

POLICING PROTESTS TO PROTECT CONSTITUTIONAL RIGHTS AND PUBLIC SAFETY

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INTRO

The right to engage in peaceful demonstration is a cornerstone of American democracy. Yet sometimes police fail to strike the right balance, approaching demonstrations as a threat to public safety, rather than as an expression of constitutionally protected rights. This results in bad outcomes, for protestors and for police.

This detailed guide provides an overview of how to police demonstrations to protect public safety and democratic freedoms. Drawn largely from what policing leaders themselves have identified as best practices as well as evidence-based research, it provides clear guidance to the police, and informs the public of what they should expect. A brief guide summarizing the key takeaways discussed here is also available.

But first, an important caveat: any agency's ability to successfully facilitate and de-escalate a demonstration will depend in large part on the relationship it has with the public before the event. Put simply, if an agency hasn't earned the public's trust with its everyday policing, it will struggle to de-escalate situations during a protest—even if it adheres to many of these best practices. We say this not to dissuade any agencies from implementing these strategies during a protest, but rather to emphasize the need to practice these principles consistently.

¹ See generally POLICE EXEC. RESEARCH FORUM, *The POLICE RESPONSE TO MASS DEMONSTRATIONS: PROMISING PRACTICES AND LESSONS LEARNED* (2018), <https://bit.ly/3egHuPT> [hereinafter PERF 2018 REPORT]; EDWARD R. MAGUIRE & MEGAN OAKLEY, *POLICING PROTESTS—LESSONS FROM THE OCCUPY MOVEMENT, FERGUSON & BEYOND: A GUIDE FOR POLICE*, <https://www.hfg.org/Policing%20Protests.pdf> [hereinafter POLICING PROTESTS].

² Maggie Koerth & Jamiles Lartey, *De-escalation Keeps Protesters and Police Safer, Departments Respond with Force Anyway*, FIVETHIRTYEIGHT, <https://53ei9t3jPCdJR> ("Former law-enforcement officials also said good policing of demonstrations isn't as simple as just showing up with an approachable demeanor. The time to make friends isn't when you need them...You have to be in front of it.").



**THE RIGHT TO
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Policy & Training

1. Create a written policy for demonstrations

Agencies should develop a mass demonstrations policy that emphasizes free expression, public safety, and de-escalation.³ This policy should incorporate public input on key concerns and insight from experts on policing, civil liberties, and human rights. In general, all agency policies should include the following provisions:

- An explicit statement that all police action at protests has two, equal goals: upholding the public's First Amendment rights and protecting public safety;
- Defined key terms so that officers and the public understand when and how certain provisions of the policy are triggered;
- Detailed procedures for how the agency will operationalize its response approach;
- A ban on mass surveillance of protestors;
- Stringent restrictions on the use of force, acknowledging that even minor uses of unnecessary force may chill rights;
- Specific provisions addressing vulnerable populations, such as people with disabilities, transgender or gender nonconforming individuals, and minors;

- An outline of the parameters and protections afforded journalists and legal observers, including the conditions under which they must be allowed to observe or monitor police conduct.

2. Train officers on this policy

Following policy reform, training should be modified so that all officers are aware of the policy requirements. Key elements of training should include:

- **Education:** Instruct officers on their role as the facilitators and protectors of peaceful demonstrations. Emphasize constitutional rights and adherence to principles of procedural justice. Consider partnering with journalists and First Amendment legal experts to develop training modules on safeguarding journalists' and legal observers' rights at demonstrations. In addition, training modules should review the latest science on crowd psychology, which explains that crowds are not uniform and that officers are competing with agitators for protestors' good will.⁴
- **De-escalation:** Emphasize the importance of de-escalation tactics specific to the protest context, including strategies for handling antagonistic interpersonal interactions with large groups. Use scenario-based training to simulate high-stress protest environments.

³ E.g., OAKLAND POLICE DEPT, OAKLAND POLICE DEPT CROWD CONTROL AND MGMT. POLICY 1 (2013), <https://bit.ly/3JPMgQk> [hereinafter OAKLAND POLICY].

⁴ POLICING PROTESTS, *supra* note 1 at 49-50.

Force & Surveillance

3. Restrict Use of Force

Ensure that use of force is authorized only when there is a clear risk to personal safety or to restrain acts of property destruction or looting. Whenever reasonably possible, officers should give a verbal warning prior to any use of force. If authorized, officers must use only the minimum amount of force necessary and proportionate to de-escalate the situation. Once the situation is under control, officers who use force immediately should administer aid (if trained to do so) or request Emergency Medical Services (EMS).

