



Wisconsin

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July 11, 2024

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Re: Open Letter Regarding Law Enforcement Responsibilities During Mass Demonstrations

To Law Enforcement Agencies in Wisconsin:

With the Republican National Convention convening in Milwaukee on July 15, likely protests, and the potential for acts of civil disobedience that could take place in response, the ACLU of Wisconsin Foundation ("*ACLU of Wisconsin*") writes to you as heads of the law enforcement agencies ("*LEA*") that will respond to such protests to remind you and your agencies of the dual responsibilities to respect and protect the constitutional rights of the protesters while conscientiously maintaining public safety. These responsibilities are not at odds with each other, and fulfilling them both requires: (1) the use of de-escalation and non-escalation, (2) genuine and clear communication with protesters and the public, (3) clear limitations on the use of force, (4) policies against the surveillance of protesters, and (5) adequate and comprehensive training. This letter gathers practical recommendations and guidance from various sources on how best to approach protests and acts of disobedience not only concerning the RNC but any future mass demonstrations in Wisconsin.¹

¹ This letter draws from a number of government, law enforcement, academic, and non-profit sources on the subject of law enforcement's role during mass demonstrations. See International Network of Civil Liberties Organizations and University of Chicago, *Defending Dissent: Towards State Practices that Protect and Promote the Rights to*

1. Prioritizing de-escalation and non-escalation

LEAs across the country now recognize that their own responses to demonstrations play a key role in ensuring peaceful protests and even acts of civil disobedience remain peaceful.² Both de-escalation and non-escalation are essential to maintaining public safety, which is never served when people are harmed, unnecessarily arrested, or lose confidence in law enforcement.³ Law enforcement operations during mass demonstrations must be designed with consideration of the impact that law enforcement's presentation, tools, and tactics will have on protesters, bystanders, and the public.

How LEAs first present themselves to protesters sets the tone for whether LEAs are perceived as an aggressive or peace-keeping presence. Law enforcement agents should dress in their regular uniforms displaying visible name tags at all times.⁴ Conversely, “[c]rowd-control equipment and weapons should only be deployed when it becomes necessary and only used to defend the life and bodily integrity of protesters, bystanders, or policing officials.”⁵ In other words, riot gear should never be used against peaceful protesters.

A disproportionate response by law enforcement meant to overwhelm protesters will escalate tensions. Moreover, mass arrests of everyone in a crowd and the “kettling”

Protest (June 2018) [hereinafter *Defending Dissent*], available at <https://www.inclo.net/pdf/Defending-Dissent-Report-Complete-WEB-FINAL.pdf>; Police Executive Research Forum, *The Police Response to Mass Demonstrations: Promising Practices and Lessons Learned* (2018) [hereinafter *The Police Response to Mass Demonstrations*], available at <https://www.policeforum.org/assets/PoliceResponseMassDemonstrations.pdf>; President Obama's Task Force on 21st Century Policing, *Final Report* (2015), available at https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf; and U.S. Department of Justice, *Police-Community Relations Toolkit: Guide to Critical Issues in Policing* [hereinafter *Guide to Critical Issues in Policing*], available at <https://www.justice.gov/crs/file/836416/download>.

² *The Police Response to Mass Demonstrations* at 25-26 (“Respond to a mass demonstration in gear and with equipment that are proportional to the mood of the crowd.”); President Obama's Task Force on 21st Century Policing, *Final Report* at 25 (“2.7 Recommendation: Law enforcement agencies should create policies and procedures for policing mass demonstrations that employ a continuum of managed tactical resources that are designed to minimize the appearance of a military operation and avoid using provocative tactics and equipment that undermine civilian trust.”).

³ *Guide to Critical Issues in Policing* at 9 (“In recent years, there has been a growing recognition in the policing profession that managing demonstrations requires a ‘softer’ approach than sometimes occurred in the past.”); *The Police Response to Mass Demonstrations* at 3 (“Ensuring that police responses to mass demonstrations are proportional to the actions and mood of the crowd is critical to making sure the police do not unintentionally escalate tensions during protests.”).

⁴ *The Police Response to Mass Demonstrations* at 4, 47 (“For instance, the lead agency may state its intention to begin with a soft approach to protests, in which officers wear regular uniforms and engage protesters by communicating that the police see their role as protecting demonstrators’ First Amendment rights.”)

