



Joint Interim Committee on Transparent Policing & Use of Force Reform

Testimony submitted by Courtney Helstein on behalf of the ACLU of Oregon

July 17, 2020

Chairs Manning and Bynum, and Members of the Committee,

The American Civil Liberties Union of Oregon¹ has long fought to preserve and extend constitutionally guaranteed rights to people who have historically been denied their rights on the basis of race. We stand with Black leaders and communities in their call to address and end the violence and killings they endure at the hands of police.

As previously requested, we continue to call for the establishment funding of a community-led effort to reimagine safety and resilience. This should include grounding and resourcing the effort in Black-led and Black-serving organizations and advocates, including leaders from transgender and houseless communities. These communities have identified a need for the time and resources to produce a community-driven long-term plan and subsequent policy, practice, and resource proposals for decision-makers to engage with.

As we continue to come together with a commitment to fundamentally redesign and realign our communities around what public safety means and looks like, there are urgent issues we hope the legislature will address in the upcoming special session.

HB 4208 & Protecting Protest

In Oregon, we have seen over a month of nightly protests against Police killing of and brutality against Black people. The public is demanding that government officials and systems act to ensure that Black Lives Matter. Yet state and federal police actions are curtailing dissent with disproportionate violence against protesters in violation of the First Amendment and Article 1 Section 8 of the Oregon Constitution.

A disturbing pattern that has emerged in the last few years in Portland. The 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 decided

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.

not to create the crime of “unlawful assembly”. This creates an unfettered dispersal power that is a grave threat to those wanting to protest. The legislature should revisit the entirety of this statute.

While the intent of HB 4208 was to severely limit the use of tear gas by police, it has instead codified a pathway for law enforcement to declare protests illegal and use tear gas on protesters based on the alleged actions of a few. The Portland Police Bureau (PPB) declared four riots within two weeks of the new law passing, including one the first night it was enacted (June 30th). PPB declared only one riot in the preceding five-week period between when George Floyd was killed and the date the law was enacted. Nothing changed about the nature of the protests in that period other than the passage of the bill. The intent of the new law was to limit the use of tear gas but it has had the opposite effect.

ORS 166.015, the riot statute, allows police to arbitrarily and without notice to the crowd classify a protest as a “riot” based on the isolated actions of a few protesters. In fact, the alleged actions of *just five people* at a peaceful protest of hundreds, or thousands, allows police to declare a “riot”. By connecting the use of tear gas by police to Oregon’s riot statute, the threshold police must meet is too low.

We implore the legislature to outright ban the use of tear gas, a weapon of war, in Oregon. Furthermore, the legislature should take further action to immediately prohibit the use of all indiscriminate weapons and provide enough flexibility to capture weapons that we know of today, like tear gas and flash bangs, and future indiscriminate weapons that we do not know of yet. While LRADs can be useful for police to communicate with protesters, the use of them as a weapon should be banned. Officers cannot control who is impacted by large clouds of chemical irritants, nor can they control who may be impacted by flashbangs or the piercing and painful sounds from LRADS. These weapons are by their very nature indiscriminate and their use should be prohibited.

Qualified Immunity

Police officers often escape liability because of qualified immunity, a legal doctrine that prevents the community from holding police responsible when they violate laws, policies, and community trust. Police officers are government officials who should be held accountable to the people they serve.

When the Supreme Court invented the doctrine of qualified immunity in 1967 it was intended to be a modest exception for those government actors who acted in good faith and reasonably believed their conduct was legal. Since then, the doctrine has expanded to provide broad immunity for law enforcement officers’ acts of violence and discrimination.

Recently, Colorado passed Senate Bill 20², which among other important provisions creates a new venue for discrimination and brutality claims under their state constitution in state court, by creating a damages action and providing for attorneys' fees.

² Colorado SB 20-217, Section 3, 2020: http://leg.colorado.gov/sites/default/files/2020a_217_signed.pdf

Officers should not be allowed to shield themselves with the doctrine of qualified immunity which has served to protect officers from accountability and deny families justice.

Like Colorado, Oregon should move to address qualified immunity by allowing victims of police misconduct to enforce their civil rights and bring a lawsuit against officers who must be held accountable.

HB 4203: Chokehold Ban

Chokeholds should be banned. Period. Restricting someone's airway can cause serious injury and death, there should be no room for ambiguity in this law. **However, there are some problematic loopholes in the HB 4203 that we strongly encourage the legislature to address immediately**

The word "knowingly" should be removed from the bill. This creates a standard that can be near impossible to prove in many circumstances, rendering the bill ineffective in fully banning this dangerous and often lethal maneuver.

Section 2(1): A peace officer is not justified in any circumstance in knowingly using physical force that impedes the normal breathing or circulation of the blood of another person by applying pressure on the throat or neck of the other person, unless the circumstance is one in which the peace officer may use deadly physical force as provided in ORS 161.239.

A key component in ending the practice of chokeholds by law enforcement is ensuring that training officers on this maneuver is prohibited. Allowing continued training is counter to the goal of ending this lethal maneuver. Additionally, this language continues to allow not only the training of but the use of chokeholds, and law enforcement can simply declare they were acting in self-defense in order to avoid discipline.

Section 5. The Board on Public Safety Standards and Training shall adopt rules prohibiting the training of police officers and reserve officers to use physical force that impedes the normal breathing or circulation of the blood of another person by applying pressure on the throat or neck of the other person, ~~except as a defensive maneuver.~~

SB 1604: Arbitration

In an effort to uphold agreed-upon discipline standards, the concept would prohibit an arbitrator from lessening a disciplinary action against a police officer if the arbitrator and the law enforcement agency determine that the officer has committed misconduct and was disciplined in a manner consistent with a disciplinary matrix adopted via collective bargaining.

While the ACLU of Oregon is in support of the general concept of this bill, we have concerns that with the current language law enforcement agencies and police union bargaining teams will

be incentivized to reduce discipline matrix outcomes in order to anchor arbitrators. It also continues to keep the public out of the conversation about appropriate officer accountability. **We respectfully request for the bill to be amended to add a statewide floor on discipline and ensure discipline matrices are not subject to collective bargaining.**

The ACLU of Oregon looks forward to continued work with this committee. Thank you for the opportunity to provide testimony.