



REPORT AND RECOMMENDATIONS
TO INDEPENDENT POLICE REVIEW
REGARDING PORTLAND POLICE BUREAU'S RESPONSE
TO THE JUNE 4, 2017 PROTESTS

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I. EXECUTIVE SUMMARY

A. Introduction

The American Civil Liberties Union of Oregon¹ submits this Report to Independent Police Review regarding the response of the Portland Police Bureau (“PPB”) to the June 4, 2017 protests in Portland, Oregon.

Portland strongly values civil liberties and freedoms, and prides itself on progressive values and robust First Amendment activity. For decades, public assemblies in Portland have provided the citizenry with a forum for marginalized voices, connecting with others and sparking ideas and debate. It is this political discourse in a traditional public forum that is the foundation of our democracy.² Unfortunately, the PPB sometimes quells these voices at the expense of the public’s rights, safety and interests.

Even before the 2016 Presidential election, the ACLU and numerous other civil rights groups voiced serious concerns over the treatment of protesters and others exercising their First Amendment rights in Portland, especially regarding profiling, use of force and oppressive permitting schemes.³

In 2012, based on a decade of community concerns they received, the Citizen Review Committee (“CRC”) formed a workgroup and began review of PPB’s crowd control policy.⁴ In 2014, the CRC workgroup published a report, which issued twelve recommendations to improve PPB’s crowd control tactics and policies. Although progress has been made, many of the CRC’s concerns exist today.

Over the past year, the ACLU has worked extensively with the City of Portland (“City”) and PPB in an attempt to facilitate better community relations and protection of civil rights and liberties.⁵ Perhaps most notably, the ACLU provided extensive comments and

¹ The American Civil Liberties Union of Oregon (ACLU of Oregon) is a nonpartisan, nonprofit organization dedicated to preservation and enhancement of civil liberties and civil rights, with more than 23,000 members in the City of Portland and over 44,000 members in the State of Oregon.

² *Seattle Affiliate of Oct 22nd Coalition to Stop Police Brutality, Repression and Criminalization of a Generation v. City of Seattle*, 550 F.3d 788 (9th Cir. 2008). (When the government seeks to regulate access to the streets, “First Amendment protections are at their strongest and regulation is most suspect”).

³ National Lawyers Guild and Northwest Constitutional Rights Center, *Whose Streets? Recommendations to the Portland Police Bureau for Responding to First Amendment Assemblies* (2007), available at https://nlgpdx.files.wordpress.com/2017/01/report_crowd-control-final-1.pdf.

⁴ *Crowd Control and the Portland Police, A Policy Review Conducted by the Crowd Control Workgroup of the Citizen Review Committee* at 2 (September 2014) (CRC Report), available at <https://www.portlandoregon.gov/ipr/article/556654>.

⁵ ACLU, *An Open Letter to Mayor Hales Regarding Free Speech* (Nov. 14, 2016), available at <http://aclu-or.org/content/open-letter-mayor-hales-regarding-free-speech>; Letter from ACLU to Mayor Hales and Chief Marshman Regarding The Arrest of PDX Resistance Organizers During Peaceful Protest (Nov. 22, 2016), available at <http://www.aclu-or.org/content/letter-mayor-hales-and-chief-marshman-regarding-arrest-pdx-resistance-organizers-during-peac>; Letter from ACLU, NLG, OL4GG Re: Portland Police

attended meetings regarding PPB Directive 635.10 Crowd Management/Crowd Control.⁶ PPB recently posted final Directive 635.10, which became effective August 30, 2017. Unfortunately, this revised directive ignored most of the ACLU's recommendations.

The 2016 election has seen an increase in First Amendment activity in Portland, and the ACLU and others have repeatedly urged the City and PPB to make major changes to their response to protests.⁷ Despite this advocacy, the negative media attention surrounding PPB's treatment of protesters, and the overwhelming demands of the community for demilitarization, de-escalation and protection of civil liberties, there has been no major progress.

In January 2017, the ACLU of Oregon began training legal observers to attend, observe, review, analyze, document, and report to the ACLU on law enforcement responses to First Amendment activity in Portland. Our legal observers have provided critical firsthand accounts of every major protest and dozens of smaller protests in Portland since January. These accounts, along with our review of media coverage and other public information, lead us to a conclusion that PPB engages in certain patterns of practice that place the community in danger and suppress First Amendment expression.

The competing protests and related events of June 4, 2017, encapsulate many of ACLU's concerns and clearly demonstrate these police patterns. This Report summarizes the PPB response of June 4th, draws on examples from other protests, makes findings, provides legal analysis, raises policy concerns, and makes recommendations for policies and procedures that better serve the public interest and protect constitutional rights.

B. Findings

The ACLU has concluded the June 4th protests and PPB response were representative of recent protests and identifies five major areas of concern. These include:

1. PPB's general posture toward protesters

The Portland Police Bureau responds differently to protesters based on the message or messenger, demonstrating bias or perceived bias especially against those protesting police, authoritarianism or fascism. This bias is often seen in the use of aggressive tactics,

Bureau's Crowd Control Activities on May 1, 2017 (May 10, 2017).