⁵ *Defending Dissent* at 65.

or corralling of protesters are simply unconstitutional.⁶ Instead, any law enforcement response should be carefully targeted and proportional to address an evidence-based public safety risk. This might mean, for example, having fewer officers present when there is no threat of violence or harm. Similarly, just because an arrest is lawful does not mean it will help maintain public safety.⁷ Likewise, “[a]ny decisions to escalate force should be traceable through a chain of command that is clear in advance.”⁸

Officers responding to protests should be well-rested with access to sufficient water, breaks and food. Officers presently being investigated for misconduct or criminality relating to improper use of force should not be part of the team responding to a demonstration.⁹

2. Genuine and clear communication with protesters and the public

Effective and clear communication with the protesters and the public at large makes it less likely that people will “resort to violence, act arbitrarily, or act out of confusion or fear.”¹⁰ To ensure such level of communication, LEAs should designate officers, ideally trained in communication and de-escalation, to negotiate mutual expectations about what will take place before, during, and after the protests. Such “dialogue officials” should be “exclusively focused on communication and . . . not carry out policing functions (i.e. making arrests or using force).”¹¹

The right to cover and record protests and the police are protected by the First Amendment of the U.S. Constitution.¹² LEAs have a duty to defend and respect such

⁶ See *Vodak v. City of Chicago*, 639 F.3d 738, 750 (7th Cir. 2011) (warning about the ease with which innocent people can be swept up during mass arrests); NYCLU, *Victory in Unlawful Mass Arrest During 2004 RNC the Largest Protest Settlement in History* (Jan. 15, 2014), available at <https://www.nyclu.org/en/press-releases/victory-unlawful-mass-arrest-during-2004-rnc-largest-protest-settlement-history> (announcing \$18 million settlement “for the arrest, detention and fingerprinting of hundreds of protesters, journalists, legal observers and bystanders during the 2004 Republican National Convention.”); Robert Patrick, *14 federal lawsuits filed over Stockley protest kettle arrests, police pepper-spraying*, St. Louis Post Dispatch, Sept. 18, 2018, available at https://www.stltoday.com/news/local/crime-and-courts/federal-lawsuits-filed-over-stockley-protest-kettle-arrests-police-pepper/article_76d4c433-dbf8-56df-adf5-1ecb71f630aa.html.

⁷ *Guide to Critical Issues in Policing* at 10 (“Avoiding making arrests if at all possible. For example, if protesters block a city street, police may be able to reroute traffic, rather than making arrests.”).

⁸ *Defending Dissent* at 65.

⁹ *Id.*

¹⁰ *Id.* at 67; *The Police Response to Mass Demonstrations* at 20 (“It’s critical to establish continued lines of communication among crowds, organizers, and police.”).

¹¹ *Defending Dissent* at 72.

¹² *ACLU of Ill. v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) (quoting *Glik v. Cunniffe*, 655 F.3d 78, 79-81 (1st Cir. 2011)).

rights without the need for special or traditional journalistic credentials. Legal observers, if present, should be allowed to safely document arrests and any uses of force. Their presence protects not only the protesters but also law enforcement. It is also unconstitutional to confiscate or search smartphones, cameras, or other recording devices without a warrant.¹³ Erasing footage or pictures is also illegal.¹⁴

During protests, LEAs should also keep the public apprised of police strategies, tools used, and arrests made through regular briefings with the media. Transparency not only maintains public trust in LEAs, but it can go a long way in making the protesters feel safe and dispelling rumors and wrong information about LEAs' responses and operations.

3. Limitations on the use of force

The use of force during a protest has a chilling effect on the First Amendment rights of all protesters. Consequently, any use of force during a protest should be avoided if at all possible.¹⁵ Use of force policies are also generally inadequate as they do not consider the First Amendment rights of protesters and do not provide sufficient guidance to officers on how to use of force during mass demonstrations. Thus, planning and carefully-drawn rules of engagement are particularly important during protests. Also, coordination between different LEAs to follow uniform rules on the use of force is essential.¹⁶

Any use of force must be legal, strictly necessary, carefully targeted, and proportional. Force should only be used in response to a clear and eminent danger of violent conduct against a person or persons.¹⁷ De-escalation, a tiered approach, clear and lawful orders, and giving people sufficient time to comply, prevent unnecessary use of

¹³ See *United States v. Berrios*, 990 F.3d 528, 532 (7th Cir. 2021) (citing *Riley v. California*, 573 U.S. 373, 401 (2014)) (“[P]olice normally need a warrant to search the contents of a cellphone that has been seized incident to an arrest”).

¹⁴ See, e.g., Wis. Stat. § 943.70(2)(a)(1-4) (2021-22) (“Whoever willfully, knowingly and without authorization does any of the following may be penalized . . . Destroys data, computer programs or supporting documentation.”)

¹⁵ See *Hodgkins v. Peterson*, 355 F.3d 1048, 1064 (7th Cir. 2014) (“The concrete possibility of arrest . . . makes clear that the [Ordinance] unduly chills the exercise of a[n] [individual’s] First Amendment rights.”).

¹⁶ See *The Police Response to Mass Demonstrations* at 46-47 (“Ensure policies and terminology on use of force and civil disobedience are consistent across agencies to prevent misunderstandings and loss of control during mass demonstrations. If necessary, resolve any inconsistencies in advance of a mass demonstration in a mutually agreed-upon unified command proposal.”).