In addition, policy and practice should include clear restrictions on the use of impact weapons and chemical weapons, and should prohibit the use of distraction devices or impact projectiles to disperse crowds. Specifically:

- Impact Weapons** (i.e. batons): A baton or similar device may be authorized for use in a non-striking defensive capacity or to stop or neutralize a perceived threatening resistance (e.g., used in the two-hand horizontal thrust on a police line).⁵ Impact weapons should not be used for general crowd control, containment, or dispersal.⁶ Intentional baton strikes to the head, neck, throat, left armpit or clavicle are considered deadly force and may only be used when deadly force is authorized.⁷ Officers should be trained to avoid those areas of the body when using a baton.
- Pepper Spray**: Pepper spray only may be used proportionately against specific individuals actively resisting arrest, or as necessary in a defensive capacity.⁸ It should not be used on people who are passively resisting, nor should it be sprayed indiscriminately over a large area as a means of crowd control.
- Firearms**: when safe and feasible, officers should try to de-escalate situations, issue verbal warnings, or use non-lethal force with the goal of resolving encounters without using deadly force.⁹ Firearms almost never should be unholstered or used during a demonstration. Officers may use a firearm only when they reasonably believe such action is immediately necessary to protect themselves or another person from imminent danger of death or serious bodily harm.¹⁰
- Vehicles**: Officers should be prohibited from intentionally creating contact between their vehicles and protestors.¹¹ Intentional use of a vehicle at any speed to strike a protestor is considered deadly force.¹² Officers also should not drive through a demonstration area to reach a mobilization point or staging area.
- Helicopters**: Helicopters should never be flown at low altitudes as a crowd dispersal tactic.

⁵ INT'L ASS'N OF CHIEFS OF POLICE, IACP MODEL POLICY: CROWD MANAGEMENT 6 (2019), <https://bit.ly/37PZG1q> [hereinafter IACP MODEL POLICY].

⁶ OAKLAND POLICY, *supra* note 3, at 15.

⁷ LOUISVILLE METRO POLICE DEPT, LOUISVILLE METRO POLICE DEPT STANDARD OPERATING PROCEDURES § 9.1.12, <https://bit.ly/351e8VX>.

⁸ IACP MODEL POLICY, *supra* note 5, at 6.

⁹ CAMDEN CTY. POLICE DEPT, USE OF FORCE POLICY CORE PRINCIPLE #4, <https://bit.ly/2HC0c82>

¹⁰ *Id.*

¹¹ CITY OF PORTLAND OR., PORTLAND POLICE DEPT DIRECTIVE 635.10, § 10.4 <https://bit.ly/35NLTJg> ("Motor bikes or motorcycles shall not be driven into a crowd or used to make physical contact with persons.")

¹² OAKLAND POLICY, *supra* note 3, at 15; TUCSON POLICE DEPT, TUCSON POLICE DEPT GEN. OPERATING PROCEDURES 2000, § 2080, <https://bit.ly/3oxdV0V>

Force & Surveillance

All use of force incidents should be documented and reported. Accurately tracking and reporting officer-involved force incidents is critical to effectively managing a policing agency and maintaining the public's trust. Admittedly, the potentially chaotic atmosphere of a protest presents significant challenges for documenting these incidents. Agencies should consider whether innovative options may be available to facilitate documentation. For example, agencies can require officers to report all uses of force live on police radio to ensure contemporaneous reporting or enable officers to report force incidents in a digital log on their agency smartphones. These live reporting methods provide a more efficient and user-friendly way to capture and track force incident data.

4. Avoid an unnecessarily militarized presence or aggressive response

Use tiered response plans that increase the level of engagement in proportion only to actual—not assumed or forecasted—conditions on the ground:

- Response plans should start "soft" with officers wearing regular uniforms and engaging the crowd while avoiding formations like lines or wedges. Demonstrate a commitment to facilitation by providing water or distributing face masks to protestors.

- Ensure that officers have ready access to helmets if needed to protect themselves from head injuries from projectiles or debris.
- Deploy officers in "hard" riot gear as a last resort, and only when necessary to protect the public or officers from violence or serious injury. In case of a violent outbreak, tactical units may be staged nearby but out of sight of protestors to avoid escalating a peaceful crowd.

5. Ban the mass surveillance of protestors

Police surveillance of protestors has a chilling effect on the constitutionally protected right to peacefully assemble. As such, agencies should ban the mass surveillance of protestors, particularly the use of controversial technologies, including facial recognition and social media surveillance. Use of drones or other aerial surveillance should be restricted to identifying specific outbreaks of violence or looting to enable targeted enforcement. Video feeds should not be recorded or stored. If protest activities are captured through existing surveillance systems, agencies should ensure that any resulting images or data are purged after a reasonable time period unless necessary to a felony investigation.

