



AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION

Hawai'i

BY EMAIL AND CERTIFIED MAIL

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**Re: Law Enforcement Agencies' Responsibilities  
During Mass Demonstrations**

Dear Attorney General Connors, Chief Ferreira, Chief Redulla, and Deputy Director Hong:

With the construction of the Thirty Meter Telescope ("*TMT*") on top of Mauna Kea restarting next week and the likely protests and acts of civil disobedience that will take place in response, the ACLU of Hawai'i Foundation ("*ACLU of Hawai'i*") writes to you as head of the law enforcement agencies ("*LEA*") that will respond to such protests to remind you and your agencies of the dual responsibilities to respect and protect the constitutional rights of the protesters while conscientiously maintaining public safety. These responsibilities are not at odds with each other and fulfilling them both requires: (1) the use of de-escalation and non-escalation, (2) genuine and clear communication with protesters and the public, (3) clear limitations on the use of force, (4) policies against the surveillance of protesters, and

(5) adequate and comprehensive training. This letter gathers practical recommendations and guidance from various sources on how best to approach protests and acts of disobedience not only concerning TMT but any future mass demonstrations in Hawai'i.<sup>1</sup>

## 1. Prioritizing de-escalation and non-escalation

LEAs across the country now recognize that their own responses to demonstrations play a key role in ensuring peaceful protests and even acts of civil disobedience remain peaceful.<sup>2</sup> Both de-escalation and non-escalation are essential to maintaining public safety, which is never served when people are harmed, unnecessarily arrested, or lose confidence in law enforcement.<sup>3</sup> Law enforcement operations during mass demonstrations must be designed taking into consideration the impact that law enforcement's presentation, tools, and tactics will have on protesters, bystanders, and the public.

How LEAs first present themselves to protesters sets the tone for whether LEAs are perceived as an aggressive or peace keeping presence. Law enforcement agents should dress in their regular uniforms displaying visible name tags at all

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<sup>1</sup> This letter draws from a number of government, law enforcement, academic, and non-profit sources on the subject of law enforcement's role during mass demonstrations. See International Network of Civil Liberties Organizations and University of Chicago, *Defending Dissent: Towards State Practices that Protect and Promote the Rights to Protest* (June 2018) [hereinafter *Defending Dissent*], available at <https://www.inclo.net/pdf/Defending-Dissent-Report-Complete-WEB-FINAL.pdf>; Police Executive Research Forum, *The Police Response to Mass Demonstrations: Promising Practices and Lessons Learned* (2018) [hereinafter *The Police Response to Mass Demonstrations*], available at <https://www.policeforum.org/assets/PoliceResponseMassDemonstrations.pdf>; President Obama's Task Force on 21<sup>st</sup> Century Policing, *Final Report* (2015), available at [https://cops.usdoj.gov/pdf/taskforce/taskforce\\_finalreport.pdf](https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf); and U.S. Department of Justice, *Police-Community Relations Toolkit: Guide to Critical Issues in Policing* [hereinafter *Guide to Critical Issues in Policing*], available at <https://www.justice.gov/crs/file/836416/download>.

<sup>2</sup> *The Police Response to Mass Demonstrations* at 25-26 ("Respond to a mass demonstration in gear and with equipment that are proportional to the mood of the crowd."); President Obama's Task Force on 21<sup>st</sup> Century Policing, *Final Report* at 25 ("2.7 Recommendation: Law enforcement agencies should create policies and procedures for policing mass demonstrations that employ a continuum of managed tactical resources that are designed to minimize the appearance of a military operation and avoid using provocative tactics and equipment that undermine civilian trust.").

<sup>3</sup> *Guide to Critical Issues in Policing* at 9 ("In recent years, there has been a growing recognition in the policing profession that managing demonstrations requires a 'softer' approach than sometimes occurred in the past."); *The Police Response to Mass Demonstrations* at 3 ("Ensuring that police responses to mass demonstrations are proportional to the actions and mood of the crowd is critical to making sure the police do not unintentionally escalate tensions during protests.").

times.<sup>4</sup> A version of this practice has already been tried and tested in Hawai'i. For example, during the Asia-Pacific Economic Cooperation meetings held in 2011, Honolulu Police Department officers purposefully wore aloha wear as part of the security strategy.<sup>5</sup> Conversely, “[c]rowd-control equipment and weapons should only be deployed when it becomes necessary and only used to defend the life and bodily integrity of protesters, bystanders, or policing officials.”<sup>6</sup> In other words, riot gear should never be used against peaceful protesters.

