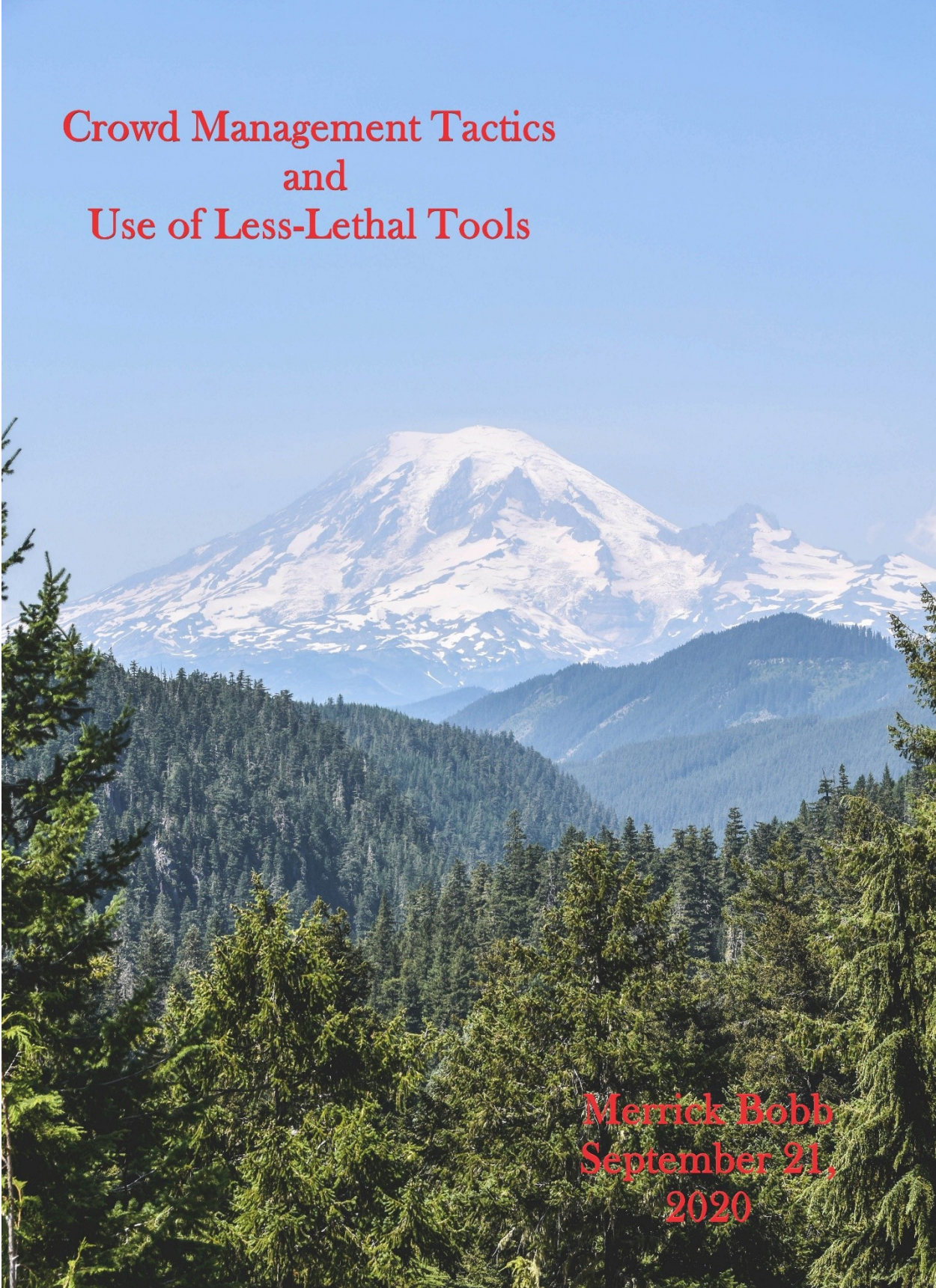




Crowd Management Tactics and Use of Less-Lethal Tools

Merrick Bobb
September 21,
2020

M E M O R A N D U M

TO: Mayor Durkan
cc: City Council, City Attorney, DOJ, OPA,
OIG, CPC
Hon. James Robart and Hon. Richard Jones