Advance Planning

6. Implement crowd management plans

Early and comprehensive planning is essential to manage protests safely and effectively. Developing a clear strategy beforehand allows for informed and competent decision making during an event.¹³ Although today's protests are often spontaneous and lack clear leaders, agencies still can prepare and train with general strategies and operational procedures that will guide the response to these flash events.

When agencies receive advance notice of a protest, incident commanders (ICs) should prepare tailored, written plans that clearly communicate a strategy of facilitation and articulate officers' specific roles and responsibilities.¹⁴ Plans should include education on the likely crowd subgroups and the issues behind the protest so that officers can understand and communicate with crowd members more effectively. They also should contemplate the need for inter-agency coordination prior to or during an event. For example, police may want to partner with the local sanitation agency to remove potential projectile or unintended barrier objects, such as trash cans or dumpsters, from demonstration sites.¹⁵

To address spontaneous events, ICs should prepare generic plans that cover different types and sizes of demonstrations to provide generally applicable strategic and tactical working principles. Operational plans should be distributed to all officers assigned to an event.¹⁶

7. Develop protocols for officer wellness

Written protocols should be prepared to address officers' physical and mental health needs during an event. This may include ensuring regular shift changes, arranging for adequate rest and hydration, and providing face masks.¹⁷ In addition, officers should receive specific preparation for the verbal assault they may encounter at protests, with mental health counseling provided for officers subject to traumatic interactions with protestors.

8. Conduct outreach to organizers, informal leaders, and participants

Agencies should conduct outreach to organizers of planned demonstrations or influential participants in spontaneous events identified through public sources, such as social media. Through this outreach, agencies should seek to facilitate cooperation and negotiate rules of engagement, including what type of behavior will result in what level of enforcement action. Police should approach these negotiations with a willingness to find a middle ground, rather than an expectation that all their demands must be met. Any negotiated terms should be communicated to the broader public through regular and social media.

For informal protests or when event leaders are unwilling to meet with command staff in advance, agencies should publicize their rules of engagement via press conferences and social media to set clear expectations. Regardless of the response to their outreach, the police goal must remain to facilitate peaceful protest and protect public safety.

¹³ TONY NARR ET AL., POLICE EXEC. RESEARCH FORUM, POLICE MANAGEMENT OF MASS DEMONSTRATIONS: IDENTIFYING ISSUES AND SUCCESSFUL APPROACHES 7 (2006), <https://bit.ly/3ozG87s>

¹⁴ IACP MODEL POLICY, *supra* note 5, at 2; THE SEATTLE POLICE DEPT., THE SEATTLE POLICE DEPT AFTER ACTION REPORT 52 (2000), <https://bit.ly/3kDqPX1>

¹⁵ PERF 2018 REPORT, *supra* note 1, at 27.

¹⁶ IACP MODEL POLICY, *supra* note 5, at 2.

¹⁷ PERF 2018 REPORT, *supra* note 1, at 26-27.

¹⁸ *Id.* at 78; POLICING PROTESTS, *supra* note 1, at 68-69; HUNTON & WILLIAMS, FINAL REPORT: INDEP. REVIEW OF THE 2017 PROTEST EVENTS IN CHARLOTTESVILLE, VIRGINIA 8 (2017), <https://bit.ly/3kRHGeR>

ISSUE SPOTLIGHT: PROTESTS ABOUT POLICING

In general, policing protests about police does not require a separate set of best practices from policing other protests. Undoubtedly, this context presents unique challenges in planning and facilitation. For example, protest organizers may be less receptive to negotiating terms with police in advance, and protestors may display more antagonism toward officers.¹⁹ Because of these exact challenges, police must adhere even more stringently to the basic best practices set forth in this guide: commitment to facilitation and targeted enforcement.²⁰ These strategies promote de-escalation and create opportunities to humanize officers in the eyes of protestors. Some additional strategies specific to a protest about policing include:

Dialogue Officers or Intermediary Officials: Consider using specially trained and attired officers (unarmed, casual clothing, reflective vests) to serve as intermediaries between command and protestors.²¹ Alternately, consider partnering with other local agencies or community or civil rights groups to serve in this intermediary role and help manage demonstrations when significant animosity toward police is anticipated.

