING, *supra* note 64, at 5.

209. Letter from Gavin Newsom, *supra* note 48.

210. CAL. PENAL CODE § 409.7(a)(3) (2021).

explicitly states that it “does not prevent a law enforcement officer from enforcing other applicable laws” where an individual is engaged in illegal activity.²¹¹ Even under a process-based definition of the press, members whose activities stray outside of newsgathering are subject to the same legal liability as any other member of the public.

Furthermore, attempting to draw a line between press and non-press based on concerns about ideology runs dangerously close to viewpoint discrimination. If a member of a so-called “fringe group” wants to observe a public protest, record their impressions, and transmit those impressions to the public, preventing them from doing so because of the content of those impressions would violate the First Amendment.²¹² Adopting a more institutional definition of a duly authorized representative over a process-based one is not unconstitutional in itself,²¹³ but if the purpose of doing so is to prevent access by people with objectionable or unusual opinions, it at least goes against the spirit of the Constitution.

As to concerns about lone newsgatherers posting on blogs or social media, leaving those with smaller audiences or unconventional platforms unprotected does the public a disservice. In today’s world, many important news stories come to light because a nearby person happened to record events and post them online.²¹⁴ These people are doing the work of the press, even if they are not employed as full-time journalists. Especially in the chaotic context of a protest, there is tremendous value in guaranteeing access to anyone engaged in

211. *Id.* § 409.7(b).

212. *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”).

213. *See* L.A. Free Press, Inc. v. City of Los Angeles, 88 Cal. Rptr. 605, 610–11 (Ct. App. 1970). At least if challenged on equal protection grounds, distinguishing between authorized and unauthorized representatives based on institutional affiliation would be subjected to rational basis review. *Id.* This would make it very unlikely to be found unconstitutional. *See* *Heller v. Doe*, 509 U.S. 312, 319–20 (1993) (explaining the extreme level of deference afforded under rational basis review).

214. *See, e.g.,* Nicholas Bogel-Burroughs & Marie Fazio, *Darnella Frazier Captured George Floyd’s Death on Her Cellphone. The Teenager’s Video Shaped the Chauvin Trial*, N.Y. TIMES (July 7, 2021), <https://www.nytimes.com/2021/04/20/us/darnella-frazier-video.html> [<https://perma.cc/ZBD2-U3QB>] (seventeen-year-old bystander who filmed the murder of George Floyd and posted the video to Facebook); Fred Ritchin, *In the Livestream Era, ‘the Trauma is Widespread’*, TIME (July 11, 2016, 12:47 PM), <https://time.com/4400930/philando-castile/> [<https://perma.cc/96E4-9TFC>] (aftermath of the shooting of Philando Castile streamed live on Facebook); Baynard Woods, *‘I Hear the Screams Every Night’: Freddie Gray’s Death Haunts Man Who Shot Video*, GUARDIAN (July 20, 2016, 6:30 AM), <https://www.theguardian.com/us-news/2016/jul/20/freddie-gray-death-haunts-man-filmed-video-baltimore> [<https://perma.cc/V836-ZNYF>] (arrest of Freddie Gray captured on video by bystander).

documenting what is going on and in preventing police interference with their activities. The unconventional backgrounds, viewpoints, and concerns of individual bloggers or internet posters allow them to be in places where the press otherwise would not be and see things that would otherwise go unnoticed.

In a surprising twist, the LAPD endorsed something like a process-based definition of the press in October 2020, just after the height of the protests surrounding the murder of George Floyd and before S.B. 98 was passed into law. In a departmental memo, supervisors and line officers were reminded to “recognize individuals who self-Identify [sic] as media representatives and . . . NOT require specific media credentials.”²¹⁵ The department was further instructed that “the inability to produce identification does not preclude an individual from acting as a member of the media.”²¹⁶ This memo shows one of California’s largest police departments completely abandoning credentials issued by itself or by media organizations as a method of identifying the press. Its direction that officers honor the word of individuals self-identifying as press is possibly even more permissive than the language defining a duly authorized representative that stymied the passage of S.B. 629—anyone who says they are a member of the press is qualified to be treated as one, and as long as their actions are consistent with their self-identification they are entitled to special access.²¹⁷ The fact that LAPD could ever feel comfortable with such a permissive policy is evidence that concerns about S.B. 98 protecting too wide a range of people are not necessarily shared by law enforcement.

A definition of a duly authorized representative based on the process of newsgathering is both the best way of enacting the intent of S.B. 98’s authors to “ensure . . . journalists’ ability to perform their critical role of documenting history and informing the public”²¹⁸ and is consistent with existing law. In fact, using California court decisions on other press protections as a guide, a good definition would look a lot like the one from S.B. 629 that was removed from S.B. 98. Without any explicit definition in S.B. 98, the S.B. 629 version—and especially

215. Memorandum from Susan Seager et al., *supra* note 183, at 9.

216. *Id.* (emphasis omitted).

