



Joint Committee on Transparent Policing and Use of Force Reform
Kelly Simon, Interim Legal Director of ACLU of Oregon
July 8, 2020

Co-chairs Manning and Bynum, Members of the Joint Committee,

Thank you for inviting the ACLU of Oregon¹ to testify today on this important and timely topic. The Bill of Rights, of our state and federal constitutions, are grounded in values that are believed to be among the requirements essential to the recognition of full human dignity and a free people. The fact that, in Oregon, we have continued to deny Black and Indigenous People and all people of color their full humanity, is shameful and must be reckoned with. It requires us to re-examine and re-commit to seeing and using constitutional principles to demand that all people must be afforded their full rights and dignities as human beings.

Free expression is one of these foundational principles and is necessary to our system of self-government, in part because it gives the people a "checking function" against government excess and corruption. If, we the people, are to have any hope of reaching our aspirations to live freely we must be able to fully participate in, be a check upon, and even push back against our elected government. To be full participants in our democracy, people must be well-informed and have access to all information, ideas and points of view. Mass ignorance, and control of the masses, creates a breeding ground for oppression and tyranny.

But in spite of its fundamental nature, our nation's commitment to freedom of expression has been tested over and over again. Especially during times of national stress, like war abroad or social upheaval at home, people exercising their First Amendment rights have been censored, fined, even jailed. And history has taught us that the government is more apt to use its power to suppress and prosecute minorities rather than to support and protect their rights.

Both the United States and Oregon Constitution protect the right to express oneself and protect the right to gather together. These are protections from government action and intrusion, not protection between or among private parties, a line that admittedly is not always clear. While generally no government actor, federal or state, can violate the federal constitutional protections, state and local actors must also comply with Oregon's constitution, which can be more protective of these fundamental rights. Neither the United States nor the Oregon constitution allow the government to censor expression based on the content or viewpoint expressed.

¹ The American Civil Liberties Union of Oregon (ACLU of Oregon) is a nonpartisan organization dedicated to the preservation and enhancement of civil liberties and civil rights. We have more than 30,000 members and supporters in the State of Oregon, and that number is growing as we speak.

But under both constitutions, the analysis becomes very fact specific. The location, the manner of expression, the degree of government intrusion, the context and the harm caused to others all become important parts of the analysis. So today, I want to provide a high-level overview of general legal principles, but it is in no way intended to be an exhaustive presentation of the law.

Let's start with the federal constitution. The First Amendment to the United States Constitution provides that, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Under the First Amendment, the government cannot enact content- or viewpoint-based restrictions. Some very limited exceptions exist for things like "true threats," where the speaker communicates an intent to commit an imminent act of unlawful violence to a particular individual or group of individuals.² Under the First Amendment, the government can impose certain, content-neutral restrictions on the time, place and manner of expression, but such laws are subject to careful judicial scrutiny to ensure that they serve an important objective (not involving suppression of speech), are narrowly tailored, and allow accessible alternatives. Free speech rights are strongest in what are known as "traditional public forums," such as streets, sidewalks, and parks, as opposed to limited public forums like virtual video legislative rooms or on private property.

Under Article I, Section 8 of the Oregon Constitution "No law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever...". This expansive free expression clause makes Oregon a national leader on free speech issues. Under Article I, section 26 of the Oregon Constitution, "No law shall be passed restraining any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good...". In Oregon, "**Article I, section 8**, prohibits lawmakers from enacting restrictions that focus on the content of speech or writing, either because that content itself is deemed socially undesirable or offensive, or because it is thought to have adverse consequences."³ In Oregon, if a law is focused on protecting against a particular harm but restricts speech, the law cannot be so broad as to reach constitutionally protected activity. This high standard means that both the content and context of speech receive very broad protection in Oregon.

In short, under both constitutions, the question of whether expressive activity is protected from government intervention is an easy "yes" when that activity is purely expression, an easy "no" when the activity is violent, and a clear "maybe" when it is somewhere in the middle -- when a person is expressing a viewpoint and causing harm in the process. There is a long history of struggle with these tough questions and we continue to see new tough questions arise as methods and mediums of expression evolve.

In Oregon, we have seen over a month of nightly protests against Police killing of and brutality against Black people. The public's rising up and demanding that its government officials and systems ensure that Black Lives Matter strikes at the very precious necessity of strong protections for the freedom of expression. However, we are seeing these foundational principles tested yet again, and yet again those tests are suppressing dissent are creating a damping effect on our first amendment rights.

² *Virginia v. Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003).

³ *State v. Robertson*, 293 Or 402, 416-17 (1982)

There are three crimes we often see police rely on to claim that those in the streets are not engaged in speech but rather conduct that they can punish: those are riot, disorderly conduct in the second degree for blocking traffic, and interfering with a peace officer for refusing to obey a lawful order. The breadth of these laws gives police wide latitude to unleash severe and life-threatening levels of force against the public, as well as strap people like journalists and medical graduate students providing first aid to protesters with arrest and criminal records.

Additionally, there is a disturbing pattern that has emerged in the last few years in Portland where we see police declare an assembly “unlawful,” order a dispersal and use significant amounts of indiscriminate weapons to force that dispersal. The civil disturbance statute, ORS 131.675, grants law enforcement explicit authority to disperse crowds it deems “unlawful.” However, the Oregon legislature chose, for good reasons, to delete the definition of “unlawful assembly” from Oregon statutes, and affirmatively considered and decided not to create a crime of “unlawful assembly”. This creates unfettered dispersal power that is a grave threat to those wanting to protest. The legislature should revisit the necessity of this statute all together.

As the Legislature and the public continue to dialogue on the important topics covered by this Joint Committee, the ACLU of Oregon’s offers our Core Guiding Principles for Policing of Protest. These principles were crafted with the expressed purpose of ensuring our fundamental right of free expression is upheld in the context of policing protests.

- Law enforcement should play no role in First Amendment contexts, unless it is to protect and enable the exercise of our constitutional and human rights to protest and to gather with others to make our voices heard. Law enforcement should not use violence to control the crowd or silence those they disagree with.
- Police response to protests and other mass assemblies should not involve militarized displays or mass violence by the government, and law enforcement should never deploy indiscriminate weapons, such as tear gas and stun grenades, on any mass gathering or assembly. In addition to posing serious risks to people’s health and safety, such weapons almost by definition violate our right to due process and will seldom, if ever, constitute the least restrictive means available to regulate unlawful conduct in the context of a protest or mass assembly.
- Police officers are subject to the Constitution—including the Due Process Clauses and the First and Fourth Amendments—during mass assemblies, just as they are at any other time. That means the police cannot use pepper spray or mace against protesters, arrest people without individualized probable cause, use excessive or disproportionate force, arrest protesters for criticizing them, or rely on illegal profiling factors like race or ethnicity.
- The most successful law enforcement approach to unlawful conduct at a mass assembly focuses on de-escalation, effective communication, and crowd management, not crowd control...or not, as one Portland police officer recently described it to local media, “pain compliance.”

Regardless of the viewpoints being expressed in Oregon streets, both the federal and Oregon constitution provides expansive protection for our freedom of expression and right to gather together. In the context of current events, it is imperative that we move forward with the simple understanding that the role of police should be to ensure the protection of this fundamental right, not to impede it. Thank you again for inviting me to speak today.

Sincerely,

A handwritten signature in black ink, appearing to read 'K.S.' with a stylized flourish extending to the right.

Kelly Simon
Interim Legal Director