⁶ ACLU Comments on PPB Proposed Directive 635.10 (Feb 15, 2017); ACLU of Oregon, NLG Portland Chapter, and OL4GG Comments on PPB Proposed Directive 635.10^{SEP} (March 22, 2017).

⁷ Letter from Lawyers for Good Government to Mayor Wheeler and Chief Marshman (Jan. 19, 2017); Letter from ACLU to Chief Marshman and Mayor Wheeler Regarding Surveillance and Law Enforcement Presence at Inauguration Day Protest (Jan. 25, 2017), available at http://www.aclu-or.org/sites/default/files/ACLU_Public_Records_Request_J20_Portland.pdf; Letter from National Lawyers Guild to Mayor Wheeler Regarding Portland Police Bureau's Crowd Control Activities on Jan. 20, 2017 (Jan. 27, 2017), available at <https://nlgpdx.files.wordpress.com/2017/01/nlg-letter-to-mayor-wheeler-re-j20.pdf>; Letter from Oregon Lawyers for Good Government to Mayor Wheeler and Chief Marshman (Feb. 8, 2017).

including use of hard gear, skirmish lines, militarized vehicles and equipment and an increased likelihood to declare an assembly unlawful and use force.

2. Declarations of unlawful assemblies

In the recent months, ACLU legal observers have witnessed thousands of peaceful protesters ordered to disperse based on the actions or perceived threats of a few individuals, without a clear and present danger to public safety⁸. PPB's actions in curtailing the fundamental rights of the people to speak and assemble are overly broad, overly applied and not sufficiently limited as to permit protected First Amendment activities to proceed. ACLU legal observers have also documented confusing and conflicting dispersal orders. Finally, these declarations create confusion, panic and escalate tensions, threatening public safety.

3. Use of Force

PPB at times makes decisions to use force prior to any imminent threat of serious lawlessness, which in turn creates an increased risk of injury to those present. The vast majority of illegal activity and the greatest risk of harm to peaceful protesters occurs after the use of force by the PPB. The decision to use force immediately escalates tensions and sometimes creates them where there were none.

The level of force used is rarely commensurate with the threat to the public, with impact munitions and chemicals deployed against protesters throwing small objects or harmless liquids at officers fully clad in hard gear.

Legal observers and reporters have witnessed point-blank use of weapons and assaults as well as indiscriminate use of impact munitions and chemical agents against protesters, legal observers, media and even bystanders not engaged in criminal activity. Finally, protesters are rarely given a reasonable amount of time to comply with orders, which can be difficult to understand, inconsistent, and lead to panic and confusion. Short time windows are especially problematic in large crowds that cannot safely disperse in any quick manner.

4. Use of Arrests and Detentions as Crowd Control

Arrests and detentions are sometimes used as a form of crowd control, depriving individuals of their Fourth Amendment rights and impairing their First Amendment rights. The use of mass arrests or detentions also lacks the requisite individualized reasonable suspicion and has been of excessive duration.

While the ACLU recognizes that targeted individual arrests at protests may promote safety while respecting the rights of others, we are concerned that some individual arrests appear to target certain activists or protest organizers. No person should be targeted for

⁸ The ACLU is advocating for the application of a clear legal standard to decisions regarding dispersal or declaring an assembly unlawful. The clear and present danger standard should be understood to mean an imminent threat of serious lawlessness. It is critical that policy and training make clear that the danger arises from the crowd itself, not any individual member of the crowd.

arrest simply for exercising her or his First Amendment rights, including sharp criticism of the police or other government officials.

C. Recommendations

Critical to the improvement of community relations and protecting the safety and liberty of the public is for PPB to adopt better and more constrained crowd control and use of force policies, and adopt and train officers in de-escalation. As will be discussed in the next section, the ACLU's comments on PPB Directive 635.10 sought to ensure these improvements. Despite overwhelming public support, the PPB disregarded the vast majority of the ACLU's comments. Recommendations for policy and procedure changes include:

1. Increase PPB emphasis on protecting rights and liberties;
2. Discontinue profiling, surveillance and bias or appearance of bias based on political affiliation, cooperation with police or permitting;
3. Implement policies that demilitarize and deescalate;
4. Prohibit unlawful assembly declarations unless the assembly is a clear and present danger to public safety;
5. Empower protesters to monitor themselves;
6. Use force only when necessary to protect the public from harm after de-escalation and other methods have failed;
7. Prohibit deploying weapons or using other force indiscriminately;
8. Give orders that are capable of being understood clearly and allow sufficient time for all gathered to comply with orders;
9. Do not use force against individuals for merely refusing to disperse, or against those complying or attempting to comply with orders;
10. Prohibit mass arrests and detentions without reasonable suspicion that each of those detained were involved in criminal activity;
11. Prohibit mass arrests or detentions as a form of crowd control; and
12. Prohibit photographs or video of individuals not under arrest.

II. PORTLAND'S CROWD CONTROL POLICY

A. Portland Police Bureau's Old Policy and ACLU's critique

Many of the concerns set forth in this Report were also thoroughly addressed in the ACLU's written comments during the 1st Universal Review of PPB Directive 635.10 Crowd Management/Crowd Control. In February 2017, the ACLU and other stakeholders met with the Mayor's office and Chief of Police regarding these comments.⁹ The first set of comments emphasized de-escalation and demilitarization, eliminated content-based analysis of demonstrations, and included prohibitions on the use of force against non-violent protesters. These comments also objected to vague terms such as "peace and order," used to justify limitations on First Amendment activity.