217. *Id.* Because it was written prior to the passage of S.B. 98, the memo specifically dealt with ensuring that self-identified members of the press were allowed to cross police lines and access *Crespo* zones in the situation of a declaration of unlawful assembly and order to disperse. *Id.* It also reminded officers that “media representatives may be allowed behind skirmish lines but may not move back and forth through police lines or otherwise interfere with police actions.” *Id.*

218. FLEMING, *supra* note 64, at 4.

its use of the “gathering, receiving, or processing information” language that is so often repeated throughout California law on the press—remains the best way of defining a duly authorized representative. It also has the benefit of ensuring that there is no entity, either law enforcement or media, acting as a gatekeeper to press protections. In practice, something along the lines of *Index Newspapers*’s list of indicia might be a helpful addition so long as it allows for self-identification as in that case and in the policy outlined in the LAPD’s memo. Having articles of clothing or equipment that clearly identify someone as a member of the press would make it easier for law enforcement to ensure that they are not interfered with, especially in a protest environment where there is a lot happening at once and police are likely dealing with other, more pressing concerns. At its core though, any definition of a duly authorized representative should be based on the actions of the person claiming protection under S.B. 98, not on whom they have credentials from.

CONCLUSION

Determining who is a “duly authorized representative of any news service, online news service, newspaper, or radio or television station or network,”²¹⁹ and thus protected under S.B. 98, should be a question of process, not institutional affiliation. The law clearly intends to protect the reporters from major media organizations who were assaulted and detained at the protests that led to its passage, but it should also be interpreted to cover local reporters, unaffiliated freelancers, and even individuals with nothing more than a phone and a social media platform so long as they are clearly engaged in gathering, receiving, or processing information for communication to the public. Because the law shields those it covers from law enforcement obstruction or arrest for an extremely narrow range of crimes, the risk that this broad interpretation might tie the hands of law enforcement or allow unscrupulous actors to claim press protection to camouflage non-press activities is negligible. Interpreting S.B. 98 broadly is important in ensuring that it is as successful as possible at safeguarding the ability of the press to play its crucial role in our society by documenting events and informing the public, whoever the particular person playing that role at a given time may be.

219. S.B. 98, 2021–2022 Leg., Reg. Sess. (Cal. 2021)

However, it is important to remember that the legal definitions of ambiguous terms in a statute are ultimately irrelevant if law enforcement declines to follow the law or its own policies. Because the protections created by S.B. 98 apply only in situations where police have closed off the area where a protest is occurring, law enforcement will necessarily be the ones determining who is duly authorized in real time.²²⁰ In many of the incidents that led to the passage of S.B. 98, journalists were carrying visible press passes and clearly identified themselves verbally as members of the press but were detained or assaulted anyway.²²¹ In at least a few cases, officers openly stated that they did not care about the legitimate credentials that the reporters they attacked presented.²²² At the time of these incidents, many law enforcement organizations already had policies clearly stating that the press should not be interfered with that were simply ignored by officers on the ground.²²³ Absent any internal discipline of the officers involved, there are no consequences for this type of conduct because settlements and judgments arising out of related lawsuits are paid directly out of municipality budgets.²²⁴

S.B. 98 contains no clear mechanism for its own enforcement, but even if it were enforceable through a damages remedy it would face the same problem.²²⁵ There is a limit to the impact that court orders or laws passed by legislatures can have without recognition from all levels of law enforcement that the protections for the press and others enshrined in state law and the Constitution serve a legitimate purpose and must be taken seriously. Accordingly, while there is great value in the explicitly stated press protections passed into law under S.B. 98, they must be accompanied by pressure, both internally from other parts of the government and externally from the institutional media and the public, to ensure compliance by law enforcement. Otherwise,

220. CAL. PENAL CODE § 409.7(a) (2021).

221. Wigglesworth, *supra* note 32; Rector, *supra* note 27.

222. Tracy & Abrams, *supra* note 2.

223. See e.g., L.A. CNTY. SHERIFF'S DEP'T, POLICY NO. 3-01/080.16—PHOTOGRAPHY, AUDIO, AND VIDEOTAPING BY THE PUBLIC AND THE PRESS (2023), <https://pars.lasd.org/Viewer/Manuals/10236/Content/10397?showHistorical=True> [<https://perma.cc/A32Y-RRGX>]; *Volume 1: Policy* § 420.85, <https://lapdonlinestrgeacc.blob.core.usgovcloudapi.net/lapdonlinemedia/2023/01/VOLUME-1-word-1.pdf> [<https://perma.cc/3KQG-B646>].

224. Amelia Thomson-DeVeaux et al., *Cities Spend Millions on Police Misconduct Every Year. Here's Why It's So Difficult to Hold Departments Accountable.*, FIVETHIRTYEIGHT (Feb. 22, 2021), <https://fivethirtyeight.com/features/police-misconduct-costs-cities-millions-every-year-but-thats-where-the-accountability-ends/> [<https://perma.cc/F7CN-N9W5>].

225. The law contains no language hinting at any kind of enforceability beyond explicitly stating that it is not grounds for criminal liability. CAL. PENAL CODE § 409.7(c) (2021).

S.B. 98 risks being nothing more than an empty gesture by the legislature, no matter how it is interpreted.