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More Protests: More Problems

Portland's Changing Landscape of Demonstration Management

Andrea Rachiele Barraclough
Portland City Attorney's Office
Portland, OR

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I. Introduction[1]

"The boisterous sea of liberty is never without a wave." – Thomas Jefferson

These words are inscribed on the United States Courthouse in downtown Portland, Oregon, not far from where many of the City's demonstrations have taken place. As these words recognize, our freedom often comes with moments of rising tensions and even discord. These rising waves sometimes manifest themselves in public demonstrations, and these demonstrations ebb, flow, and change over time.

In 1991, one of President George H.W. Bush's White House aides referred to Portland as "Little Beirut".[1] The nickname was meant to evoke a parallel with Beirut, Lebanon, a city ravaged by civil war in the '80s.[2] History, of course, proved the nickname undeserved.

However, after the 2016 election, demonstrations in traditionally-progressive Portland have resumed with intensity, and some demonstrations have turned violent.[3] Portland has a long history and experience with demonstrations; but, in the past year, the tides have changed, and Portland has had to find new ways to adjust and adapt.

In the past, demonstrations primarily consisted of concerned citizens marching to City Hall, protesting police, City Council, or national government actions. In the past year though, the City has had to reevaluate demonstration management strategies to include consideration of demonstrations that are met with equal intensity by counter-demonstrations. Not only is the Portland Police Bureau (PPB) trying to control violence directed against the City, but it now must stop two opposing groups from possibly using violence against each other.

This paper examines both the traditional and new brand of demonstrations in Portland through the lens of the legal landscape within which PPB and the City must make demonstration management decisions. Additionally, this paper notes how Portland's progressive identity shapes these policies. Finally, to assist other municipalities who may face demonstration management dilemmas and might be seeking guidance or advice from a jurisdiction that regularly sees mass demonstrations, this paper will acquaint the reader with Portland's relevant police directives governing demonstration management.

II. The Laws and Policies Within Which Portland Must Work

A. No Absolute Prior Restraint

One question non-lawyers often ask is why can't Portland stop protests before they start, particularly where there is intelligence suggesting that a large and violent demonstration is coming or where potentially violent demonstrators seek a permit? The

[1] This paper does not express the views of the City of Portland or bind the City, the City Attorney's Office, or its author to the views expressed herein.

obvious answer is that free speech, no matter what the message is (aside from fighting words), cannot be restrained by preemptive action. "[E]njoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and present danger [to public peace and order] is presumptively a First Amendment violation. The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs, rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct."[4]

This is true even if prior demonstrations have been violent. A demonstration cannot be preemptively banned based on the occurrences at a prior demonstration.[5] Thus, a demonstration should not be declared unlawful, nor arrests be made or force used, until the current demonstration poses a clear and present danger to public peace.

B. Protest Management Once a Demonstration Starts

If a police response after the demonstration starts is the only constitutional means to manage a demonstration, at what point can and should police take action, even if it ultimately restrains speech? In Oregon, a city can disperse an assembly if that assembly turns into either an unlawful assembly or civil disturbance, or a riot.[6] After an order to disperse, if the crowd does not disperse, arrests can be made.[7]

Defining a "riot" is easy. Under Oregon law, a person who acts with five or more other persons to engage in violent conduct that intentionally or recklessly creates a risk of public alarm commits the crime of rioting.[8] Such level of violence is easy to spot, and police can issue an order to disperse for this clear conduct.

"Unlawful assembly" and "civil disturbance" are harder to delineate. Oregon Revised Statutes (ORS) do not define these terms. Instead, these definitions are culled from the amalgamation of two cases: *City of Portland v. Hemstreet,* 119 Or.App. 239, 850 P.2d 1131 (1993) and *Cantwell v. Connecticut*, 310 U.S. 296 (1940). These cases state: "When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious."[9] Using this standard, PPB defined a civil disturbance as "[a]n 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." *See* PPB Directive 635.10.[10]

Thus, police can call an event an unlawful assembly and/or civil disturbance where demonstrators cease being peaceful, start making furtive movements in readiness for violence, fail to remain on sidewalks or other non-traffic areas, and start taking actions such as: militarizing in preparation for violence (e.g., putting up shields and making furtive movements behind them as if preparing weapons); walking en mass into traffic and stopping vehicles or public transport; throwing things at police which could harm them or a bystander; or vandalizing or destroying city or private property.

Once a peaceful demonstration devolves into a civil disturbance or a riot, police have several options under PPB Directive 635.10. The first tactic PPB will usually try is to reason with the event organizers and see if the organizers can get the issues under control.[11] Unfortunately, this effort at management cannot always be pursued, as not all crowds have an organizer or will cooperate in conversing with police.