⁹ ACLU Comments on PPB Proposed Directive 635.10 (Feb 15, 2017).

At a subsequent meeting, the ACLU and other stakeholders were informed that the directive would be significantly revised to move all use of force into Directive 1010.10, and the City allowed for a second Universal Review of 635.10, during which the ACLU, NLG and OL4GG submitted joint comments.¹⁰

The joint comments during the second Universal Review reiterated many of the previous concerns regarding the use of force and chilling of constitutional rights. Again, the ACLU and other groups raised serious concerns about the constitutionality of the definitions, such as the newly included “civil disturbance,” which the revised Directive defined as “[a]n unlawful assembly that constitutes the breach of peace or any assembly of persons where there is a threat of collective violence, destruction of property, or other criminal activity.”^[11] The comments requested, among other things, narrowing the definition to comply with constitutional law, and providing that assemblies could only be dispersed if the crowd presents “a clear and present danger to the safety of the public or members.”

The joint comments also encouraged creating a rapid response policy, prohibiting collecting data and information on protesters not engaged in criminal activity, and prohibiting the following tactics to merely disperse a crowd, including:

- use of deadly force
- use of skip-fired specialty impact projective munitions
- use of direct-fired specialty impact munitions
- use of aerosol hand held chemical agents.

ACLU, NLG and OL4GG were not invited to participate in any further discussion.

B. Portland Police Bureau’s New Policy and ACLU’s Critique

On August 1, 2017, PPB released revised Directive 635.10, which became effective on August 30, 2017.¹¹ All of the nearly one hundred public comments were consistent with ACLU, NLG and OL4GG comments and recommendations during both Universal Reviews, yet very few of these recommendations were incorporated.

In fact, the final directive does not provide any significant limitations on or standards for militarization, crowd dispersal or use of force. As discussed in Section IV below, the term “civil disturbance” is defined as a disruption to “peace or order,” which in turn allows for crowd dispersal, arrests, detentions and use of force (including impact munitions and chemical agents) against protesters. The new Directive allows use of force and chilling of constitutional rights without a finding of a clear and present danger to public safety.

¹⁰ ACLU of Oregon, NLG Portland Chapter, and OL4GG Comments on PPB Proposed Directive 635.10^[11] (March 22, 2017).

¹¹ Available at: <https://www.portlandoregon.gov/police/article/649353>.

PPB made minor revisions as recommended by the stakeholders, including minimal limitations on gathering information, providing consistent warnings and considering whether dispersal endangers public safety. The revised directive also provides that journalists and legal observers will not be arrested if they are following orders and not engaged in criminal activity. Unfortunately, these revisions do not address the larger issues.

C. Portland Police Bureau’s Practices are Intrinsicly Linked to Failed Policies

PPB’s counterproductive and constitutionally dubious response to protesters is intrinsicly linked to policies and directives that discourage assembly and speech. With its broad definitions, PPB may, and does, approach many protests like a battleground and declares unlawful assemblies in the name of peace and order. With its lack of limitations or prohibitions, PPB may, and does, use force that is not commensurate to any safety threat in order to control crowds and chill First Amendment rights.

These policies and directives lead to PPB responses that create the public frustration, outcry and disappointment the City now sees.

III. PORTLAND POLICE BUREAU’S APPROACH TO PROTESTS

A. Bias/Selective Enforcement

The June 4th events took place against a backdrop of violence and tragedy with the Max killings on May 26, 2017 and related white supremacist rhetoric. Many in the City were moved by the tragedies to appear in large numbers to denounce hatred and white supremacy. Tensions were high. Media reported that the white supremacists discussed carrying firearms and using militiamen as security. The antifascist groups stated that they would defend themselves and vulnerable populations against the white supremacists as necessary, which could include physical force.

It is a fundamental precept of the First Amendment that the government cannot favor the rights of one private speaker over those of another.¹² Nor may the experience of police or actions of groups at prior demonstrations be used to suppress First Amendment activity at subsequent events.¹³ Yet we find that PPB appears to be using past events to inform its responses and target certain groups.

From the beginning of the June 4th events until the end of the evening, PPB’s actions gave an impression of bias against the protesters at Chapman Square (the “Chapman protesters”). Although some associated with the white supremacists at Terri Schunk (the

¹² *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

¹³ *Black Tea Society v. City of Boston*, 378 F.3d 8 (1st Cir. 2004) (Use of past events to justify response); *Farber v. Rizzo*, 363 F. Supp. 386 (E.D. Pa. 1973).

“Terri Schruck protesters”) made comments in online forums that discussed violence and carrying firearms to the protest, they appeared to be treated as police associates.¹⁴

We believe a September 10th tweet by PPB encapsulates their approach to protesters: A photograph of a pack of C-batteries in the grass, stating, “Weapons are starting to appear in the park. Batteries just found by officers can look innocuous, but can be harmful if thrown at others.” Only the most biased lens would see \$20 worth of batteries as having no other purpose than to harm others.

