Proposal to Repeal ORS 131.675, Oregon's Unlawful Assembly Statute

American Civil Liberties Union of Oregon
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INTRODUCTION

ORS 131.675 provides that "[w]hen any five or more persons, whether armed or not, are unlawfully or riotously assembled," officers must "command them in the name of the State of Oregon to disperse. If, so commanded, they do not immediately disperse, the officer must arrest them or cause them to be arrested; and they may be punished according to law."

But the law does not punish unlawful assembly. The Oregon legislature repealed the statutory definition of "unlawful assembly" and declined to criminalize the act. A separate statute, ORS 166.015,[1] punishes the crime of riot. Yet ORS 131.675 somehow remains on the books, permitting authorities to disperse gatherings they unilaterally determine are "unlawful" and authorizing the arrest of those who do not comply. The statute thus violates state and federal constitutional protections of free speech, free assembly, and freedom from unreasonable search and seizure. It also contravenes long-standing legislative intent to prevent and penalize violent riots, not passive assemblies of citizens exercising free speech rights.

ORS 131.675 is nothing more than a toothless vestige of the Deady[2] era. Its prohibition of "riotous" assemblies is redundant of the riot statute, ORS 166.015, and its attempted regulation of "unlawful assembl[ies]" reaches constitutionally protected conduct. Because it no longer serves any valid purpose, ORS 131.675 should be repealed and its requirement that authorities provide notice before dispersing a "riotously assembled" group should be incorporated into the criminal riot statute, ORS 166.015.

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[1] ORS 166.015 provides that "[a] person commits the crime of riot if while participating with five or more other persons the person engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm."

[2] As a member of Oregon's territorial legislature and delegate to the Oregon constitutional convention, Matthew Deady advocated for racist positions, including slavery and discrimination against African and Chinese Americans. The University of Oregon recently renamed the hall formerly named after Deady, and despite being Oregon's first federal judge, his portrait was removed from the federal courthouse. https://www.wweek.com/news/2020/06/16/portrait-of-matthew-deady-oregons-first-federal-judg e-stripped-from-u-s-courthouse-lobby/

DISCUSSION

A. Executive Summary.

ORS 131.675 threatens rights under the state and federal constitutions for two independent reasons.

First, ORS 131.675 is overbroad. By failing to define "unlawful assemblies" but nonetheless prohibiting them, the statute reaches constitutionally protected conduct, including the right to free speech, peaceful assembly, and freedom of the press.

Second, the statute unconstitutionally permits the arrest of participants who fail to disperse once an officer deems an assembly "unlawful," even though violation of ORS 131.675 is not a crime. Any such arrest would violate state and federal prohibitions on unreasonable seizures, and corresponding Oregon statutory law. *See* U.S. Const. amend. IV US Const, Art I, § 4; Or Const, Art I, § 9; ORS 133.310.

Moreover, even if ORS 131.675 could be amended to comply with constitutional requirements, the statute is superfluous in light of the riot statute, ORS 166.015. ORS 131.675 lost independent significance in 1987 when the Oregon legislature repealed former subparts (2) and (3). Instead of attempting to amend ORS 131.675 to satisfy constitutional and statutory restrictions, we recommend that the legislature focus on continuing the work it began decades ago and develop an enforceable, effective, and constitutional anti-riot statute. To that end, we recommend that the legislature amend ORS 166.015 to add ORS 131.675's requirement that officers provide notice before dispersing riotous crowds. ORS 131.675, however, should be repealed.

B. ORS 131.675 Restricts Constitutionally Protected Conduct.

The First Amendment to the United States Constitution provides in relevant part, "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press or of the right of the people peaceably to assemble, and to petition the government for a redress of grievances." US Const. Am. 1.

The free speech guarantee in the Oregon Constitution is widely considered one of the nation's strongest, broader in scope than even the First Amendment to the U.S. Constitution since it specifies that no subject is off limits. It reads: "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; but every person shall be responsible for the abuse of this right." Or Const, Art I, § 8.

1. ORS 131.675 Permits Dispersal of Peaceable Assemblies in Violation of Federal and State Constitutional Rights and Legislative Intent.