A disproportionate response by law enforcement meant to overwhelm protesters will escalate tensions. Moreover, mass arrests and the “kettling” or corralling of protesters are simply unconstitutional.<sup>7</sup> Instead, any law enforcement response should be carefully targeted and proportional to address an evidence-based public safety risk. This might mean, for example, having fewer officers present when there is no threat of violence or harm. Similarly, just because an arrest is lawful does not mean it will help maintain public safety.<sup>8</sup> Likewise, “[a]ny decisions to escalate force should be traceable through a chain of command that is clear in advance.”<sup>9</sup>

Officers responding to protests should be well-rested with access to sufficient water, breaks, and food. Officers presently being investigated for misconduct or

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<sup>4</sup> *The Police Response to Mass Demonstrations* at 4, 47 (“For instance, the lead agency may state its intention to begin with a soft approach to protests, in which officers wear regular uniforms and engage protesters by communicating that the police see their role as protecting demonstrators’ First Amendment rights.”)

<sup>5</sup> Hawai'i News Now, *HPD releases some of its APEC security strategy* (Oct. 21, 2011), available at <https://www.hawaiinewsnow.com/story/15779089/hpd-releases-some-of-its-apec-security-strategy/>.

<sup>6</sup> *Defending Dissent* at 65.

<sup>7</sup> See, e.g. *Hickey v. City of Seattle*, C00-1672 MJP, 2006 WL 3692658, at \*13 (W.D. Wash. Dec. 13, 2006) (holding in summary judgment that mass arrests conducted during the 1999 World Trade Organization meeting in Seattle lacked individualized suspicion of wrongdoing and probable cause); NYCLU, *Victory in Unlawful Mass Arrest During 2004 RNC the Largest Protest Settlement in History* (Jan. 15, 2014), available at <https://www.nyclu.org/en/press-releases/victory-unlawful-mass-arrest-during-2004-rnc-largest-protest-settlement-history> (announcing \$18 million settlement “for the arrest, detention and fingerprinting of hundreds of protesters, journalists, legal observers and bystanders during the 2004 Republican National Convention.”); Robert Patrick, *14 federal lawsuits filed over Stockley protest kettle arrests, police pepper-spraying*, St. Louis Post Dispatch, Sept. 18, 2018, available at [https://www.stltoday.com/news/local/crime-and-courts/federal-lawsuits-filed-over-stockley-protest-kettle-arrests-police-pepper/article\\_76d4c433-dbf8-56df-adf5-1ecb71f630aa.html](https://www.stltoday.com/news/local/crime-and-courts/federal-lawsuits-filed-over-stockley-protest-kettle-arrests-police-pepper/article_76d4c433-dbf8-56df-adf5-1ecb71f630aa.html).

<sup>8</sup> *Guide to Critical Issues in Policing* at 10 (“Avoiding making arrests if at all possible. For example, if protesters block a city street, police may be able to reroute traffic, rather than making arrests.”).

<sup>9</sup> *Defending Dissent* at 65.

criminality relating to improper use of force should not be part of the team responding to a demonstration.<sup>10</sup>

## **2. Genuine and clear communication with protesters and the public**

Effective and clear communication with the protesters and the public at large makes it less likely that people will “resort to violence, act arbitrarily, or act out of confusion or fear.”<sup>11</sup> To ensure such level of communication, LEAs should designate officers, ideally trained in communication and de-escalation, to negotiate mutual expectations about what will take place before, during, and after the protests. Such “dialogue officials” should be “exclusively focused on communication and . . . not carry out policing functions (i.e. making arrests or using force).”<sup>12</sup>

The right to cover and record protests and the police are protected by the First Amendment of the U.S. Constitution.<sup>13</sup> LEAs have a duty to defend and respect such rights without the need for special or traditional journalistic credentials. Legal observers, if present, should be allowed to safely document arrests and any uses of force. Their presence protects not only the protesters but also law enforcement. It is also unconstitutional to confiscate or search without a warrant smartphones, cameras, or other recording devices.<sup>14</sup> Erasing footage or pictures is also illegal.<sup>15</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 67; *The Police Response to Mass Demonstrations* at 20 (“It’s critical to establish continued lines of communication among crowds, organizers, and police.”).