When discussions fail or cannot occur, the safety of the public as a whole requires the unlawfully assembled crowd to disperse, and ORS 131.675 expressly allows police to disperse the crowd at that point.[12] PPB officers will attempt to give a minimum of two notices to disperse with warnings that failure to do so could result in arrests or reasonable use of force.[13] If the crowd does not disperse after these notices, riot control agents can be used so long as avenues of egress are available to the crowd.[14]

Reasonable force at a demonstration is the same as it is in any other context—officers are expected to follow the standards in *Graham v. Connor*.[15] The Incident Commander (IC) must only authorize, and line officers must only use, force that is objectively reasonable under the totality of the circumstances.[16] To that end, certain crowd-control tactics are expressly prohibited as *per se* unreasonable—fire hoses, canines, and tasers cannot be used on any member of the crowd, a police car cannot be used to push the crowd, nor can police on horseback use the horse to control a crowd that is sitting or lying.[17]

Arrests of demonstrators are permissible, but only under specific circumstances. Obviously, persons committing crimes can be arrested based on the probable cause that they committed an individual and articulable crime.[18] Others, however, can only be arrested if they remain at the civil disturbance or riot after a warning to disperse has been given.[19] In order to effectuate an arrest in a crowd control situation, an officer must be able to articulate individualized probable cause as to each arrestee; "guilt by association" is not allowed.[20]

But before any police actions can be taken, warnings are required by Directive 635.10 if feasible. Specifically, one of the IC's responsibilities is to assure that all warnings have been given prior to uses of force or arrests.[21] The announcements have to be loud, intelligible, and consistent.[22] They should also be repeated at least twice before action is taken, giving the crowd notice and opportunity to comply with police orders.[23] Effective warnings can be an appropriate de-escalation tool, encouraging the peaceful demonstrators to separate themselves from violent demonstrators.

C. "Hard Gear" vs. "Soft Gear"

Additionally, some in the community raise concerns when demonstrators are met by police wearing protective equipment that can appear intimidating. Portland has made an effort to balance public image concerns with the needs and rights of its staff when it comes to the wearing and display of personal protective gear (PPE), sometimes referred to as "hard gear." "Hard gear," also called "riot gear" by some, is a term used by the

public to describe the protective equipment that police officers *must* wear when working a violent demonstration. And "must" is the correct word.

OSHA laws require PPE, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, be provided by an employer to employees wherever it is necessary by reason of work hazards, work processes, or work environment.[24] The obligation is on the employer to assess the workplace to determine if hazards are present, or are likely to be present, which necessitate the use of PPE. If such hazards are present, or likely to be present, the employer shall 1) select, and have each affected employee use, the types of PPE that will protect the affected employee from the hazards identified in a hazard assessment; 2) communicate selection decisions to each affected employee; and 3) select PPE that properly fits each affected employee and which is capable of mitigating chemical, flammable, or radiological hazards, or biohazardous or mechanical irritants encountered in a manner capable of causing injury or impairment.[25]

In crowd control situations, the employer is obligated to consider and balance the following in deciding whether and to what extent OSHA requires that PPE is needed and used:

1) Level of protection required to mitigate work hazard, work process, or work environment (i.e. officer safety);
2) Crowd behavior
3) Criminal intelligence
4) Nature of the event
5) Presence of weapons; and
6) Crowd perception and the potential for escalation.

Where the IC determines conditions of the event warrant the wearing or carrying of any PPE, the employer must select the type of PPE required to mitigate the hazard, provide it, and require it to be worn.

Thus, because of OSHA requirements, it is not always an option to let officers manage a demonstration event in "soft gear," or regular patrol uniforms. What police can wear will be largely dictated by crowd behavior. Still, despite the fact that hard gear is a requirement depending on the conduct of the crowd, Directive 635.10 accounts for public concerns about the militarized look of police in riot gear. Specifically, the directive establishes the preference that officers in PPE be kept out of sight of the main demonstration area where possible until or unless the IC deems they are needed based on crowd temperament.[26]

D. Time, Place, and Manner Restrictions

While effective policing is favored in lieu of a prior restraint, police can constitutionally implement time, place, and manner restrictions in advance of a planned demonstration where intelligence suggests they are needed to protect public safety.