Officer wellness: Demonstrations that target policing itself typically result in increased tensions and provocations from protestors. Crowd management plans for these demonstrations should provide for officers to be rotated out more frequently so they can rest, have a meal or a snack, and compose themselves before resuming their duties.²²

¹⁹ PERF 2018 REPORT, *supra* note 1, at 1; POLICING PROTESTS, *supra* note 1, at 68–69.

²⁰ PERF 2018 REPORT, *supra* note 1, at iii (“Ensuring that police responses to mass demonstrations are proportional to the actions and mood of the crowd is critically important. These considerations are particularly important for demonstrations that are about police use of force or other police actions, as opposed to economic or social issues.”); Berkeley Police Dep’t, Response to Civil Unrest: A Review of Berkeley Police Dep’t’s Actions & Events of Dec. 6 and 7, 2014 at 49–50 <https://bit.ly/37LgUgt> (“Opportunities for the police to use crowd management rather than control tactics should be recognized and seized...Perhaps because this protest was about confronting the police to redress grievances against ‘the police,’ crowd control tactics such as skirmish lines were particularly antagonistic to many in the crowd.”).

²¹ Similar to the “Community Network Team” model employed by Tucson Police Department, Tucson Police Dep’t, Critical Incident Review Board: Congress St./ Granada Ave. Immigration Protest 54–55 (2017), <https://bit.ly/3JIS500u> (discussing the creation of the “Community Network Team,” whose members are “specially selected and trained to deploy during large events and protests.”). See also POLICING PROTESTS, *supra* note 1, at 71.

²² POLICING PROTESTS, *supra* note 1, at 80; see also PERF 2018 REPORT, *supra* note 1, at 12.

During the Event

9. Respond proportionally

During a protest, police action always should seek to de-escalate—not elevate—tensions with crowd members. Whenever possible, agencies should avoid an unnecessarily militarized presence or aggressive response. To enable this proportional approach, use tiered response plans that increase the level of engagement in proportion only to actual—not assumed or forecasted—conditions on the ground. Response plans should start "soft," with officers wearing regular uniforms and attempting to engage with the crowd. At this stage, any formations that signal the police may be preparing to disperse the crowd, such as lines or wedges, should be avoided. Officers can demonstrate a commitment to facilitation by distributing water or face masks to protestors.

Of course, protests that start peacefully may not remain that way, and officer safety is a critical concern. If officers are initially deployed in soft gear, ensure they have ready access to helmets in the event they need to quickly protect themselves from head injuries from projectiles or debris. If actual violence or property destruction is occurring or imminent and officers require additional protective gear, agencies may deploy bicycle officers as the next phase of a tiered response.²³ Bikes provide multiple benefits: they are easier to maneuver through a crowd than vehicles; officers on bikes are more approachable than those in riot gear; and bike helmets provide protection without appearing militaristic.²⁴

The final stage of a tiered response plan allows for officers to deploy in "hard" gear, like riot gear. This stage should be considered a last resort,

authorized only when necessary to protect the public or officers from violence or serious injury. In case of a violent outbreak, tactical units may be staged nearby, but should remain out of sight of protestors to avoid escalating a peaceful crowd. If a police force is committed to and trained in the principles of de-escalation and facilitation, then the need to increase the level of the response should be the exception rather than the rule.

10. Target enforcement

Along with tiered response plans, agencies should target enforcement only to those engaging in violence, property destruction, or other serious crimes. At large protests, taking police action against individuals without affecting peaceful bystanders will be difficult, and interventions must be well-focused and carefully considered. Even when enforcement is necessary against particular individuals, officers should continue to facilitate peaceful protest. Because of the real potential for enforcement to escalate a situation, two considerations should guide every enforcement decision:

- The likelihood that police action will improve the situation; and
- The seriousness of the offense(s) and the objective dangers they present.

To implement this approach, instruct and train officers to distinguish between violent criminal behavior and lower-level acts of civil disobedience. Explain that this strategy requires allowing some illegal but nonviolent behavior to persist, such as some traffic law violations. It also may require issuing citations instead of arrests for

²³ PERF 2018 REPORT, *supra* note 1, at 5.