<sup>12</sup> *Defending Dissent* at 72.

<sup>13</sup> “Every Circuit Court of Appeals to address this issue (First, [Third], Fifth, Seventh, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public.” *Fields v. City of Philadelphia*, 862 F.3d 353, 355 (3d Cir. 2017) (citing, among other Circuit Court cases, *Fordyce v. City of Seattle*, 55 F.3d 436 (9th Cir. 1995), which also recognized a First Amendment right to gather news).

<sup>14</sup> See *Riley v. California*, 573 U.S. 373 (2014) (holding that police officers were required to obtain warrant before searching digital data on cell phones incident to arrest).

<sup>15</sup> See, e.g., Haw. Rev. Stat. §§ 708-827 (“A person commits the offense of criminal tampering in the second degree if the person intentionally tampers with property of another person, without the other person's consent, with intent to cause substantial inconvenience to that person or to another.”); 708-895.6 (“A person commits the offense of unauthorized computer access in the second degree if the person knowingly accesses a computer, computer system, or computer network without authorization and thereby obtains information.”).

During protests, LEAs should also keep the public apprised of police strategies, tools used, and arrests made through regular briefings with the media. Transparency not only maintains public trust in LEAs, but it can go a long way in making the protesters feel safe and dispelling rumors and wrong information about LEAs' responses and operations.

### **3. Limitations on the use of force**

The use of force during a protest has a chilling effect on the First Amendment rights of all protesters. Consequently, any use of force during a protest should be avoided if at all possible.<sup>16</sup> Use of force policies are also generally inadequate as they do not consider the First Amendment rights of protesters and do not provide sufficient guidance to officers on how to use of force during mass demonstrations. Indeed, none of the policies from your LEAs—recently obtained through public records requests—discuss or provide guidelines on the adequate use of force during a protest or demonstration. Thus, planning and carefully-drawn rules of engagement are particularly important during protests. Also coordination between different LEAs to follow uniform rules on the use of force is essential.<sup>17</sup>

Any use of force must be legal, strictly necessary, carefully targeted, and proportional. Force should only be used in response to a clear and eminent danger of violent conduct against a person or persons.<sup>18</sup> De-escalation, a tiered approach, clear and lawful orders, and giving people sufficient time to comply, prevent unnecessary use of force. Crowd control equipment and weapons, such as long range acoustic devices (sound weapons) and dogs, intimidate peaceful protesters and are

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<sup>16</sup> See, e.g., *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (“This court has held that government officials violate [the First Amendment] when their acts ‘would chill or silence a person of ordinary firmness from future First Amendment activities.’” (quoting *Mendocino Environmental Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300 (9th Cir.1999))).

<sup>17</sup> See *The Police Response to Mass Demonstrations* at 46-47 (“Ensure policies and terminology on use of force and civil disobedience are consistent across agencies to prevent misunderstandings and loss of control during mass demonstrations. If necessary, resolve any inconsistencies in advance of a mass demonstration in a mutually agreed-upon unified command proposal.”).

<sup>18</sup> See, e.g., *Collins v. Jordan*, 110 F.3d 1363, 1371–72 (9th Cir. 1996) (“Finally, enjoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and present danger 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.” (citations omitted)).

indiscriminate in their nature.<sup>19</sup> Thus, they should not be used during protests and for crowd control purposes.

Any arrests—particularly of people engaged in peaceful civil disobedience—should be conducted with the minimal use of force required.<sup>20</sup> Any arrests should also be performed by police officers wearing appropriate uniforms and visible name tags. “Prompt information on the place of detention should be provided to interested persons and access to legal services for the detainee must be ensured.”<sup>21</sup>

In the event people are injured by law enforcement, evidence should be properly handled and preserved, weapons seized, and the orders issued documented for a later independent investigation and review.