When the government seeks to regulate access to the streets, "[f]irst Amendment protections are at their strongest and regulation is most suspect."[27] The government may impose reasonable time, place, and manner restrictions on expressive activity in a public forum.[28] A restriction is "reasonable" if: (1) it is content-neutral; (2) it is narrowly tailored to serve a significant government interest; and (3) it "leave[s] open ample alternative channels for communication of the information.[29]"

1. Content Neutrality

If free-speech restrictions are based on the form of a demonstration and not the message delivered at said demonstration, the regulations are content neutral.[30] Thus, managing the form of the demonstration, e.g., a march instead of a congregation, or marching on one street instead of another, and not what is being said during the demonstration, is allowed and is content neutral.

2. Narrow Tailoring

When a content-neutral regulation does not entirely foreclose all means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal.[31]

There is an informative case on point, *Menotti v. City of Seattle*, which stems from the City of Seattle's creation of "protest zones" during the World Trade Organization's (WTO) international meetings. The City of Seattle passed an emergency ordinance telling demonstrators exactly where they could protest in order to keep the WTO attendees safe, and the City informed demonstrators that they would be subject to immediate arrest for demonstrating outside said zone.[32] The Court held that "[a] statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy."[33]. To be narrowly tailored, a statute "need not be the least restrictive means of furthering [the government's] interests, but the restriction may not burden substantially more speech than necessary to further the interests.[34]" It further found that "[n]o one could seriously dispute that the government has a significant interest in maintaining public order; indeed, this is a core duty that the government owes its citizens . . . [i]n the face of violent riot, [a] City ha[s] a duty to restore order and to ensure the safety of . . . the residents of Seattle."[35]

Thus, based on *Menotti*, police can direct a certain route for a march or permit a certain location for congregating, as long as such action does not impede the ability of the two groups to communicate their message to each other. This would arguably be viewed as narrow tailoring.

There is a challenge in balancing *Menotti* with the prior restraint prohibitions in *Collins*. On the one hand, *Collins* suggests that a City cannot ban or curtail planned demonstration activities based on past conduct or events, while *Menotti* suggests that the level of past violence and destruction can be a primary factor in considering whether the speech restriction is narrowly tailored to prevent continued or future violence.

Accordingly, protest zones are likely most appropriate where the intelligence gathered coupled with history of demonstration activity reveals the potential for significant violence or significant injury to life or property.

3. Other Channels of Communication Remaining Open

Menotti also addresses this prong of the time, place, manner test. The case states: "[t]he Supreme Court generally will not strike down a governmental action for failure to leave open ample alternative channels of communication unless the government enactment will foreclose an entire medium of public expression across the landscape of a particular community or setting.[36]" Additionally, "[a]n alternative is not ample if the speaker is not permitted to reach the intended audience.[37]"

Appellants argued they were entirely prevented from communicating with WTO delegates because they could not meet them at close range, but the Court held "there is no authority suggesting that protesters have an absolute right to protest at any time and at any place, or in any manner of their choosing.[38]" The facts of *Menotti* suggested that the demonstration zones, established across the street from the WTO headquarters, were not so far from the delegates that demonstrators could not communicate directly across the street their message.[39]

However, one unique point made by the Court was that sometimes the location of the expressive activity is part of the expressive message, and where that is the case, the government's proposed alternative location might not be an adequate or ample alternative.[40] For example, if an anti-war demonstration is specifically chosen to occur at a war memorial, a government attempt to remove the event from the war memorial may dilute the message and therefore, would not be allowed.[41]

Accordingly, as long as demonstrators still have access to each other or the government to communicate their messages, and as long as the place chosen for the message does not have a special connection with the message itself, police can leave open an alternative channel of communication by moving a demonstration from a crowded city location to a less populated city location if the locations still allow the demonstrators' message to be communicated.

E. Permitting

Certainly, not all demonstrations are permitted, let alone planned. But a large number of them do start out permitted and only later devolve when violent elements attempt to join and take over peaceful causes. Citizens have requested, and the City has considered, how permitting can be used as a tool for demonstration management.

The United States Supreme Court has traditionally referred to any permitting scheme as a "prior restraint on speech" that faces a "heavy presumption against validity.[42]" However, there is a difference between permits that "authorize a licensor to pass judgment on the content of speech" and those whose purpose "is not to exclude

communication of a particular content, but to coordinate multiple uses of limited space" on a content-neutral basis.[43] Thus, permitting regimes whose sole purpose is to regulate competing uses of public space are evaluated as a content-neutral time, place, and manner permitting scheme.[44]

To be valid under the First Amendment, a permitting policy "(1) must not delegate overly-broad discretion to a government official; (2) must not be based on the content of the message; (3) must be narrowly tailored to serve a significant governmental interest; and (4) must leave open ample alternatives for communication.[45]"

Luckily, Portland is guided by two pieces of binding authority on point that specifically detail how to create a constitutional permitting scheme in the Ninth Circuit.