1. Positioning of officers

The appearance of bias occurred at the outset of the events. The police immediately lined up in a heavy skirmish line, primarily facing the Chapman protesters. There were far fewer police on the Terri Schruck side of Madison Street, and those officers were often facing away from Terri Schruck or were casually talking to the Terri Schruck protesters.

2. Recording of protesters

For many years, the NLG has raised concerns about video surveillance of groups based on political affiliation.¹⁵ The ACLU consistently asserted the position that photographing and recording protesters violates ORS 181.575, which prevents collection of information about the political or social views, associations or activities unless directly related to criminal activities.¹⁶

On at least two occasions, a large van with a video recorder, parked on Madison Street with the camera aimed only at the Chapman protesters. These information-gathering techniques not only appear to violate Oregon law, but they perpetuate the perception of bias against the groups at which they are aimed.

3. Regulating signage and other property

The regulation of signage, namely the poles and sticks on which they are carried is another example of selective enforcement and the appearance of bias. At a few recent protests, namely those with a high number of antifascist or Black-bloc participants, the

¹⁴ Only weeks before, a similar white supremacist rally was held in East Portland, at the end of which PPB provided the white supremacist protesters a free bus ride back to their starting location.

¹⁵ See, National Lawyers Guild and Northwest Constitutional Rights Center, *Whose Streets? Recommendations to the Portland Police Bureau for Responding to First Amendment Assemblies* (2007), available at https://nlgpdx.files.wordpress.com/2017/01/report_crowd-control-final-1.pdf.

¹⁶ See, Letter from ACLU to Chief Marshman and Mayor Wheeler Regarding Surveillance and Law Enforcement Presence at Inauguration Day Protest (Jan. 25, 2017), available at http://www.aclu-or.org/sites/default/files/ACLU_Public_Records_Request_J20_Portland.pdf; ACLU of Oregon, NLG Portland Chapter, and OL4GG Comments on PPB Proposed Directive 635.10^{SEP} (March 22, 2017).

PPB has conducted what amount to raids of protesters to confiscate sticks and poles attached to their signs, as well as cardboard and plastic “shields.”

In dozens of other recent protests in Portland, hundreds or thousands of people have marched through the streets with all manner of sticks and poles. At the rally on May Day, an ACLU legal observer asked a police officer why he did not confiscate poles at the Women’s March or other events, he replied, “you didn’t see forty anarchists attending the Women’s March, did you?”

On June 4th, the difference was especially stark: on many occasions, teams of PPB officers stormed Chapman Square to confiscate signage. Yet Terri Schruck protesters walked freely, wearing body armor, military gear, and carrying large sticks and poles. While we understand that Terry Schruck was under the control of DHS, PPB still made no efforts at confiscation of such items on Portland property, nor did it direct DHS to do so. Regardless, the appearance of bias and selective enforcement clearly existed.

4. Use of detention and pretext against protesters

When the Terri Schruck protesters started to wrap up, PPB increased its numbers at Chapman Square, in what appeared to be an attempt to allow the Terri Schruck protesters a safely exit. PPB ordered Chapman protesters to the middle of the park (on the pretext of thrown objects). Shortly thereafter, PPB ordered the Chapman protesters to leave the area, and then detained a group of approximately 150 who had left.

In his June 21, 2017 letter to Mayor Wheeler, Chief Marshman confirmed that PPB used the detention to protect the Terri Schruck protesters.¹⁷ (“Beyond the usual concerns with traffic safety and public inconvenience, there were additional threats posed by this behavior, primarily the risk that the marchers would come into physical conduct [sic] with the group they were protesting against, resulting in threats to both groups’ physical safety”).

B. Militarization

On June 4th, PPB appeared in riot gear at the outset of the protest, establishing skirmish lines, particularly aimed towards the Chapman protesters. While this event was unique in that competing groups may have increased the potential for conflict, the overall concern about militarization and its effects on civil rights and public safety remains.

Numerous civil rights groups, including the ACLU, repeatedly contend that a militarized police response to protesters escalates tension and even creates violence. The social-psychological research suggests that militarized policing can greatly inflame situations that might otherwise end peacefully. This “weapons effect” provides that the mere sight of weapons increases aggression in both angry and non-angry individuals, and the more

¹⁷ June 21, 2017 Letter from Chief Marshman to Mayor Wheeler, available at <http://cni.pmgnews.com/documents/artdocs/00003581080174.PDF>.

the environment contains stimuli associated with violence, the more likely violence is to occur.¹⁸ The Deciding Force Project at UC Berkeley’s Institute for Data Science has found that protests tend to turn violent when officers use aggressive tactics, such as approaching demonstrators in riot gear or lining up in military-like formations.¹⁹

Police chiefs in other cities, including Seattle²⁰ and Boise²¹ recognize that militarized police cannot deescalate crowds and that protesters comply with the law to the extent they perceive that officers act with justice and legitimacy.

Properly applied, de-escalation techniques begin long before an officer is faced with conflict. Our legal observers have seen increased attempts at officers arriving in “soft gear” and engaging with the crowd. We believe these lead to better results.