ORS 131.675 purports to regulate both "riotous[]" and "unlawful[]" assemblies, but the Revised Statutes define only riot, not unlawful assembly. Without any narrowing, ORS 131.675 proscribes peaceful, non-violent gatherings that authorities may unilaterally deem "unlawful." As such, the statute reaches conduct protected by Article I, sections 8 and 26 of the Oregon Constitution. *See* Or Const, Art I, §§ 8, 26 (prohibiting laws that, among other things, "restrain[] any of the inhabitants of the State from assembling together in a peaceable manner to consult for their common good").

In addition, given existing Oregon law defining and prohibiting riot, there is no *need* to narrow, rather than delete, the overbroad prohibition on "unlawful assembl[ies]." The legislative history behind ORS 131.675 demonstrates a clear intent to regulate riots—not some lesser and undefined "unlawful assembly." Indeed, the legislature expressly *repealed* the definition of unlawful assembly more than three decades ago, yet failed to repeal ORS 131.675. The legislature should do so now.

a. The Legislative History Behind the Decision to Repeal the Definition of "Unlawful Assembly" Demonstrates Intent to Regulate Violent Riots.

Much like the current enactment of ORS 131.675, the statute's closest, earliest iteration failed to define "unlawful[] * * * assembl[y]":

> "If any persons, to the number of three or more, whether armed or not, shall be unlawfully, riotously or tumultuously assembled in any city, town, or county, it shall be the duty of the mayor and each of the altermen and councilmen * * *, and of every justice of the peace * * *, and of the sheriff * * * to go among the persons so assembled, or as near them as may be with safety, and in the name of the territory of Oregon, to command all the persons so assemble, immediately and peaceably to disperse; and if the persons so assembled, shall not thereupon immediately and peaceably disperse, it shall be the duty of each of the magistrates and officers to command the assistance of all persons there present, in seizing, arresting and securing in custody, the persons so unlawfully assembled, so that they may be proceeded with according to law."

App. A (General Laws of Oregon, ch VII, § 1, pp. 227-28 (1855)).

By 1864, the Oregon legislature had provided definitions for "riot" and "unlawful assembly":

> "Any use of force or violence, or any threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together, and without authority of law, is riot. Whenever three or more persons assemble with intent, or with means and preparations, to do an unlawful act, which would be riot if actually committed, but do not act towards the commission thereof, or whenever such persons assemble without authority of law, and in such manner as is adapted to disturb the public peace or excite public alarm, or disguised in a manner to prevent them from being identified, such an assembly is an unlawful assembly."

App. B (General Laws of Oregon, Crim Code, ch XLVII, § 623, p. 556 (Pittock 1864)); *see also* App. C (The Codes and Statutes of Oregon, title XIX, ch VI, § 1913 (Bellinger & Cotton 1902)).

These definitions remained largely unchanged for nearly a century. By 1962 they read as follows:

> "(1) Any use of force or violence, or threat to use force or violence, if accompanied by immediate power of execution, by three or more persons acting together, and without authority of law, is riot.
>
> "(2) When three or more persons assemble with intent, or with means and preparation to do an unlawful act, which would be riot if actually committed, but do not act towards the commission thereof; or assemble without authority of law and in a manner adapted to disturb the public peace or excite public alarm; or assemble disguised in a manner adapted to prevent them from being identified, it is an unlawful assembly."

App. D *(Former* ORS 166.040 (1969)).[3]

The statutes changed in 1971, when the legislature enacted the Oregon Criminal Code of 1971: "the culmination of a comprehensive effort to revise substantive Oregon criminal law."

[3] Earlier versions exist at Oregon Laws chapter 207, section 84 (1921) and ORS 145.020 (1953).

State v. Chakerian, 325 Or 370, 378, 938 P2d 756 (1997); *see also State v. Wille,* 317 Or 487, 499, 858 P2d 128 (1993).

As relevant here, the overhaul revised the definition of "riot" contained in ORS 166.040(1) to what is currently enacted as ORS 166.015. The commentary to the initial Proposed Criminal Code suggests the drafters based the new definition in part on five common law "riot" factors:

> "(1) there must be at least three persons; (2) they must have a common purpose; (3) there must be execution or inception of the common purpose; (4) there must be an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose; (5) *there must be force or violence,* not merely used in demolishing, but displayed in such a manner as to alarm at least one person of reasonable firmness and courage."