In *Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression & Criminalization of a Generation v. City of Seattle*, the Ninth Circuit held unconstitutional a Seattle Ordinance allowing the Chief of Police, when granting a permit, to require marchers to only use sidewalks and not city streets.[46] Important facts the Court considered were: 1) the ordinance itself did not discuss numbers of demonstrators considered too many, while the Chief of Police was issuing permits for only so many demonstrators to attend (and no permits contained a participant limit); 2) the ordinance gave the Chief of Police the discretion to modify the march in various ways after the grant of the permit, including changing the "proposed line of movement or march"; and 3) the ordinance did not require officials to articulate their reasons for denying permission to march in the streets nor provide a mechanism for direct administrative or judicial review.[47] The Court ruled that the Chief of Police had too much subjective discretion in being able to limit permits based on the content of speech, and the guidelines were not uniformly applied.[48]

But, another case did allow permit limits on a peace march where the City of Long Beach imposed a number of conditions, including the route of the march and the location of the rally, on a demonstration march permit.[49] The following language from Long Beach's permitting ordinance was deemed constitutional:

> *The city manager may condition any permit ... with reasonable requirements concerning the time, place or manner of holding such event as is necessary to coordinate multiple uses of public property, assure preservation of public property and public places, prevent dangerous, unlawful or impermissible uses, protect the safety of persons and property and to control vehicular and pedestrian traffic in and around the venue, provided that such requirements shall not be imposed in a manner that will unreasonably restrict expressive or other activity protected by the California or United States constitutions.*[50]

Accordingly, a city can have a legally-defensible time, place or manner restriction through permitting, so long as it is uniformly applied and instructive regarding the discretion that must be used.

III. Directive 635.10 – A Collaborative Directive

Portland is a progressive city proud of community engagement and transparency efforts. To that end, PPB has an interactive mechanism by which it creates and enacts police directives. Whenever a policy is up for review, Portland community members have an opportunity to offer suggested changes before the policy is changed, and can once more make comments and propose changes to the revised first draft.[51] Additionally, experts are consulted regarding policies dealing with specialized policing. And finally, where a legal entity, such as the American Civil Liberties Union (ACLU) or National Lawyers Guild (NLG) wishes to share concerns about a policy, the Mayor's Office is receptive to open conversation to address those concerns.

Also, when it comes to any policies containing use of force requirements, Portland is required to vet those policies with the United States Department of Justice (USDOJ) Civil Rights Division per a 2012 Settlement Agreement in *United States v. City of Portland* (based on a USDOJ finding of a pattern of excessive use of force on the mentally ill or those in mental health crisis).[52]

Thus, when PPB overhauled Directive 635.10 in August of 2017, it was heavily reviewed by many sources and its final form was very much the result of a collaborative process. To explain the review and drafting process, and to address the concerns received during the public comment period, PPB drafted an Executive Summary to explain to both concerned citizens and legal organizations the reasons why certain choices were made and why certain requests could not be accommodated.[53]

Indeed, when the ACLU drafted a letter of public comment during the universal review period regarding Directive 635.10, the ACLU, the National Lawyers Guild, PPB management, and other stakeholders met to discuss the ACLU's proposals; the result was a policy that, while not accepting of all ACLU's suggested changes, did accept many of the ACLU's proposals.[54]

Thus, Portland's current Directive 635.10 is a document born of best efforts to cooperate on a topic where police and demonstrators may have a difference of opinion. It was the hope of the City that collaborating with all stakeholders would result in a better, more complete, and more defensible policy.

IV. Portland's Recent Demonstration History—Old and New

The flexibility built into Directive 635.10 has become all the more critical in the wake the changing tide of demonstrations in Portland. Before the 2016 election, the typical Portland demonstration could be characterized as either "citizens vs. the

government," or "citizens vs. big corporations." Examples of demonstrations between 2010 and the end of 2016 include the following medium- to large-scale events:

- March 29, 2010 – citizens demonstrate two officer-involved shootings[55];
- May 1, 2010 – citizens demonstrate an anti-immigrant Arizona law[56];
- July 31, 2011 – citizens march against sexual violence[57];
- October 6, 2011 – Occupy Wall Street sympathy march[58];
- October 6, 2011 to August 1, 2012 – Occupy Portland encampment demonstration and ten various marches and gatherings in support[59];
- May 1, 2012 – Anti-corporate and anti-government demonstration[60];
- November 3, 2012- citizens demonstrate against budget cuts to education[61];
- January 25, 2016 - citizens demonstrate against the Portland to Montreal oil pipeline[62];
- May 25, 2013 – citizens march against Monsanto[63];
- February 11, 2014 – citizens demonstrate against the City regarding the homeless[64];
- July 24, 2014 – citizens march in protest against Israel's attacks on Gaza[65];
- November 25, 2014 – citizens march in protest of the Ferguson officer shooting court decision[66];
- May 1, 2015 – citizens demonstrate against working conditions of minority workers and police shootings as "Hand's Up, Don't Shoot" and the May Day parade intersect[67];
- July 30, 2015 – citizens demonstrate against Shell Oil by dangling from a City bridge, acting as a human barrier to an ice-breaking ship[68];
- October 13, 2016 – citizens demonstrate against the PPB union contract[69]; and
- November 8 to November 16, 2016 – citizens host nightly demonstrations following the election of Donald Trump[70].