For example, at an anti-war protest in March attended mostly by antifascist protesters, a large number of officers arrived wearing ordinary uniforms. Tensions were high and the protesters informed the police that their presence was a threat. The police agreed to give them space if the protesters obeyed the laws. After an hour of marching peacefully with police a block away, the protesters disbanded with no incident.

C. Treatment of spontaneous vs. permitted events

The nature of the PPB presence at the permitted Women’s March on January 21, 2017, stands in stark contrast to other anti-Trump rallies since the 2016 election that took to the streets without acquiring a permit. PPB showed up to the Women’s March in every day uniforms and had a friendly engagement with the crowd, even taking photographs with marchers. Although the ACLU is aware that hard-gear officers were poised to be deployed at the Women’s March if need be, they were out of sight of most of the thousands present downtown.

Unpermitted rallies have a number of reasons for not obtaining a permit, not the least of which is the importance of spontaneous speech in response to current events. Whether an assembly has a permit or not has no bearing on the violent nature of those gathered. However, PPB often shows up in hard gear from the outset at events that do not have

¹⁸ Anderson, C, Benjamin Jr., J., & Bartholow, B., *Does the Gun Pull the Trigger?* Vol. 9, No. 4, July 1998, available at: <http://scanlab.missouri.edu/docs/pub/pre2010/caa-ajb-bdb-psychsci1998.pdf>; Berkowitz, L., & LePage, A. (1967) *Weapons as aggression-eliciting stimuli*, *Journal of Personality and Social Psychology*, 7, 202–207; Jesse Singal, *How Militarizing Police Can Increase Violence*, *NY Magazine*, Aug. 14, 2014, available at: <http://nymag.com/scienceofus/2014/08/how-militarizing-police-can-increase-violence.html>.

¹⁹ <http://www.sfgate.com/bayarea/article/Police-often-provoke-protest-violence-UC-5704918.php?#photo-6723892>.

²⁰ NPR Transcript: Commissioner Kerlikowske's Full Interview, July 18, 2014, available at: <http://www.npr.org/2014/07/18/332286063/transcript-commissioner-kerlikowskes-full-interview>.

²¹ *Crowd Management Adopting a New Paradigm* By Boise Police Chief Mike Masterson, *FBI Law Enforcement Bulletin*, August 2012; available at <https://leb.fbi.gov/2012/august/leb-august-2012>.

permits. This communicates to those gathered and the public that the gathering is presumed to be unsafe even if there is no reason to make that assumption. And again, the hard gear increases tensions rather than de-escalating or preventing them, and the difference in posture suggests bias against certain speech.

D. Recommendations

1. Train officers to eliminate the existence and appearance of bias against or in favor of specific groups, including profiling of protesters and gathering information of those not engaged in criminal activity;
2. Implement policies that demilitarize, deescalate and emphasize protection of rights and liberties. Effective practices would include:
 - a. Sending officers out in soft gear, in small clusters dispersed throughout the crowd;
 - b. Where officers presence is unwelcome in the crowd, stationing officers at a reasonable distance;
 - c. Prohibiting military style skirmish lines, unless necessary to protect a likely threat to public safety;
 - d. Prohibiting the use of riot vans or military style vehicles unless a riot is in progress; and
 - e. Emphasize de-escalation techniques at all stages and aspects of police encounters.
3. Apply the same constitutional analysis, crowd management and criminal procedure to demonstrations whether or not they have obtained a permit.

IV. DECLARATIONS OF UNLAWFUL ASSEMBLIES

Extremely concerning in both a policy and constitutional context is the consistent pattern of PPB declaring an assembly unlawful. As discussed above, the broad discretion PPB has to declare an unlawful assembly and the application to entire demonstrations for an indefinite duration is constitutionally dubious.

PPB's mission statement is to "... work with all community members to preserve life, maintain human rights, protect property and promote individual responsibility and community commitment." Yet, time and time again, PPB's response to protests prioritizes convenience and control above protection and facilitation of First Amendment rights. It consistently appears that PPB believes their goal is to terminate demonstrations as quickly as possible.

A. Overly Broad Policy and Application

The government must bear an extraordinarily heavy burden to regulate speech in public forums.²² As discussed above, the Directives allow PPB to enact undue limitations on

²² *NAACP, Western Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir.1984).

protected First Amendment rights. Legal observers have repeatedly witnessed these limitations.

Under revised Directive 635.10, a civil disturbance is “An unlawful assembly that constitutes a clear and present danger of riot, disorder, interference with traffic upon the public streets or when another immediate threat to public safety, peace or order appears.” There is no further definition of “unlawful assembly,” nor is there any guidance or limitation as to when a “threat to public safety, peace or order appears.” This is constitutionally insufficient.

Protests and demonstrations are, in their nature, a threat to peace and order. As the Supreme Court stated:

[Speech] may indeed best serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.²³

And in the context of protests and demonstrations in public places, “...citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.”²⁴ The First Amendment requires that limitations on these rights must be based on an *imminent* threat and not a vague desire for peace or order.²⁵ It should also be noted that Article 1, Section 8 of the Oregon Constitution provides even greater protections than those provided by the First Amendment.