²⁴ *Id.* at 71.

a broader swath of offenses than typically may be permitted.²⁵ Of course, the decision to issue citations for an arrest-eligible offense needs to be balanced against legitimate concerns that individuals will re-engage in the same illegal activity.²⁶ Yet policing agencies should make a concerted effort to use the least restrictive enforcement option at the outset and not assume, without an articulable basis, that the criminal behavior will continue.²⁷

Mass Arrests: Mass arrests should be avoided at all costs – they escalate tensions with protestors and deplete officer resources at the scene.²⁸ In the rare circumstances in which mass arrests may be necessary, incident commanders should develop a plan that estimates the number of anticipated arrests and ensures sufficient staffing.²⁹ For spontaneous events, the incident commander(s) should assess the scene on the ground to determine if additional personnel and resources are required.³⁰

To enable efficient processing, agencies may need to modify their typical arrest procedures to expedite processing. For example, agencies can develop a shortened intake form or eliminate fingerprinting for non-felony offenses.³¹ Reducing the the number of people fingerprinted during a protest assumes heightened relevance during COVID-19 because of public health concerns around shared, high-contact surfaces. If it is necessary to obtain fingerprints, i.e., when booking someone who's

committed a felony, agencies may consider using mobile fingerprint technology to expedite the process.³²

Agencies also should develop a high-volume processing system that prepares certain district houses or mobile facilities with adequate resources to process arrests as quickly as possible.³³ Individuals subject to arrest should be brought to the nearest processing facility.³⁴ Transport to a distant location should occur only when there is a substantial risk that on-site processing would allow the unlawful behavior to continue.³⁵ During processing, precautions should be taken to ensure that protestors' constitutional rights are respected, including providing reasonable access to restrooms, water, food, and necessary medical attention.³⁶ Special care should be taken to ensure that vulnerable populations, such as people with disabilities or transgender individuals, are searched and detained in a respectful manner; all effort must be made to provide shelter and restroom facilities appropriate to their needs and identities.

Crowd Containment: Indiscriminate crowd containment measures should rarely, if ever, be used; containment without a point of egress should never be permitted. Instead, agencies should focus on providing clear, well-spaced dispersal orders and isolating actual bad actors through a targeted enforcement approach. Policing agencies should develop a procedure

²⁵ See, e.g., OAKLAND POLICY, *supra* note 3, at 19 (recommending citation and release for minor offenses rather than custodial arrest); cf. COVID-19: Stay-At-Home and Social Distancing Enforcement, POLICING PROJECT, <https://bit.ly/3jJBRDi> (last updated May 20, 2020) (“Agencies are encouraged to avoid custodial arrests absent offenses that involve imminent public safety threats such as harm to others, and instead approach infractions through education and awareness. Even issuing citations should be considered carefully given the catastrophic financial impact of the pandemic on many individuals and families.”); Police Responses to COVID-19, Brennan Center, <https://bit.ly/3kPd3lW> (last updated July 8, 2020) (recommending police “issue warnings whenever possible. In the case of more severe infractions, police should issue a summons or a ticket in lieu of making an arrest absent an immediate threat to public safety.”).

²⁶ OAKLAND POLICY, *supra* note 3, at 20.

²⁷ *Id.*

²⁸ POLICE EXEC. RESEARCH FORUM, MANAGING MAJOR EVENTS: BEST PRACTICES FROM THE FIELD 44 (2011).

²⁹ OAKLAND POLICY, *supra* note 3 at 19.

³⁰ E.g., CHICAGO POLICE DEPT, MASS ARREST PROCEDURES SPECIAL ORDER S06-6 at III.A <https://bit.ly/2TxAr1E> (Sept. 27, 2018).

³¹ *Id.*

³² Mobile Fingerprint Identification, P.A. CHIEFS POLICE ASS'N, <https://bit.ly/2HHEuA0> [hereinafter MOBILE FINGERPRINT IDENTIFICATION]; U.S. DEPT HOMELAND SEC., MOBILE IDENTIFICATION FINGERPRINT DEVICES MARKET SURVEY REPORT 1-3 (January 2015), <https://bit.ly/3kCgUjF>; VERA INSTITUTE OF JUSTICE, LOS ANGELES COUNTY JAIL OVERCROWDING REDUCTION PROJECT FINAL REPORT 18 (Sept. 2011), <https://bit.ly/34CUJHc>; Memorandum from Danielle M. Outlaw (Mar. 17, 2020), <https://bit.ly/2HG05Hc>.

³³ PERF 2018 Report, *supra* note 1, at 18.

³⁴ OAKLAND POLICY, *supra* note 3, at 19 (requiring that arrestees be cited “at or near the demonstration cite” or, in the alternative, from “temporary processing stations or police facilities as near the site of arrest as possible.”).

³⁵ *Id.*

³⁶ See *id.* (requiring that detained arrestees receive “reasonable access to toilet facilities and to appropriate medical attention”).