App. E (Proposed Criminal Code § 218, p. 212 (quoting Kenny's Outline of Criminal Law § 437 (17th ed 1958))) (Emphasis added).

The drafters emphasized that "Mt must be shown that the rioters were involved in a common disorder; it is not enough to show that numerous individuals were engaged in similar unrelated activities. *Mere presence without taking part by word or deed is not participation." Id.* (emphasis added). They described the phrase "tumultuous and violent conduct," as used in ORS 166.015, as intending to *"represent more than mere loud noise or disturbance. The language is designed to imply terroristic mob behavior involving ominous threats of personal injury and property damage. Persons participating in large urban riots would probably be punished for individual criminal acts rather than for riot." Id.* (emphasis added).

The definition of "unlawful assembly" was also the subject of some discussion. The October 24, 1969 subcommittee meeting of the Oregon Criminal Law Revision Commission reflects an understanding that an unlawful assembly was a crowd "that might develop into a riot" and the prohibition covered conduct "designed to incite a riot even though riot has not yet occurred." Oregon Criminal Law Revision Commission, Subcommittee No. 3, p. 3 (Oct. 24, 1969).

Ultimately, however, the legislature elected to delete the existing definition—which turned exclusively on assemblers' unmanifested "intent" to do an unlawful act, disturb the public peace, or excite public alarm *(see* App. E *(former* ORS 166.040(2)))—without revision.

b. The Former Definition of "Unlawful Assembly" Threatened Constitutionally Protected Free Speech and Assembly.

The Oregon legislature's focus on prohibiting riots and penalizing only those actually engaged in violence—rather than assembling with an "intent" to do so—was consistent with changes occurring elsewhere. In 1971, as the Criminal Code overhaul was underway, the Virginia Supreme Court invalidated Virginia's unlawful assembly statute, which contained definitions nearly identical to Oregon's, on First Amendment grounds. *Compare former* Va Code § 18.1-254.1 *with* App E *(former* ORS 166.040(2)); *see Owens v. Commonwealth,* 179 SE2d 477 (Va 1971).

The Virginia court rejected the statute's proscription of assemblage based on the participants' mere *intent* to use force and violence "even though they do not have the means of effecting force and violence and they do not pose a threat of force and violence." 179 SE2d at 479. As with Oregon's pre-1971 statutory scheme, the Virginia statute unconstitutionally outlawed "a mere gathering of inactive, silent and unobstructive persons * * * if they have the described subjective intent or purpose." *Id.* at 480.

Three decades later, the Oregon Supreme Court invalidated a disorderly conduct statute for similar reasons. ORS 166.025(1)(e) proscribed an individual's "peaceabl[e] * * * congregat[ion]" with others based solely on their *"intent* to cause public inconvenience, annoyance or alarm." *State v. Ausmus,* 336 Or 493, 507, 85 P3d 864 (2003) (emphasis added).[4] The Court held that because the statute "reache[d] that conduct, the legislature has stepped beyond the permissible regulation of damaging conduct or the harmful effects that may result from assembly or speech" and encroached on rights protected by Article I, sections 8 and 26, of the Oregon Constitution. *Ausmus,* 336 Or at 507.

The ban on "unlawful assembly" is improper with *or* without the prior definition. As detailed further below, full repeal of ORS 131.675 is the logical conclusion to the efforts begun decades ago.

2. ORS 131.675 Permits Arrest Without Probable Cause of a Crime in Violation of Constitutional Protections and Oregon Statutory Law.