FROM: Merrick Bobb

DATE: September 21, 2020

**RE: Crowd Management Tactics and Use of
Less-Lethal Tools**

Introduction

On June 5, 2020, Mayor Jenny Durkan wrote a letter creating a team of DOJ, OPA¹ OIG, CPC, and me in connection with the recent protests and demonstrations to evaluate crowd management tactics and use of less-lethal tools. In that letter, the Mayor stated:

“During the past nearly 10 years under the Consent Decree, there has been a rigorous process of reviewing and developing SPD policy and practices that must conform to national best practices on policing with input from the federal Monitor, US Department of Justice (“DOJ”) and approval by the federal court.

“In light of recent events, I request your initial review of SPD’s crowd management policy, including the use of all crowd control tools and strategies, in the next 30 days, I fully appreciate the review may take longer, and that you will need to determine both the scope and timeframe.”

¹ OPA stands for Office of Police Accountability; OIG stands for Office of the Inspector General; and CPC stands for Community Police Commission.

In response to the Mayor, I submit this memorandum.²

The Facts

The definitive history of the recent Seattle demonstrations and protests will not be written anytime soon. The events are still too raw, and the participants too wedded to their own perspective, to be able to comment objectively overall. Nevertheless, it is important to have the best current facts at hand to consider the appropriateness of crowd management tactics and less-lethal tools.

The most detailed reports on events to date, along with certain print and media accounts, can be found in the papers filed in federal court before the Hon. Richard Jones in support of the Temporary Restraining Order (TRO), which the Court granted on June 12, 2020.³ Of equal importance are papers filed before Judge Jones clarifying the Preliminary Injunction, as cited below. The City of Seattle opposed the motion for a TRO which also helped to

² I did not serve on this team as court-appointed monitor and, in any event, I am no longer monitor. Thus, I want to make clear nothing said herein shall be attributed to Judge Robart or deemed by anyone to represent his views. OIG, OPA, and CPC have already responded to the Mayor. This memorandum represents only my personal views, and I do not offer this memo on their behalf.

³ That Temporary Restraining Order became a Preliminary Injunction on stipulation of the parties and order of court dated June 17, 2020. Thereafter, plaintiffs filed a motion to hold the defendants in contempt which was resolved on August 10 in an Order Granting Stipulated Clarification of Preliminary Injunction. That Order provided, among other things, that SPD was enjoined from "[u]sing chemical irritants or projectiles of any kind without, when feasible, first issuing a warning that it is reasonably calculated to alert attendees in the area where the weapons are to be deployed and allowing them reasonable time, space, and opportunity under the circumstances to leave the area." *Id.* at p.3.

establish facts. Also important in establishing a factual basis are statements made by Mayor Jenny Durkan during the protests.

The crux of the matter from the plaintiffs and the Court's perspective seems to be that the Seattle Police Department (SPD) responded to assertively violent actions by persons embedded among peaceful protesters in a manner which diminished or deprived peaceful protesters of their constitutional rights. From the City's perspective, which failed to persuade the Court, Seattle police officers were facing unprecedented violence and injurious attack and responded within the constraints of the SPD's use of force policies and applicable law.

This memorandum will proceed accepting as accurate the descriptions by Judge Jones of the events covered, as augmented by two statements of the Mayor sharing that perspective.

