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By **Daigle Law Group**

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DAIGLE LAW GROUP

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Mickey H. Osterreicher, General Counsel, National Press Photographers Association, Reserve Deputy, Erie County Sheriff's Office, New York

“This is my job. This is my job. . . . I’m just doing my job. . . . I was sent here. . . . I’m a journalist.”¹ This refrain was not enough to keep journalist Andrea Sahouri from being pepper-sprayed and arrested while covering a protest. She was prosecuted for “failure to disperse” and “interference with official acts,” unlike the other more than 120 journalists arrested or detained in 2020, who had similar charges dismissed (if they were charged at all).²

Despite widespread calls for the case to be dropped, prosecutors argued that Sahouri’s status as a journalist had no bearing; the charges were levied because she had refused to comply with dispersal orders, then tried to pull away from the arresting officer. She was acquitted on both counts after less than two hours of deliberation, leading to strong condemnation of the police and prosecutors.³

In contrast, the New Jersey attorney general ordered a local prosecutor to drop charges and apologize to a journalist who was arrested while covering a Black Lives Matter protest, stating, “We don’t arrest reporters in this country and this state for doing their jobs.”⁴ In the ensuing lawsuit, the court refused to dismiss claims of violating a journalist’s First and Fourth Amendment rights during the arrest, finding that the complaint “adequately states a failure-to-train and failure-to-supervise claim” and officers would “confront a particular situation”—journalists or reporters covering a protest.⁵

There was a sharp rise in the number of journalists assaulted and injured while covering news events in 2020; many of these injuries were alleged to be at the hands of law enforcement.⁶ In one case, a freelance journalist was blinded by a rubber bullet while reporting on a protest. Her lawsuit survived a motion to dismiss where the court found “that numerous other journalists experienced similar, seemingly unjustified incidents involving less-lethal munitions . . . suggest an unconstitutional custom carried out by MPD officers of targeting journalists for unlawful reprisals.” The City of Minneapolis was also found to be “deliberately indifferent to widespread, consistent, unlawful use of force against the press” with respect to *Monell* claims, and the union president was plausibly liable for “alleged influence over the MPD and its rank-and-file officers, his communications during the protests, and the actions taken by MPD officers toward the press.”⁷

Right to Record—New Constitutional Right?

In a case with broader implications, allegations that Transportation Security Administration agents violated First and Fourth Amendment rights when they stopped the recording of a pat-down search and ordered the video deleted. In denying qualified immunity, the court noted, “officials should not evade liability for constitutional violations because their employer has not provided adequate training” and that the First Amendment claim presented a new context under *Bivens*.⁸

Noting “a right may . . . be clearly established based on a ‘consensus of cases’ of persuasive authority’ from other jurisdictions” (emphasis added), the court found that “precedent may ‘clearly establish’ a right, even if a court has not recognized that right in the ‘specific context before’” and that “officials can still be on notice that their conduct violates established law even in novel factual circumstances.” (emphasis added)⁹

Moving the needle one more step, the court concluded that “although neither the Supreme Court nor the Fourth Circuit has recognized a right to record government officials performing their duties, both the general constitutional rule and a consensus of cases clearly establish this right.”¹⁰

Developing Trends

Last July, a federal judge issued a 14-day preliminary injunction against Portland police, restricting officers’ interactions with journalists documenting protests and enjoining them “from arresting, threatening to arrest, or using physical force directed against any person whom they know or reasonably should know is a journalist.”¹¹ More recently, another federal court in Minnesota issued a temporary restraining order restricting police in the same way concerning their actions toward journalists and ordering that “such persons shall not be required to disperse following the issuance of an order to disperse, and such persons shall not be subject to arrest for not dispersing following the issuance of an order to disperse.”¹²) New York State recently enacted a new statute, “Recording Certain Activities,” which states, “a person not under arrest or in the custody of a law enforcement official has the right to record law enforcement activity and to maintain custody and control of that recording.”¹³

California legislators passed a similar bill in 2020, which the governor refused to sign. Public Peace: Media Access, allowing “authorized news representatives to enter areas that have been closed by law enforcement” and prohibiting officers “from intentionally assaulting, interfering with, or obstructing a duly authorized representative.” (emphasis added)¹⁴

In his pocket veto message, the governor noted that “law enforcement agencies should be required to ensure journalists and legal observers have the ability to exercise their right to record and observe police activities during protests and demonstrations.”¹⁵

Easy Way/Hard Way—Takeaway

“Never argue with anyone who buys ink by the barrel and paper by the ton” is an expression that was coined about the losing proposition of picking a fight with the press, and, while law enforcement may win the first skirmish on the street, they often ultimately lose the war in court.