ISSUE SPOTLIGHT: ZIP TIES

CONSIDER ALTERNATIVES, OR RESTRICT THEIR USE

Zip-ties—also known as flex cuffs—are lightweight hand restraints made of plastic or nylon that are an economical, disposable alternative to traditional metal handcuffs.³⁷ Unlike metal handcuffs, zip ties do not lock into a single fixed position when placed on a person's wrists.³⁸ Because of their low cost and light weight, they often are used by police to make a large number of arrests in a dynamic situation.³⁹ Yet, their flexibility also can lead to injury as the cuffs can continue to tighten after they're placed on an individual's wrists.⁴⁰ Excessive tightening and improper use of zip-tie cuffs can cause serious pain, bruising, lacerations, and numbness—or even permanent nerve damage.⁴¹

Because of these known risks, agencies instead should consider alternative restraint options, such as tri-fold disposable restraints.⁴² Made of plastic and designed for use by law enforcement, tri-fold restraints can lock in a fitted position on a person's wrist and thus reduce the potential for excessive tightening and subsequent injury.⁴³

Although these handcuffs may be more expensive than zip-ties, they still are more economical and more practical for field use than traditional metal handcuffs.

Agencies that are unwilling or unable to procure tri-fold restraints can reduce the risks posed by zip ties by adopting the following best practices:

- Require that officers carry flex cutters with them whenever they might use zip-tie cuffs.⁴⁴
- Require officers applying zip-ties to write their badge number in permanent marker on the cuffs so that supervisors or protestors can hold officers accountable for cuffs that are used improperly or maliciously.⁴⁵
- Explicitly require that arrestees in flex cuffs are checked at regular intervals, such as every 15 minutes, to ensure proper fit.⁴⁶

for communicating warnings to protestors prior to dispersing crowds. This should cover the time and manner in which warnings are given and how many times warnings will be repeated before arrests occur.⁴⁷ Warnings must be clearly audible and should consist of the offense or violations being committed that necessitate dispersal.⁴⁸ Agencies may need to invest in adequate loudspeakers and/or station officers at different ends of the

crowd to ensure all affected protestors can hear warnings. Long range acoustic devices may be used as public address systems, but they should not be deployed as a crowd control or dispersal tactic. Names of officers issuing dispersal orders should be recorded in the command log.⁴⁹ If police have sufficient notice of demonstrations, they should communicate these procedures and expectations to the public beforehand.⁵⁰ In addition, officers

³⁷ SARAH KNUCKEY, KATHERINE GLENN, EMI MACLEAN, ET AL., SUPPRESSING PROTEST: HUMAN RIGHTS VIOLATIONS IN THE U.S. RESPONSE TO OCCUPY WALL ST. 78 (2012), <https://bit.ly/2Ja609z> [hereinafter SUPPRESSING PROTEST].

³⁸ See, e.g., Gerry McNeilly, POLICING THE RIGHT TO PROTEST: G20 SYSTEMIC REVIEW REPORT, OFFICE OF THE INDEPENDENT POLICE REVIEW DIRECTOR 238, <https://bit.ly/34Bb3lm> (May 2012) [hereinafter McNeilly].

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See also, Peter Senzamic, *Plastic Handcuff Use by NYPD During Anti-Brutality Protests Strikes a Nerve*, CITY, <https://bit.ly/37OmSwV> [hereinafter SENZAMICI].

⁴² *Tri-Fold Restraints*, ASP, <https://bit.ly/3jCYUab> (last visited Aug. 7, 2020).

⁴³ See McNeilly, *supra* note 39, at 238–39 (noting that tri-fold restraints, such as the ASP plastic wrist restraint, “can be locked . . . to reduce the potential for the restraint to tighten and cause unnecessary pain or injury to the detainee”).

⁴⁴ See, e.g., OAKLAND POLICY *supra* note 3 at 19 (“each unit involved in detention and/or transportation of arrestees with flex-cuffs should have a flex-cuff cutter and adequate supplies of extra flex-cuffs readily available.”); Sacramento Police Department, *Search & Handcuff Manual*, 4 <https://bit.ly/34zeTBI> (“Officers using flex cuffs must have a cutting tool in their possession in order to remove the cuffs. A wire cutter or diagonal cutter should be used rather than a knife.”).

⁴⁵ OAKLAND POLICY, *supra* note 3, at 19.

⁴⁶ SUPPRESSING PROTEST *supra* note 37 at 44 (quoting Nevada Dep’t. of Corr. Admin. Reg. 407, Use of Handcuffs and Restraints 3).

⁴⁷ PERF 2018 REPORT, *supra* note 1, at 27; IACP MODEL POLICY, *supra* note 5, at 5.