The Mayor said on June 29, "I have stated the crowd control actions by SPD during the protests failed appropriately to de-escalate conflicts and used a disproportional response that impacted people lawfully exercising First Amendment rights."⁴ When asked in an earlier interview if she thought that use of force by the SPD was proportional, she replied that she thought "it was too quick and too much."⁵ When asked whether the use of force was indiscriminate, Mayor Durkan pointed out that the Judge had used that word and agreed that "everybody got caught in the net."⁶ She thought that Judge Jones "hit the right balance.... He clearly is protecting the right to protest, and banned the use of ... tear gas, pepper spray, against peaceful protesters, but also said

⁴ Letter of Mayor Durkan to Monica Martinez Simmons, Seattle City Clerk, June 29, 2020.

⁵ Verbatim Transcript of interview of Mayor, June 12, 2020, P. 9.

⁶ *Id.* at 8.

if there is an individual circumstance where a police officer has to use that, if there is an imminent threat, that's not banned.”⁷

The Court had noted that it had reviewed “the evidence supplied by the parties, but of, of course, the record is limited at this stage. Based on the Court’s review, the video and testimonial evidence show that on some occasions the SPD has in fact use less-lethal weapons disproportionately and without provocation.”⁸

The Court stated:

“Both parties agree that some protesters did launch objects at the police, ranging from rocks, bottles, fireworks, traffic cones, traffic flares, and more. [Citations to record] Moreover, the City represents that SPD confronted ‘significant arson events, assaults on civilians and officers, as well as wide-spread looting and property destruction’ among other criminal activities. [Citation to record] This, no doubt, poses a serious threat to officer life and safety. *Id.* at 19. But, as to these protestors, the Court agrees with Plaintiffs’ reading of *Collins*: ‘the proper response to potential and actual violence is for the government to ensure an adequate police presence, and to arrest those who actually engage in such conduct, rather than to suppress legitimate First Amendment conduct as a prophylactic measure.’ 110 F.3d at 1372....Second, SPD’s actions would chill a person of ordinary firmness from continuing to protest...”⁹

“SPD’s use of less-lethal, crowd control weapons have surely chilled speech. To start, exposure to tear gas and pepper spray is ‘excruciating.’ [Citations to record] The same is true of the projectiles that SPD fires into crowds, which can

⁷ *Id.* at 7.

⁸ Order, p.3.

⁹ Order, p.6.

cause intense pain and bruising. [Citations to record] Though ‘less lethal,’ these devices have been sufficiently lethal to deter some protestors from protesting again. [Citations to record] The Court holds that SPD’s use of these weapons would chill a person of ‘ordinary firmness’ from protesting. Finally, Plaintiffs have shown that the protests were a substantial or motivating factor in SPD’s conduct. Plaintiffs contend that SPD indiscriminately threw an excessive amount of chemical agents at peaceful protests over police brutality. [Citation to record] They argue that this reveals that a ‘substantial or motivating purpose’ of the force was Plaintiffs’ exercise of their First Amendment rights. *Id.* The Court agrees. The use of indiscriminate weapons against all protesters—not just the violent ones—supports the inference that SPD’s actions were substantially motivated by Plaintiffs’ protected First Amendment activity. ¹⁰....

“Both testimonial and video evidence establish that SPD likely violated Fourth Amendment rights. Plaintiffs testified that they were peacefully protesting... when they fell victim to the weapons at issue.... A video of a June 1, 2020 protest in Capitol Hill suggests that SPD exerted excessive force without provocation—the protesters were largely peaceful, SPD changed its posture by replacing front-line officers on bicycles with officers donning gas masks, and then SPD deploy a battery of pepper spray, flash-bang grenades, and tear gas.... At most, this evidence shows that Plaintiffs, and many protesters alike, were engaging in minor property, and offered only passive resistance at the time they were attacked....¹¹

¹⁰ Order pp. 6,7.

¹¹ Order, p.8.

“The balance of hardships favors an injunction.... The City has already conceded that ‘safety was shattered for many by images, [of] sound and gas more fitting of the war zone’... These actions strongly suggest that the City has overstepped, causing protesters undue hardship.