In early 2017, there was a massive demonstration on January 20, 2017, as citizens demonstrated against President Trump's inauguration. The demonstration turned into a riot that made national news, injuring police officers and citizens and causing significant property damage.[71]

But then in March of 2017, the City of Portland opted to cancel the annual 82nd Avenue Parade of Roses based on security concerns raised when Antifa demonstrators threatened to disrupt the parade if the Multnomah County Republican Party were allowed to march in it.[72] Just across the river from Portland, in Vancouver, WA, Joey Gibson, a conservative blogger who founded a group called "Patriot Prayer," decided to demonstrate against his perception of Portland being "bullied by Antifa" into cancelling the parade.[73] He organized a "March for Free Speech" in Portland, on April 29, 2017.[74]

However, one Patriot Prayer demonstration soon turned into two, and Patriot Prayer came back to rally in Portland on June 4, 2017.[75] This second planned demonstration gained considerable negative attention because just days earlier, on May 26, 2017, a white supremacist who had attended the April 29th demonstration stabbed two men to death on a train for protecting two young minority women.[76] Because political speech is protected, the City could not stop the second planned event, and instead focused on planning for the event while accommodating a voice of dissent. Meanwhile, the citizens of Portland were still reeling from the deaths of the Good Samaritans. What emerged was a large and intense demonstration coupled with three separate counter-demonstrations,[77] which changed Portland's demonstration landscape from "citizens vs. The Man" to "citizens vs. citizens." This greatly altered the dynamic of PPB's crowd management needs.

At the June 4th demonstration, there were fourteen arrests, including an arrest for carrying a concealed weapon, and bags of bricks and fireworks were confiscated.[78] Patriot Prayer was back in Portland for a "Freedom March" on June 30, 2017. This time, the demonstration and counter-demonstration turned violent, as the two sides fought, punched, and hit each other with burnt flag poles.[79] A citizen even pulled out pepper spray and sprayed it into the crowd.[80]

Just one week later, Patriot Prayer organized again on August 6, 2017.[81] PPB opted to try a hands-off approach, but violence still occurred.[82] A month later on September 10, 2017, another Patriot Prayer march was met by Antifa, and this time, police arrested seven people after smoke devices and projectiles were thrown at officers.[83] On October 8, Patriot Prayer returned, and police increased their presence in response to intelligence that the rally might include torches and fires.[84] On November 4, Antifa and other demonstrators gathered to mark the year since the election, and this time, it was the alt-right that appeared to counter-demonstrate.[85] Then, on December 9, 2017, Patriot Prayer returned to Portland to demonstrate against sanctuary cities and were met by counter-demonstrators, resulting in physical confrontations between the two groups.[86] Thus, PPB has had to handle a demonstration and counter-demonstration every month since April in 2017.

Patriot Prayer took the first six months of 2018 to focus on gatherings in other cities like Seattle and San Francisco, but in the meantime, Joey Gibson announced his candidacy for U.S. Senate.[87] This added a new layer of complexity to analyzing the First Amendment issues, as it further solidified Gibson's right to speak about political topics as a political candidate, no matter how unpopular his political messages were to most Portlanders. By June, Gibson and Patriot Prayer returned their attention to Portland and again held near monthly demonstrations. The first of 2018, on June 3, culminated in violence as PPB continued to remain hands off wherever possible.[88] However, allowing demonstrators access to each other led to civilian injuries, and police were harshly criticized for not stepping in to break up the physical altercations.[89] Two weeks later, despite an attempt by police to further involve themselves in breaking up fights, another Patriot Prayer march met by counter-demonstrators turned into a riot, with full large group fights occurring.[90]

All of the history brewing between Patriot Prayer and Antifa since 2017 created an environment online that saw both groups promising major and significant violence against the other when they next met in Portland. Intelligence suggested Patriot Prayer planned to come to Portland armed with loaded guns and that Antifa planned to bring makeshift and chemical weapons. Portland had to brace itself for the possibility of another Charlottesville, which was the picture being painted by national media.[91]