ORS 131.675 also is unconstitutional because it authorizes the warrantless arrest of citizens without probable cause that a crime has been committed. *See Beck v. State of Ohio,* 379 U.S. 89, 91, 85 S. Ct. 223, 225, 13 L. Ed. 2d 142 (1964) (a warrantless arrest is reasonable and

[4] ORS 166.025(1)(e) provided that '" [a] person commits the crime of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, the person * * * [c]ongregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse[.]"' *Ausmus,* 336 Or at 498 (third brackets in original) (quoting *former* ORS 166.025(1)(e)).

consistent with the Fourth Amendment of the United States Constitution only if based on probable cause to believe that the individual "had committed or was committing" a crime)); *Dunaway v. New York,* 442 U.S. 200, 218, 99 S. Ct. 2248, 2260, 60 L. Ed. 2d 824 (1979) (officers "violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner"); Or Const, Art I, § 9 (prohibiting laws that violate the right of people to be secure against unreasonable search or seizure). It also violates related Oregon statutory law that identifies when an officer may arrest an individual without a warrant—that is, when an officer has probable cause to believe a crime has been committed. *See* ORS 133.310 (police officer may arrest without a warrant if the officer has probable cause to believe that the person has committed a felony, a misdemeanor, an unclassified offense punishable by the maximum penalty allowed for a Class C misdemeanor, or a crime in the officer's presence).

"Unlawful assembly" is not, and never has been, a crime. Oregon statutes have only ever penalized *rioters. See, e.g.,* App. B (General Laws of Oregon, ch XLVII, § 624, p. 557 (Pittock 1864) (describing felony or misdemeanor charges for persons "guilty of participating in any riot")); App. C (The Codes and Statutes of Oregon, title XIX, ch VI, § 1914 (Bellinger & Cotton 1902) (same)); ORS 1 66.015.[5]

Indeed, the Oregon courts recognized early that while the Criminal Code "define[d] 'unlawful assembly,'" it did not "declare a participation therein, *when not accompanied by violence,* to be a misdemeanor or crime, *and affixe[d] no penalty therefor." State v. Stephanus,* 53 Or 135, 138, 99 P 428 (1909) (emphasis added). In other words, "an assemblage of persons, unaccompanied by any acts such as would bring it within the charge of riot, as defined by our Code, *[wa]s not a crime under [Oregon's] statute";* an assemblage became unlawful "upon the commission of such acts as w[ould] constitute a riot." *Id.* at 138-39 (emphasis added).

Oregon's early lawmakers and courts thus agreed that assemblies were punishable only when "accompanied by violence" insofar as they "constitute[d]" a riot. Codes and Statutes of Oregon, title XIX, ch VI § 1914; *Stephanus,* 53 Or at 137. Indeed, more than 50 years after *Stephanus* was decided, the Attorney General opined:

> "There is no penalty assigned by the statutes to acts described in ORS 166.040 (2) [defining unlawful assembly]. ORS 166.050

[5] From 1855 until 1987, Oregon also punished citizens present at an unlawful assembly who refused to assist in dispersing the crowd and/or arresting participants when officers demanded, as well as officers who failed to exercise their authority to disperse such assemblies. *See* General Laws of Oregon, ch VII, §§ 2, 3, p. 228 (1855); App. F *(former* ORS 131.675(2), (3) (1971); *former* ORS 131.990). In 1985, the United States District Court for the District of Oregon declared that these requirements violated the First and Fourteenth Amendments of the United States Constitution, and the legislature repealed them in 1987. *See* App. G (Senate Judiciary Committee, ACLU Testimony on Senate Bill 581, p. 9-12 (Mar. 26, 1987) (enclosing *Hund et al. v. County of Linn et al.,* Civ No. 85-1415 (Nov. 14, 1985)).

> assigns penalties for riot as defined by ORS 166.040 (1). * * * But * * * there is no penalty assigned to acts not amounting to riot but which do become unlawful assembly. It is therefore my view that ORS 166.040 (2) does not in itself describe a crime, either a misdemeanor or a felony."

30 Op Atty Gen 419 (1960-62) (citing 40 Or L Rev 60 (1960); *Stephanus,* 53 Or 135).

It appears that lawmakers considered making "unlawful assembly" a misdemeanor during the 1971 Criminal Code overhaul, but declined to adopt any such law—presumably because criminalizing such conduct based on the pre-1971 definition would violate constitutional protections. *See* Proposed Criminal Code § 219, p. 213.