Because the phrase “threat to public safety, peace or order” does not comply with First Amendment requirements of clear and present danger to public safety,²⁶ the Directive fails to protect constitutional rights. Further, these terms fail to give notice as they do not have an “ordinary and unmistakable meaning” and or provide standards for

²³ *Terminiello v. City of Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 896, 93 L. Ed. 1131 (1949).

²⁴ *Boos v. Barry*, 485 U.S. 312, 322 (1988); *see also, Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (“Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action.”).

²⁵ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

²⁶ *Terminiello v. Chicago* 337 U.S. 1, 4 (1949) (citations omitted). [§] (freedom of speech is protected “unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”).

adjudication.²⁷ PPB too often declares an assembly unlawful because of a few isolated incidents of provocation or annoyance.

B. Imputing the Acts of a Few to an Entire Assembly

Those attending protests and demonstrations are generally not engaged in a large conspiracy to commit an illegal act, but instead come together to stand in solidarity to deliver a message. By declaring an assembly unlawful because of the actions of a few, PPB effectively imputes the actions of any one criminal act in a protest area to the entirety of the protest. This allows for the equivalent of the “heckler’s veto,” whereby a private actor can invoke the police to silence a speaker.²⁸ Such overly broad treatment and imputation is contrary to First Amendment rights.

On June 4th, PPB declared Chapman Square an illegal assembly after objects were allegedly thrown. Many ACLU legal observers closely watched for thrown objects based on past experiences, yet they saw only a water balloon tossed at Terri Schruck.²⁹ The vast majority of the protesters were peacefully assembled.

On January 20th, protesters were met with skirmish lines at the Burnside Bridge. Reports are that water bottles were thrown at the riot police. An unlawful assembly was declared and minutes later the police deployed chemical weapons at the crowd. Again, the entire protest consisted of thousands of people, over 99% of who were peacefully assembled.

On May Day, thrown rocks and a Pepsi can resulted in an unlawful assembly declaration. The organizers of the march strategically asked the antifascist/Black-bloc and anarchist groups to stay at the end of the march. During the march, all of the allegedly criminal activity came from some members of this small and practically separate segment. Again, at least 99% of protesters were peacefully demonstrating, and the criminal activity was discrete, yet PPB shut down the entire assembly.

Elderly adults, disabled people and young children were present at each of these events when the assembly was declared unlawful. Also present were hundreds or even thousands of peaceful protesters who showed no indication of engaging in criminal activity or civil disobedience. Tensions, disorder and confusion usually escalated significantly after these declarations.

On September 10th, PPB again declared an unlawful assembly based on the acts of a few. At one point, PPB even announced that “peaceful protesters” had to leave or be subject to arrest. Entire blocks of protesters who had not seen any illegal activity became angry and extremely confused. This time, however, PPB did not enforce the declaration, and the

²⁷ *State v. Ausmus*, 336 Or 493, 85 P3d 864 (2003) (finding disorderly conduct statute unconstitutionally vague); *Ashton v. Kentucky*, 86 S. Ct. 1407, 384 US 195 (1966) and *Edwards v. State of South Carolina*, 372 U.S. 229, 236-238, 83 S.Ct. 680, 683-684 (1963)(convictions for “breach of the peace reversed where the offense was imprecisely defined).

²⁸ See, *Hill v. Colorado* 530 US 703, 735.

²⁹ Legal observers concede that they might not have been able to see very small projectiles such as marbles.

protesters were allowed to continue marching without incident. We are certain that had crowd control tactics been utilized to disperse the crowd, the situation would have escalated in the exact same way as previous protests.

C. Recommendations

1. Prohibit unlawful assembly declarations when protester activity is not a clear and present danger to public safety;
2. Set clear policies for what constitutes a clear and present danger;
3. Arrest, detain or focus on only those engaged in criminal activity; and
4. Allow those not engaged in criminal activity to resume the demonstration as soon as practicable.
5. Prohibit the threat of arrest of peaceful protesters.

V. USE OF FORCE

Because of the dangers inherent in the use of force, including chemical and impact munitions,³⁰ and the chilling effect on First Amendment activity, force should only be used at protests when necessary to prevent clear and present danger to public safety. ACLU legal observers have seen, time and time again, that the decision to use force is the biggest catalyst for unrest and criminal activity.

Use of force in Portland protests typically includes anything from shoving protesters with bicycles to shooting them with impact munitions. While the application of force should be commensurate with the threat, this is not always the case in Portland. Any use of force as a form of crowd control should be exercised with extreme caution and only where de-escalation fails. As such, force inevitably places everyone at greater risk.

A. Use of Force Endangers Public Health, Safety, Peace and Order

June 4th provides an excellent example of how the decision to use force is often dangerous and counterproductive. As discussed above, PPB ordered the Chapman protesters to move from the south side of the park. Within minutes, they began shoving protesters north. Some protesters did not understand what was happening, some were trying to leave, and some were yelling at the police. PPB then deployed explosive devices towards the center of Chapman, causing panic and injuring protesters attempting to leave the area. At approximately the same time, they deployed tear gas, again harming protesters, most of who were attempting to leave or, at worst, non-violently refusing to disperse.