⁴⁸ IACP MODEL POLICY, *supra* note 5, at 5; PERF 2018 REPORT, *supra* note 1, at 27; POLICING PROTESTS, *supra* note 1, at 78–79 (“provide people with the opportunity to ‘heed the warnings and exit the area’”).

⁴⁹ IACP MODEL POLICY, *supra* note 5, at 5.

⁵⁰ PERF 2018 REPORT, *supra* note 1, at 27.

should be trained in the procedures for crowd containment tactics, including simulations during scenario-based training.

Police should avoid kettling, or other restrictive containment tactics, unless absolutely necessary.⁵¹ Kettling is a crowd control tactic in which police confine a group of demonstrators in a small area and control access in and out of the area. In limited situations, targeted crowd containment practices may serve to de-escalate potentially violent situations while avoiding police use of force.⁵² For example, police may attempt to separate and contain actually violent members of a crowd as an alternative to arrest or using force and/or to prevent a breach of peace from expanding. Still, kettling or any containment practice that doesn't provide exit points or differentiate peaceful protestors raises legitimate legal and human rights concerns.⁵³ Adopting a targeted approach to protest policing should obviate the need to deploy group containment tactics.⁵⁴

In the limited situations in which large-scale crowd containment measures are necessary, agencies should apply the following best practices:

- *Exit:* Officers should never encircle a crowd without providing a consistent point of exit.⁵⁵

- *Communication:*
 - Clear warnings, in multiple languages, should be issued prior to implementing any containment tactic with real opportunity to comply.⁵⁶
 - Officers should never encircle a crowd and subsequently order them to disperse.⁵⁷
 - Officers should provide regular updates to contained individuals on duration and reasons for containment.⁵⁸
- *Differentiation:*
 - Agency policy and guidelines should include a general prohibition on containing media and legal observers.⁵⁹
 - All efforts should be made to contain only violent protestors, with non-violent protestors and bystanders identified and allowed to filter out as soon as possible.⁶⁰
- *Welfare:*
 - Care should be rendered to anyone experiencing a medical emergency in the containment zone.⁶¹
 - Discomfort of those contained should be limited, with plans in place to provide access to toilets and water.⁶²
- *Duration:* Containment should last only as long as is absolutely necessary to quell violence or risk of serious injury to non-violent protestors and bystanders.⁶³

⁵¹ NATI POLICING IMPROVEMENT AGENCY, MANUAL OF GUIDANCE ON KEEPING THE PEACE 110 (2010) <https://bit.ly/3INGP51> [hereinafter NPIA REPORT]; see also Use of Police Lines, D.C. Code § 5-331.08 (2005) <https://bit.ly/3jKXuUB> (prohibiting the encirclement of protestors except in limited circumstances such as to ensure demonstrators' safety); *European Court Says 'Kettling' Tactics in 2001 Lawful*, BBC (March 15, 2012), <https://bbc.in/3jGX7Rq> (reporting European Court of Human Rights' decision that kettling may be lawful if deployed in particular circumstances and to protect human life and avoid property damage).

⁵² PORTLAND CITY AUDITOR, POLICY REVIEW: POLICE BUREAU CAN IMPROVE ITS APPROACH TO CROWD CONTROL DURING ST. PROTESTS 9 (2018), <https://bit.ly/34z22A> [hereinafter PORTLAND POLICY REVIEW].

⁵³ POLICING PROTESTS, *supra* note 1, at 76; PERF 2018 REPORT, *supra* note 1, at 73.

⁵⁴ POLICING PROTESTS, *supra* note 1, at 76.

⁵⁵ PERF 2018 REPORT, *supra* note 1, at 19, 75.

⁵⁶ NPIA REPORT, *supra* note 51, at 110; cf. PERF 2018 REPORT, *supra* note 1, at 72; IACP MODEL POLICY, *supra* note 5, at 4-5 (recommending clear warnings given prior to arrests or forced crowd dispersal); PORTLAND POLICY REVIEW, *supra* note 52, at 12 (recommending a policy on mass detentions that includes warnings provided to protestors prior to detention).

⁵⁷ PERF 2018 REPORT, *supra* note 1, at 27.

⁵⁸ NPIA REPORT, *supra* note 51, at 110.⁵

⁵⁹ PORTLAND POLICY REVIEW, *supra* note 52, at 12.

⁶⁰ NPIA REPORT, *supra* note 51, at 110; see also, POLICING PROTESTS, *supra* note 1, at 76 (condemning overly restrictive crowd containment measures and recommending a differentiated response strategy that targets only those actually engaged in criminal activity).