Therefore, it is incumbent that agencies implement commonsense guidelines for their officers regarding these issues and as part of crowd control policies.¹⁶ But, such general orders are just pieces of paper without proper training and commensurate discipline when necessary.

In an age of cellphone cameras and social media, one of the most difficult challenges facing both the police and the press is determining who is a journalist. While almost an impossible question to answer, it is one that still must be dealt with every day and can be especially problematic during protests and social unrest. One of the best ways to deal with this challenge is through regularly scheduled meetings with local media representatives and before major events. It is an opportunity to resolve and address issues on both sides and better understand the roles and responsibilities of both groups.

The ultimate takeaway is that doing it the “easy way” by upholding one’s constitutional oath helps prevent officers and agencies from being sued and journalists from being arrested. Most importantly—it allows the public to be better informed.

Notes:

¹Ryan W. Willer and William Morris, “‘An Important Victory for the First Amendment’: Iowa Journalist Andrea Sahouri Acquitted in Rare Trial of Reporter,” *USA Today*, March 10, 2021.

²IA Code § 723.3 (2014); IA Code § 719.1(1) (2003); U.S. Press Freedom Tracker, “Arrest/Criminal Charge.”

³Ryan J. Foley, “Journalist Acquitted in Iowa Case Seen as Attack on Press,” *Associated Press*, March 10, 2021.

⁴Mike Davis, Jerry Carino, and Andrew J. Goudsward, “Cory Booker: APP Journalist Arrest ‘Unacceptable’; NJ Attorney General Apologizes as Charges Dropped,” *Asbury Park Press*, June 2, 2020.

⁵Mike Davis, “APP Reporter Lawsuit for Arrest While Covering Black Lives Matter Protest Can Proceed,” *Asbury Park Press*, March 8, 2021; *Gustavo Martinez v. City of Asbury Park et al.*, No. 3:20-cv-08710 (D.N.J. 2021); Mike Davis, “Charges Dropped Against Asbury Park Press Reporter Covering George Floyd Protest. ‘I Apologize.’” *Asbury Park Press*, June 2, 2020.

⁶See “U.S. Press Freedom Tracker”; U.S. Press Freedom Tracker, “Physical Attack.”

⁷Josh Verges, “Judge in Lawsuit Calls Minneapolis Police Violence against Journalists during George Floyd Protests ‘Serious and Troubling,’” *Pioneer Press*, February 22, 2021; *Tirado v. City of Minneapolis*, No. 0:20-cv-01338 (D. Minn. 2021).

⁸*Dyer v. Smith*, No. 3:19-cv-921 (E.D. Va. 2021).

⁹*Dyer*, No. 3:19-cv-921, at 11–12, internal citations omitted.

¹⁰*Dyer*, No. 3:19-cv-921, at 14–15.

¹¹*Index Newspapers LLC v. City of Portland*, No. 30:20-cv-1035 (D. Or. 2020).

¹²*Goyette v. City of Minneapolis*, No. 20-cv-1302 (WMW/DTS) (D. Minn. 2020).

¹³NYS Civil Rights Law §79-P.

¹⁴Public Peace: Media Access, CA SB-629; Governor’s Veto Message to CA SB-629.

¹⁵Public Peace: Media Access, CA SB-629; Governor’s Veto Message to CA SB-629.

¹⁶See, Oakland Police Department, “Public Information and the Media,” Training Bulletin III-G, October 28, 2005; *Oakland PD Crowd Control and Crowd Management Policy*, Section XI (2005), 22; Also see *Protests and Public Safety: A Guide for Cities & Citizens*, Sections IV–VII (Washington, DC: Institute for Constitutional Advocacy and Protection, Georgetown Law, 2020), 102–121.

Mickey H. Osterreicher serves as general counsel to the National Press Photographers Association. He was a print and broadcast visual journalist for 40+ years and has been a uniformed reserve deputy with the Erie County, New York, Sheriff’s Office since 1976. He also served on the IACP Public Recording of Police project team.

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