It does not appear that any imminent risk of public safety existed to justify the initial use of force on June 4th. Most reports consisted of small “projectiles” hurled at police (who were covered from head to toe in hard protective gear). If anything, the use of force

³⁰ International Network of Civil Liberties Organizations and Physicians for Human Rights, *Lethal in Disguise; The Health Consequence of Crowd-Control Weapons*.

placed the public (and PPB) at greater risk and immediately escalated tensions, thereby creating the “civil disturbance” that the police expected.

This is consistent with other events. On January 20th, after reports of water bottles thrown at police (wearing military-style protective gear), protesters were ordered to disperse at about the same time as PPB broadcasted pepper spray over hundreds of people, most of whom were peacefully protesting and unaware of the impending use of force. In fact, bystanders and tourists were impacted by chemical weapons at this and other protests. Rather than protecting the public, it appeared that PPB was protecting itself from minor aggression. Nearly all of the alleged illegal activity occurred after this use of force.

On May Day, shortly after the order to disperse around 4:30 p.m., protesters attempting to leave the area (or peacefully remaining) were met with explosive devices around 4:42 p.m. Some of these were frighteningly close to families and bystanders. These devices caused panic, if not anger. The vast majority of the alleged illegal activity and property destruction occurred after the PPB use of force.³¹

In many protests, teams of peacekeepers and liaisons work with the public to monitor, prevent and stop activity that is illegal or puts the public at risk. By empowering protesters to monitor themselves, the police allows for greater expression of constitutional activity and lessen the likelihood that their involvement will escalate tension or lead to use of force. This approach also allows PPB to focus its limited resources on preventing injury. This is consistent with best practices and usually has far better outcomes.

B. Orders Are Often Difficult If Not Impossible To Comply With

Related to the decision to use force against protesters is the manner of carrying out such force. Protesters are often given insufficient time to comply with orders and do not have a reasonable opportunity to leave before being subject to weapons or violence. In addition, they often receive conflicting orders and orders that are impossible to comply with.

June 4th is one example of the improper manner of using force. Shortly after 3:30 p.m., protesters were ordered to leave the south end of Chapman Square and move north. Within ten minutes, police began shoving protesters, which caused panic and led to people tripping, falling, and pushing into each other. Due to the chain barrier surrounding Chapman and the packed crowd all trying to leave, with a few staying behind, it was difficult to exit the park. Approximately five minutes after that, with much of the crowd still heading north in Chapman Square, PPB deployed chemical and impact munitions directly into the crowd and into the middle and north end of the park - in the direction they were ordered to go. An ACLU legal observer was injured in the process when she was struck with some sort of impact munition.

³¹ PPB actually used force prior to any illegal activity, by shoving protesters with bicycles and batons when “monitoring” the crowd.

On January 20th, protesters were ordered to disperse, but surrounded on multiple blocks and unable to leave the area. At one point, an announcement ordered them to head west, but a line of riot police refused to allow anyone to go west. Protesters were then ordered into Pioneer Courthouse Square and then informed that if they were in the square, they would be subject to arrest.

On President's Day, protesters were ordered onto sidewalks. Police then tackled and arrested protesters on the sidewalks.

On May Day, due to the size of the march and poor broadcasting, it was impossible to hear orders in the front half of the demonstration. This created confusion and disorder.

Crowd dispersal is safest as a slow and gradual process. Especially when unexpected, the crowd needs time to understand what is happening, orient, find friends, and make a rational decision of what to do. The amount of time needed likely increases as crowd size increases. To deploy weapons before protesters have an opportunity to make these decisions and comply with orders is dangerous and multiplies the chaos exponentially.

C. Recommendations

1. Empower protesters to monitor themselves and only use force when there is a clear and present danger to public safety;
2. Do not use force indiscriminately or unnecessarily – use of weapons against protesters engaged in First Amendment activity is almost always unnecessary;
3. Prohibit deploying weapons into a crowd as this creates great risk of injury;
4. Give orders that are capable of being followed, allow sufficient time to comply with orders given the difficulties of movement and navigation in crowds; and
5. Do not arrest or use force against those complying or attempting to comply with orders.

VI. USE OF ARRESTS AND DETENTIONS AS CROWD CONTROL

A. Mass Arrests and Detentions

On June 4th, PPB instructed protesters at Chapman Square to head north. Many protesters who left Chapman Square began to march peacefully down 4th Avenue. Three ACLU legal observers who were present witnessed no criminal activity, let alone any imminent risk to the public safety. At Morrison Street, approximately 150 of the protesters, including journalists and one ACLU legal observer were kettled and detained for approximately 90 minutes. An announcement stated that they were being investigated on suspicion of disorderly conduct.

To pass Fourth Amendment muster, prior to arresting a demonstrator for failure to disperse, the officers must give fair notice and an opportunity to comply.³² In addition, “where activities protected under the First Amendment are involved, ‘the requirements of the Fourth Amendment must be applied with scrupulous exactitude.’”³³ The protesters on 4th Avenue had received no warnings, orders or any opportunity to comply. In fact, they were in compliance with prior orders to leave Chapman and go north.