¹⁷ See *Collin v. Chi. Park Dist.*, 460 F.2d 746, 753-54 (7th Cir. 1972) (holding that responses to First Amendment expression cannot be anticipatory); see also, *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[F]reedom of speech . . . 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.”).

force. Crowd control equipment and weapons, such as long-range acoustic devices (sound weapons) and dogs, intimidate peaceful protesters and are indiscriminate in their nature.¹⁸ Thus, they should not be used during protests and for crowd control purposes.

Any arrests—particularly of people engaged in peaceful civil disobedience— should be conducted with the minimal use of force required.¹⁹ Any arrests should also be performed by police officers wearing appropriate uniforms and visible name tags. “Prompt information on the place of detention should be provided to interested persons and access to legal services for the detainee must be ensured.”²⁰

In the event that people are injured by law enforcement, evidence should be properly handled and preserved, weapons seized, and the orders issued documented for a later independent investigation and review.

4. Policies against the surveillance of protesters

The indiscriminate surveillance of protesters not only infringes on the protesters’ right to privacy, but also deters people from organizing and demonstrating freely. Consequently, the use of bulk surveillance tactics and technologies—such as cell-site simulators (also known as Stingrays or international mobile subscriber identity (IMSI) catchers), facial recognition technology, and databases of activists—should be prohibited because they do not distinguish between lawful and unlawful conduct.²¹ Any collection, retention, and use of personal information in the context of mass demonstrations should be strictly limited to situations where there is individualized suspicion supported by probable cause that the person has committed or is about to commit a crime. “A generalized and undefined belief that someone taking part in a protest may commit some offence in the future does not justify surveilling, taking or retaining a photograph, or recording video footage of protesters.”²²

¹⁸ See ACLU of Hawai‘i, *July 10, 2019 Letter re DLNR’s Acquisition of a Long Range Acoustic Device*, available at <https://acluhawaii.files.wordpress.com/2019/07/aclu-letter-to-dlnr-re-lrad.pdf>.

¹⁹ *Lester v. City of Chicago*, 830 F.2d 706, 713 (7th Cir. 1987) (“Under the Fourth Amendment, a police officer’s use of force in arresting a suspect violates the Constitution if, judging from the totality of circumstances at the time of the arrest, the officer used greater force than was reasonably necessary to make the arrest.”).

²⁰ *Defending Dissent* at 80.

²¹ See, e.g., U.S. Department of Justice, *Recommendations for First Amendment-Protected Events for State and Local Law Enforcement Agencies* at 11-13 (Dec. 2011) (prohibiting, among other things, “[i]nvestigating and collecting, maintaining, using, or sharing information regarding persons or groups solely because they are involved in constitutionally protected activity”), available at https://www.ncirc.gov/onlinetraining/modules/first_amendment_rollcall/Recommendations.pdf.

²² *Defending Dissent* at 93.

5. Adequate and comprehensive training

LEAs must ensure their officers have the specialized training and skills necessary to prepare them to use good judgment during mass protests, where raised voices, passion, anger, and grievances—often directed at the government or the police—run high. Such training must include at a minimum instruction on (i) how to respect and protect the right to protest, (ii) how to de-escalate tense situations during mass demonstrations, (iii) communication, dialogue, and public engagement, (iv) the use of specialized equipment during protests, and (v) structural inequality and implicit bias. Training on procedural justice is also helpful for LEA decision-makers.²³

“Training on the use of crowd-control equipment and weapons should include: the impact and harm caused by each weapon or piece of equipment; the likely perceptions of and reaction to the use of each weapon, including the possible escalation in tensions; whether less harmful means are available to achieve the particular aim, and, if not, whether the overall objective of the use of force is better achieved by not using the provided equipment.”²⁴

Any such training should be incorporated into basic and ongoing instruction that includes “real-life scenarios and exercises that rely on past cases to identify both poor decision-making and unlawful conduct.”²⁵ All training should be updated and reviewed periodically by independent experts from different disciplines such as law, sociology, and psychology. Performance evaluations of officers and promotions should also be based on skills and principles learned during the training sessions.

* * *

In summary, the relationship between law enforcement and protesters does not need to be and should not be antagonistic. Building and maintaining trust with the protesters and the broader community are important to public safety. In turn, respecting civil rights and liberties are important to maintaining such trust, particularly during what could be prolonged protests like the ones expected against the RNC. We trust that you will take these suggestions and restrictions on conduct very seriously.

²³ *The Police Response to Mass Demonstrations* at 32 (“Procedural justice training was very good for us because it reminded us of what we’re really out there to do, and that is to protect and facilitate people’s constitutional rights.”)

²⁴ *Defending Dissent* at 80; see also *The Police Response to Mass Demonstrations* at 37-38.

²⁵ *Defending Dissent* at 56.

Sincerely,



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