Due to the serious and emergent nature of the expected demonstration, time, place, and manner restrictions were enacted with the goal of creating a free speech zone for the planned part of the demonstration (the Patriot Prayer gathering), while using officers as a human barrier to keep the counter-demonstrators (whose plans were unknown to PPB) separate but still within a reasonable distance to communicate their counter-messages to Patriot Prayer. This plan thankfully did keep Portland's demonstration safer than it had been forecasted to be, though several arrests and injuries did occur.[92]

VI. Strategies of Protest Management

As one can see, Portland is not a stranger to handling demonstrations, both peaceful and those that devolve into riots. While strategies that work here in our large city may not be suitable for every jurisdiction, the City and PPB have found over the years and with experience that four key ingredients go into successful demonstration management: 1) messaging; 2) planning; 3) teamwork during the demonstration; and 4) after-event review and take-aways.

A. Messaging

Communication is critical to all interaction, and this includes mass interaction using the most modern means. Today's demonstration organizers use social media (Facebook, Instagram, Twitter, etc.) to reach out to potential attendees with event information, and police can use these same channels to reach these same people. PPB has found it an invaluable necessity for their Public Information Officer to set up user accounts on most, if not all, social media platforms and to disseminate information through those accounts.

For example, ahead of the August 4, 2018, demonstrations, where intelligence suggested Patriot Prayer members were being encouraged to bring loaded firearms, PPB used Twitter and Facebook to set forth in advance the Oregon laws that forbid the carrying of loaded firearms in a public park except where the carrier has an Oregon concealed-carry license. PPB believes this advance messaging and warning regarding possible criminal penalties for those with out-of-state concealed-carry licenses greatly decreased the possibility of gun violence at the event.

PPB uses social media for more than advanced warnings. PPB continues to livestream information on Twitter throughout the course of a demonstration, as

experience has shown media outlets and demonstrators check their phones during events to track PPB actions. Thus, for instance, when the sound truck issues an order to disperse if an assembly has been called a civil disturbance or riot, PPB tweets the same warning.

Of course, for those not social media savvy, verbal communication is also required. Indeed, Directive 635.10 requires loud and audible warnings to be given to the crowd as a means of dispersal and before force can be used.[93] To accomplish this purpose, PPB has two trucks equipped with long-range loud speakers (Long Range Acoustic Device- LRAD) that can emit sound to almost a mile away. The PIO, who is in constant communication with the IC during the demonstration, receives direction from the IC and then translates that direction to an order to be given by the sound truck. PPB believes that use of these long-range speakers and repeated messaging can help better manage crowds by communicating PPB's expectations to the entire crowd.

Accordingly, other jurisdictions new to protesting may wish to consider social media and long-range speakers as tools to assist in crowd messaging.

B. Planning

Where a demonstration is planned in advance and does not erupt spontaneously, pre-planning based on collected intelligence is crucial to successful crowd management. By getting a feel for the size of the expected crowd, the expected participants, and expected location and time of the event, officers can begin to consider strategies for an effective use of resources.

For example, if intelligence indicates a possible crowd of 20-50 individuals in the daytime for a few hours at a park, one or two squads might be sufficient coverage. But if intelligence indicated 2,000 to 5,000 participants will surge on ten square blocks at night, there is a possibility of needing most on-duty officers, calling in off-duty officers, and possibly seeking assistance from nearby jurisdictions.

Intelligence can also provide an idea of who the expected participants will be. If the demonstration has one or more known lead organizers, police can attempt to establish contact in advance and discern the expectations for the event. If the organizers are cooperative and offer to share their route with police (or even agree to seek a permit), planning can lead to a more organized march. If, however, the demonstration organizer is anonymous or refuses police contact, this can indicate a need for more resources. Knowing whether police are likely to encounter peaceful demonstrators, antagonistic demonstrators, or a combination of both will help guide resource use and OSHA considerations of the type of PPE that needs to be available.

Of course, intelligence will inherently also reveal the message behind the demonstration. However, while knowing what type of demonstration is coming can and should be used as a factor in planning, that knowledge should not be used to justify an absolute prior restraint.

C. Teamwork During the Demonstration

It goes without saying that crowd events are unpredictable, fluid, and have the potential to be either fruitful gatherings or dangerous affairs. This is why is it important to have an emergency or crowd management team that is prepared and knowledgeable, with a team leader that can make quick decisions and accept accountability.

PPB has a small, rotating team of high-level staff members that alternate in the role of Incident Commander. This assures that the highest levels of the Bureau are informed about, involved in, and responsible for demonstration management activities. It also inherently brings to the table significant experience with all types of policing, such that the IC can anticipate police concerns on the ground and direct management response with eyes and ears on all facets of the demonstration.