#### **4. Policies against the surveillance of protesters**

The indiscriminate surveillance of protesters not only infringes on the protester’s right to privacy but also deters people from organizing and demonstrating freely. Consequently, the use of bulk surveillance tactics and technologies—such as cell-site simulators (also known as Stingrays or international mobile subscriber identity (IMSI) catchers), facial recognition technology, and databases of activists—should be prohibited because they do not distinguish between lawful and unlawful conduct.<sup>22</sup> Any collection, retention, and use of personal information in the context of mass demonstrations should be strictly limited to situations where there is individualized suspicion supported by probable cause that the person has committed or is about to commit a crime. “A generalized and undefined belief that someone taking part in a protest may commit some

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<sup>19</sup> See ACLU of Hawai‘i, *July 10, 2019 Letter re DLNR’s Acquisition of a Long Range Acoustic Device*, available at <https://acluhawaii.files.wordpress.com/2019/07/aclu-letter-to-dlnr-re-lrad.pdf>.

<sup>20</sup> See *Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1130 (9th Cir. 2002), as amended (Jan. 30, 2002) (holding that use of pepper spray against nonviolent protesters using “black bears” (i.e., self-releasing lock-down devices used to link protesters together) constituted excessive force).

<sup>21</sup> *Defending Dissent* at 80.

<sup>22</sup> See, e.g., U.S. Department of Justice, *Recommendations for First Amendment-Protected Events for State and Local Law Enforcement Agencies* at 11-13 (Dec. 2011) (prohibiting, among other things, “[i]nvestigating and collecting, maintaining, using, or sharing information regarding persons or groups solely because they are involved in constitutionally protected activity”), available at [https://www.ncirc.gov/onlinetraining/modules/first\\_amendment\\_rollcall/Recommendations.pdf](https://www.ncirc.gov/onlinetraining/modules/first_amendment_rollcall/Recommendations.pdf).

offence in the future does not justify surveilling, taking or retaining a photograph, or recording video footage of protesters.”<sup>23</sup>

## 5. Adequate and comprehensive training

LEAs must ensure their officers have the specialized training and skills necessary to prepare them to use good judgment during mass protests, where raised voices, passion, anger, and grievances—often directed at the government or the police—run high. Such training must include at a minimum instruction on (i) how to respect and protect the right to protest, (ii) how to de-escalate tense situations during mass demonstrations, (iii) communication, dialogue, and public engagement, (iv) the use of specialized equipment during protests, and (v) structural inequality and implicit bias. Training on procedural justice is also helpful for LEA decision-makers.<sup>24</sup>

“Training on the use of crowd-control equipment and weapons should include: the impact and harm caused by each weapon or piece of equipment; the likely perceptions of and reaction to the use of each weapon, including the possible escalation in tensions; whether less harmful means are available to achieve the particular aim, and if not, whether the overall objective of the use of force is better achieved by not using the provided equipment.”<sup>25</sup>

Any such training should be incorporated into basic and ongoing instruction that includes “real-life scenarios and exercises that rely on past cases to identify both poor decision-making and unlawful conduct.”<sup>26</sup> All training should be updated and reviewed periodically by independent experts from different disciplines such as law, sociology, and psychology. Performance evaluations of officers and promotions should also be based on skills and principles learned during the training sessions.

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In summary, the relationship between law enforcement and protesters does not need to be and should not be antagonistic. Building and maintaining trust with the protesters and the broader community are important to public safety. In turn,

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<sup>23</sup> *Defending Dissent* at 93.

<sup>24</sup> *The Police Response to Mass Demonstrations* at 32 (“Procedural justice training was very good for us because it reminded us of what we’re really out there to do, and that is to protect and facilitate people’s constitutional rights.”)

<sup>25</sup> *Defending Dissent* at 80; see also *The Police Response to Mass Demonstrations* at 37-38.

<sup>26</sup> *Defending Dissent* at 56.

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respecting civil rights and liberties are important to maintaining such trust, particularly during what could be prolonged protests like the ones expected against TMT.

If you have any questions or comments, please contact me at 808-522-5908 or [mcaballero@acluhawaii.org](mailto:mcaballero@acluhawaii.org).

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Mateo Caballero', written in a cursive style.

Mateo Caballero  
Legal Director

cc: Governor David Y. Ige ([cindy.mcmillan@hawaii.gov](mailto:cindy.mcmillan@hawaii.gov))  
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