For police to detain a person, they must have individualized reasonable suspicion that the person has committed or is about to commit a crime.³⁴ ORS 141.615 requires that the detention be of a reasonable time. It is extremely dubious that PPB believed that each one of these individuals had or was about to commit a crime. Further, keeping 150 people detained for nearly two hours was unreasonable.

As discussed above, Chief Marshman’s ad hoc explanation was that PPB didn’t want the Chapman protesters to come into contact with the Terri Schrunck protesters.

B. Requiring and Photographing Identification

At the June 4th protests, PPB took an extreme measure in which they trapped all persons on 4th Avenue between Morrison and Alder streets under the guise of investigating disorderly conduct. Anybody present on that block, including bystanders, media and legal observers were detained for approximately 90 minutes while police came up with a plan then slowly filed individuals out, taking photographs of each person’s face and identification card in the process.

Again, the Constitution requires that investigatory stops be premised on individualized reasonable suspicion. Indiscriminate detention of hundreds to investigate a low-level crime with minimal threats to public safety is disproportionate and likely unconstitutional. The threat to the First and Fourth Amendment rights of those present on that city block was exacerbated by the fact that they had to have their face and identification documents photographed in order to exit the kettle.

The ACLU remains gravely concerned about these actions because PPB still has not disclosed to the public what was done with those photographs. PPB should ensure the public that the photographs taken have been destroyed, have not been stored, nor have they been entered into any database or shared with any other law enforcement agency.

³² See *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107, 111 (D.C. Cir. 1977).

³³ *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 1981, 56 L.Ed.2d 525 (1978)(quoting *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 511, 13 L.Ed.2d 431 (1965)).

³⁴ *Hibel v. Sixth Judicial Dist.*, 542 US 177, 185 (2004) (requiring that investigative stops be predicated on reasonable suspicion to believe further investigation may produce evidence that the person is involved in criminal activity); see also *Berg v. New York City Police Commissioner*, No. 12-CV- 3391, 2016 WL 4257525, at *3 (SDNY Aug 10, 2016) (where police detain without a warrant, a presumption arises that the detention was unlawful and the burden shifts for proving privilege to confine).

Such utter disregard for the privacy rights of those present not only threatens the constitutional rights of those present, but it also likely violates ORS 181.575, which prohibits the collection of information about an individual based on his/her political or social views or associations. This tactic should be strictly and expressly prohibited in PPB's directives.

C. Other Uses of Arrests as Crowd Control

Another example of the use of force and arrest can be seen on the day of Quanice Hayes's burial, when approximately 30-40 people attended a rally at the Justice Center.³⁵ Eventually, the crowd marched through the streets for the four blocks to City Hall, where they intended to attend a City Council meeting. They blocked traffic for a minute or two at each intersection. Upon arriving at City Hall, the doors were locked. The protesters continued to rally outside and demanded to be let into the building. Eventually, approximately 15 of them participated in a "die-in" on 4th Avenue. Traffic police diverted traffic. Shortly thereafter, roughly sixty officers in riot gear blocked the intersections on both sides of City Hall. Within several minutes, over a dozen riot police rushed out from inside of City Hall, arresting and shoving those laying in the street. The rest of the protesters cleared and the police continued to block the intersection for roughly an hour as they waited for the crowd to disperse.

Again, no clear and present danger of harm justified treating protesters like criminals. The police intervention did not keep anyone safe. Nor did excessive attempts at controlling a crowd serve the public order – in fact the traffic disruptions and military-style attack of the police likely increased disorder.

D. Recommendations

1. Prohibit mass detentions without individualized reasonable suspicion and prohibit mass arrests without probable cause;
2. Prohibit use of arrests as a form of crowd control, where the crime is not a clear and present danger;
3. Request additional officers to ensure that (lawful) detentions are processed within an hour; and
4. Do not require photographs or identification of those not under arrest.

VII. CONCLUSION

PPB has demonstrated a consistent bias towards certain segments of the population in how it responds to First Amendment activity, using assumptions and past events to create a police response that is determined to shut down the activity as quickly as possible, in the name of convenience, rather than any clear and present danger. An antagonistic and

³⁵ Quanice Hayes was a 17-year-old boy who was killed by a PPB officer on February 9, 2017. *See, e.g.,* Samantha Matsumoto, *Hundreds gather to remember Quanice Hayes, black teen killed by police*, THE OREGONIAN, March 24, 2017, http://www.oregonlive.com/portland/index.ssf/2017/03/hundreds_gather_to_remember_qu.html

militarized approach creates a rift between the residents and the police and escalates the situation, putting the public in danger.

By declaring assemblies unlawful, PPB impedes First Amendment rights and further escalates the tension. Unlawful assembly declarations are often followed by use of chemical or impact munitions before protesters have an opportunity to comply. Using force as a form of crowd control puts large groups at risk of serious harm and has a chilling effect on constitutional rights. The force used is often not commensurate with the risk and is carried out in a manner that is inconsistent with constitutional rights, best practices and a healthy relationship between PPB and the public.

Finally, arrests and detentions are often used as a pretext for crowd control in violation of statutory and constitutional law.

The ACLU believes significant changes need to be made to PPB's training, policy and practices.