Further, the team should, if resources allow, be comprised of many different officers performing various duties with the purpose of assisting the IC to make fully informed tactical decisions. At a minimum, it is important to have: 1) a person to generate and direct announcements and messaging; 2) a person or people to keep eyes on live feeds of events on the ground; and 3) an operations leader who takes in information from ground sergeants and provides line officers with IC directions. Having a person or people at the management center to record or scribe the important ground and/or air intelligence and tactical decisions as they occur may also help preserve the events more contemporaneous in time to the event for later review.

Part of having an effective team is making sure that the team is trained in case law and directives prior to the start of a demonstration. To that end, emergency management teams should be in constant contact with advisory counsel, both before and during a demonstration, to make sure all anticipated scenarios have been or will be legally analyzed.

D. After-Event Review and Take-Aways

A debrief, whether an informal discussion or a formal meeting after the event (or both), is an excellent learning tool that will help any police department learn and expand their knowledge base to aid with future demonstrations. ICs should elicit feedback from ground sergeants and operations staff to ascertain whether the decisions made had a positive or negative practical effect. Public Information Officers should make note of any post-event intelligence denoting the presence of weapons or violence, such that citizens can fully understand the extent of the danger presented by the demonstrations and the police actions taken. Before ground sergeants come to the debrief, they should request comment from their line officers to make sure all IC directions were understood and to see if there was anything that could be done differently to improve officer safety or assist in safe crowd management. It would also be helpful for municipal counsel to be present, so that possible litigation could be anticipated.

In sum, teamwork does not stop once the demonstration is over. It must continue after the demonstration has concluded by way of the team working together to analyze in hindsight the strengths and weaknesses of their approach. In doing so, police departments and cities can better ensure accountability and public safety.

IX. Conclusion

Portland is a place that protects freedom of speech, and regardless of the message, it will continue to do so. Given the law, the best possible solutions are continued, effective policing and appropriate City government responses to prepare for demonstrations based on individualized intelligence for each event. Thus, as discussed above, Portland will do what it can to allow citizens to project their message while protecting safety and public order.

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[3] *See* Leah Sottile, *A Complicated Past Lies Behind Portland's Violent Protests*, THE ANCHORAGE DAILY NEWS (Nov. 14, 2016), https://www.adn.com/nation-world/2016/11/14/a-complicated-past-lies-behind-portlands-violent-protests/.

[4] *See Collins v. Jordan,* 110 F.3d 1363, 1373 (9th Cir. 1996).

[5] *See id*. at 1372.

[6] OR. REV. STAT. (O.R.S.) § 131.675 (2017).

[7] *See id*.

[8] *See* O.R.S. § 166.015 (2017).

[9] *See City of Portland v. Hemstreet,* 119 Or. App. 239, 242 (1993), *citing Cantwell v. Connecticut,* 310 U.S. 296, 308 (1940).

[10] PORTLAND, OR., POLICE BUREAU DIRECTIVE 635.10 (2017), https://www.portlandoregon.gov/police/article/649358.

[11] *See id*. at. "Procedure, section 3.1.1.2."

[12] *See id*. at. "Procedure, section 9.1."

[13] *See id*. at. "Procedure, section 9.1.2"

[14] *See id*. at. "Procedure, sections 9.2., 9.2.1."

[15] *See Graham v. Connor,* 490 U.S. 386 (1989).

[16] *See id*.; *see also* PORTLAND, OR., POLICE BUREAU DIRECTIVE 1010.00 (2017), https://www.portlandoregon.gov/police/article/647779.

[17] *See* PORTLAND, OR., POLICE BUREAU DIRECTIVE 635.10, "Procedure, sections 10.1., 10.3., and 10.4."

[18] *See id*. at "Procedure, section 12.3."

[19] *See id*. at "Procedure, section 11." However, a bystander cannot be charged with the crime of Interfering with a Police Officer if failing to disperse and engaging in passive resistance. *See* ORS 162.247.

[20] *See Duncan v. California*, No. S-04-523 LKK/PAN, 2006 WL 1883385, at *2 (E.D. Cal. July 7, 2006).

[21] *See* PORTLAND, OR., POLICE BUREAU DIRECTIVE 635.10, "Procedure, section 6.1.5."

[22] *See id*. at "Procedure, section 8.1."

[23] *See id*. at "Procedure, sections 8.3.1 and 8.3.2."

[24] *See* 29 C.F.R. § 1910.132(a).

[25] *See* 29 C.F.R. § 1910.132(d).