ORS 131.675 should be repealed for the additional reason that it authorizes the arrest of persons "unlawfully * * * assembled," even though unlawful assembly is not a crime, and thereby violates both the Oregon and United State Constitutions, and Oregon statute limiting when arrests can be made.[6]

C. ORS 131.675 Is Superfluous.

The ACLU of Oregon previously offered testimony on ORS 131.675 in 1987, when the legislature was considering repealing sections of the statute that required citizens to assist officers with dispersal and arrest efforts when asked, and penalized officers who did not disperse an "unlawful or riotous" assembly. *See* footnote 4, *supra.* The ACLU argued that the statute should be repealed in its entirety, foreseeing precisely the situation now facing this body:

> "The present law was almost repealed during the comprehensive revisions of the Oregon Criminal Code in 1971 and 1973. For some reason which does not appear in the Legislative archives, committee members apparently balked at that time. The original recommendation to the Judiciary Committees from staff at that time was to eliminate the entire provision, including subsection (1).
>
> "As I stated earlier, the ACLU's position is that subsections (2) and (3) are clearly unconstitutional. Repeal of those sections

[6] Because "unlawful assembly" is not a crime, the vast majority of protesters are arrested and charged under ORS 162.247 (Interfering with a peace officer). That statute makes it a crime to, among other things, "[r]efuse[] to obey a lawful order by the peace officer or parole and probation officer." ORS 162.247(1)(b). For the reasons set forth in this paper, the declaration of an unlawful assembly under ORS 131.675 is not a "lawful order" permitting the arrest of those who fail to disperse.

> are *[sic]* essential at this time. *We believe that subsection (1) is archaic and unnecessary. We would support its repeal as well. However, if it is left to stand by itself it probably would not result in any direct harm other than taking up space in the ORS."*

App. G (Senate Judiciary Committee, ACLU Testimony on Senate Bill 581, p. 3 (Mar. 26, 1987) (emphasis added)).

In other words, with "unlawful assembly" no longer statutorily defined, and with "riot" the subject of its own statute, ORS 131.675 would be superfluous without subparts (2) and (3). Nonetheless, the legislature declined to repeal ORS 131.675 in its entirety, creating the current redundancy.

The ACLU lacked foresight in 1987 only insofar as it predicted that the redundancy would be harmless. Over the past month and a half, peaceful protesters across this state have been tear gassed, shot with rubber bullets, and beat with batons solely because they have found themselves in crowds declared "unlawful." That is not the result that the legislature intended when it revised the statute in prior decades, and it is certainly not one that it should abide now.

D. The Legislature Should Amend Oregon's Riot Statute, ORS 166.015, to Specify How a Riotous Crowd May Be Dispersed.

In tandem with the repeal of ORS 131.675, the riot statute (ORS 166.015) should be substantially amended. As noted, the single relevant aspect of ORS 131.675 is its requirement that officers give notice and an opportunity to disperse before effectuating the dispersal themselves. **With the repeal of ORS 131.675, those notice and dispersal opportunity requirements should be imported into the riot statute.** Other proposed amendments to the riot statute include, but are not limited to, the following:

- **Proposed Definition for Riot in the Second Degree:** "A person is guilty of riot in the second degree when, simultaneously with five or more persons, that person engages in tumultuous and violent conduct and thereby intentionally or recklessly create a clear and present danger to public safety."

- **Proposed Definition for Riot in the First Degree:** "A person is guilty of riot in the first degree when, simultaneously with ten or more persons, that person engages in tumultuous and violent conduct and thereby intentionally or recklessly create a clear and present danger to public safety, and in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs"

- **Protected Groups:** Medics, legal observers, journalists, those providing humanitarian aid, and persons passively present or passively resisting should be treated as "protected groups" exempt from dispersal, force, or arrest.

CONCLUSION

Officers require lawful authority to disperse a violent riot and ensure public safety. But that authority, and the circumstances permitting its exercise, must be express and unambiguous to satisfy constitutional requirements. ORS 131.675 is not the answer. Whether unconstitutional or redundant, the statute serves no valid purpose. The legislature should expand ORS 166.015 to specify the steps pursuant to which a riotous crowd may be constitutionally dispersed, and repeal ORS 131.675.