⁶¹ NPIA REPORT, *supra* note 51, at 111.

⁶² Id.; PORTLAND POLICY REVIEW, *supra* note 52, at 12.

⁶³ See NPIA Report, *supra* note 51, at 110 (directing that crowd containment tactics be limited in time).

11. Communicate transparently (both internally and externally)

During a protest, clear communication reduces conflict and promotes safety for officers and protestors alike. Internally, officers should have access to a dedicated radio line for logistics and to communicate needs to command for essentials like food, water, or medical attention.

Policing agencies also should develop external communication plans for protestors, the general public, and the media. Agencies should acknowledge the essential roles played by journalists and legal observers and ensure their access to information and ability to do their jobs unobstructed absent serious public safety concerns. Legal observers should have access to areas where arrests are being made unless their presence would in fact obstruct lawful enforcement action. Even then, visual access for media and legal observers should be preserved.

To reduce the administrative burden on police and remove any appearance of a conflict of interest, press credentialing and legal observer registration should be handled by a separate agency or neutral body. Agencies also should consider maintaining an agency press officer in the field to answer journalists' questions and address issues raised.

To communicate with demonstrators, agencies should ensure that all announcements or warnings are audible and well documented. Agencies should implement a clear warning procedure, discussed above, that requires multiple, well-spaced warnings in relevant languages before any enforcement action.⁶⁴ To inform the general public, agencies should share live updates and information on social media during the course of an event. For multi-day protests, agencies also should share live updates and information on social media during the course of an event. For multi-day protests, agencies also should conduct daily press

conferences that share rules of engagement, enforcement rationale, and accurate information while correcting misinformation.⁶⁵

Command should share intelligence with protest leaders about outside agitators infiltrating lawfully planned protests and demonstrations. Certainly, that information will affect the policing agencies' strategy and their operations before and during the demonstration. It is plausible that such information also may impact protest leaders' plans, communications and safety measures. In the spirit of facilitating peaceful protests and protecting those who choose to exercise their First Amendment rights, agencies should do everything in their power to ensure peaceful and lawful demonstrations are not thwarted by those with ulterior motives. To not share such pertinent information not only jeopardizes the demonstration and its orderliness but it also jeopardizes the safety of the event's participants.

Relatedly officers should never attempt to covertly infiltrate a group engaged in protest activities unless there is reasonable suspicion that the group is planning to engage in criminal activity and there are no less intrusive investigatory means. Undercover police activity at protests can chill First Amendment rights and lead to violence.⁶⁶

Finally, officer anonymity should be prohibited, with badges and nameplates clearly visible at all times. As David Couper, the former Madison, Wisconsin Chief of Police and a noted expert in protest policing has explained, "[a]nonymity or any depersonalization of police conducting crowd management encourages negative crowd behavior. It can also lead to unaccountable behavior on the part of the police."⁶⁷ If displaying names presents demonstrated harassment concerns, officers should be clearly identified with numbers. Similarly, police leadership should be visible, with on-the-ground command staff available to respond to issues raised by protestors.

⁶⁴ Koerth & Lartey, *supra* note 2 (describing transparent communication as a best practice de-escalation tactic).

⁶⁵ PERF 2018 REPORT, *supra* note 1, at 58, 79.

⁶⁶ Sahil Singhvi, *Police Infiltration of Protests Undermines the First Amendment*, BRENNAN CENTER (Aug. 4, 2020), <https://bit.ly/34AqC36>

⁶⁷ David Couper, *Crowds, Protest and Police, Improving Police*, Oct. 31, 2011, <https://bit.ly/34Cjxiz>.

After the Event

12. Evaluate

Some of the most important policing work begins when a protest ends in the form of internal evaluation. For larger demonstrations or those that result in violence or uses of force, policing agencies should engage in comprehensive after-action reviews to understand what went right and what could be improved. Ideally, these reports should be conducted by a neutral party, such as an Inspector General. They should include investigations of all uses of force and should contain feedback from event organizers, participants, and other affected community members to ensure the review represents a holistic picture of the event. All findings should be made public.

13. Retrain

Following these reviews and at regular intervals, demonstration training should be re-evaluated and updated to reflect lessons learned from post-event assessments.

14. Support

Finally, officers should be provided with access to counseling and peer support as needed in the event of violence or other traumatic or stressful events during a protest.

Conclusion

Protests present some of the most complex and challenging situations police face. This guide provides strategic and operational recommendations to enable fair and effective policing practices before, during, and after these events. Implementing these recommendations should help ensure that an agency's approach to protest policing not only protects public safety but also preserves citizens' constitutional rights.

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