[26] *See* PORTLAND, OR., POLICE BUREAU DIRECTIVE 635.10, "Procedure, section 5.2.3."

[27] *See Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression & Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 797 (9th Cir. 2008) (citation omitted).

[28] *See Reed v. Lieurance*, 863 F.3d 1196, 1211 (9th Cir. 2017) *citing Kuba v. 1-A Agric. Ass'n*, 387 F.3d 850, 858 (9th Cir. 2004).

[29] *See id., quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 897 (9th Cir. 2008).

[30] *See Occupy Eugene v. U.S. Gen. Servs. Admin.*, 43 F. Supp. 3d 1143, 1150 (D. Or. 2014), *citing Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 295 (1984).

[31] *See Hill v. Colorado*, 530 U.S. 703, 726 (2000).

[32] *See Menotti v. City of Seattle*, 409 F.3d 1113, 1130–31 (9th Cir. 2005).

[33] *See id*. at 1130-31 (citation omitted).

[34] *See id., citing United States v. Baugh*, 187 F.3d 1037, 1043 (9th Cir.1999).

[35] *See id*.

[36] *See id*. at 1138 (citation omitted).

[37] *See Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1025 (9th Cir. 2009), *citing Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir.1990).

[38] *See Menotti*, 409 F.3d at 1138-39.

[39] *See id*. at 1138-39, *citing Hill v. Colorado*, 530 U.S. 703, 729 (2000) ("Signs, pictures, and voice itself can cross an 8–foot gap with ease").

[40] *See id., citing Galvin v. Hay*, 374 F.3d 739, 756 (2004); *see also Acorn v. City of Phoenix*, 798 F.2d 1260, 1267 n. 5. (1986).

[41] *See Galvin*, 374 F.3d at 747-50 ("[t]he Court has recognized that location of speech, like other aspects of presentation, can affect the meaning of communication and merit First Amendment protection for that reason."). Note: in other words, *Galvin* makes clear that if the situs of the protest is linked to the message of the protest, it is likely not a place that can be governed by a time, manner, place restriction.

[42] *See Forsyth Cnty v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

[43] *See Thomas v. Chicago Park District*, 534 U.S. 316, 322 (2002).

[44] *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1036-37 (9th Cir. 2006).

[45] *See Forsyth Cnty.*, 505 U.S. at 133.

[46] *See Seattle Affiliate of Oct. 22nd Coal. to Stop Police Brutality, Repression & Criminalization of a Generation v. City of Seattle*, 550 F.3d 788, 797–98 (9th Cir. 2008).

[47] *See id*.

[48] *See id*. at 798-99.

[49] *See Long Beach Area Peace Network*, 574 F.3d at 1022.

[50] *See id*.

[51] *See* PORTLAND, OR., POLICE BUREAU DIRECTIVE 010.00 (2018), "Procedure, sections 2-4," https://www.portlandoregon.gov/police/article/678287.

[52] *See United States v. City of Portland*, 3:12-cv-02265-SI (D. Or., Dec. 17, 2012).

[53] *See* PORTLAND, OR., POLICE BUREAU DIRECTIVE 635.10.

[54] *See* Mat dos Santos and Katherine McDowell, *American Civil Liberties Union of Oregon Comments on PPB Proposed Directive 635.10*, AM. CIVIL LIBERTIES UNION (Feb. 15, 2017), https://www.aclu-or.org/sites/default/files/field_documents/aclu_or_comments_ppb.pdf; *compare Directive 635.10, Crowd Management/Crowd Control Executive Summary*, CITY OF PORTLAND, OREGON (Mar. 31, 2017), https://www.portlandoregon.gov/police/article/653003.

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[59] *See id*.

[60] *See* Levi Pulkkinen, *Months later, five charged in May Day Riot*, KOMO NEWS (Nov. 28, 2012), https://komonews.com/archive/months-later-five-charged-in-may-day-riot.

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[62] *See* Beth Quimby and Edward D. Murphy, *Huge crowd turns out to denounce possible transport of tar sands in region*, PRESS HERALD (Jan. 26, 2013), https://www.pressherald.com/2013/01/26/tars-sands-oil-opponents-march-in-portland/.

[63] *See Protesters around the world march against Monsanto*, USA TODAY (May 26, 2013, 12:08 AM), https://www.usatoday.com/story/news/world/2013/05/25/global-protests-monsanto/2361007/.

[64] *See* Eleanor Goldberg, *Angry Residents Wave Pitchforks, Torches in Protest of Mayor's Crackdown on Homelessness*, HUFFINGTON POST (updated Dec. 6, 2017), https://www.huffingtonpost.com/2014/02/14/portland-homelessness-illegal_n_4790205.html.

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