“The public interest favors an injunction.... these protests occurred during a pandemic spread of which may be exacerbated by chemical irritants such as tear gas and pepper spray.... The weapons are indiscriminate, use the entire crowds of protesters without targeting any single agitator or criminal.... Because they are indiscriminate, they may even spill into bystanders’ homes or offices as they have done before.”¹²

The relief granted by the Court stated:

“The City of Seattle, including the Seattle Police Department and any other officers, departments, agencies, or organizations under the Seattle Police Department’s control (collectively, ‘the City’), is hereby enjoined from employing chemical irritants or projectiles of any kind against persons peacefully engaging in protests or demonstrations. This injunction includes: (1) any chemical irritant such as and including CS Gas (‘tear gas’) and OC spray (‘pepper spray’) and (2) any projectile such as and including flash-bang grenades, ‘pepper balls,’ ‘blast balls’, rubber bullets, and foam-tip projectiles. This Order does not preclude individual officers from taking necessary, reasonable, proportional, and targeted action to protect against a specific imminent threat of physical harm to themselves or identifiable others or to respond to specific acts of violence or destruction of property. Further, tear gas may be used only if (a) efforts to subdue a threat by using alternative crowd measures, including pepper spray, as permitted by this paragraph, have

¹² Order, p. 10.

been exhausted and ineffective and (b) SPD's Chief of Police has determined that use of tear gas is the only reasonable alternative available. The Chief of Police may only authorize limited and targeted use of tear gas and must direct it to those causing violent or potentially life-threatening activity. To the extent that chemical irritants or projectiles are used in accordance with this paragraph, they shall not be deployed indiscriminately into a crowd and to the extent reasonably possible, they should be targeted at the specific imminent threat of physical harm to themselves or identifiable others or to respond to specific acts of violence or destruction of property."¹³

Based upon these facts, for the reasons set forth below, I have concluded that SPD's crowd management tactics during the recent demonstrations and protests were deficient in the following ways:

1. There was an apparent absence of an overall strategic plan to deal with violent individuals without significant prejudice to legitimate First Amendment activity by peaceful protesters. The SPD, like police departments across America, lacked seasoned and well-trained commanders to respond to the novel circumstances of the George Floyd and BLM protests. There also was a seeming lack at times of sensitivity to the First Amendment rights of journalists and the moral and ethical role of medics.¹⁴

¹³ Order, p.12.

¹⁴ One must, however, keep in mind that it is very difficult during a protest where individual or groups have turned violent for the responding officers and their commanders to distinguish and treat differently everyone within or at the edge of a violent event. Journalists and medics will respond to where

2. In the absence of the strategic plan and well-trained commanders, there was a lack of adequate preparation and training of rank-and-file police officers and their supervisors. Seasoned and well-trained commanders should have been taking the actions of the crowd into consideration and making judgment calls based on the crowd size, actions, environment, and the law enforcement resources available to the commanders to manage the crowd. This is with the understanding that utmost care should be given to supporting constitutional rights.
3. There was a tendency to call something a riot when it might have met some technical definition but was not a rebellion or melee and did not constitute an overall imminent threat of death or serious physical injury. As a result of using the label of "riot," there followed indiscriminate and poorly controlled use of less-lethal tools, particularly tear gas and blast balls as described later in this memorandum.¹⁵

the action is, either to report on it or to treat those who appear or are injured. If law enforcement gives a dispersal order and is responding to the violent event, all those within that area risk becoming cojoined to those who are violent. That did not seem to be the case in the recent Seattle protests and demonstrations. In any event, the First Amendment still controls, however, and this may be why Judge Jones stresses that less-lethal tools should be directed, if possible, at those causing violent or potentially life-threatening activity.

15 The facts as I have described them do not focus on the experience of SPD officers in dealing with some of the most violent and virulent of the persons who showed up at protests solely to injure the police. There were many exemplary SPD officers who had to put up with difficult circumstance. A highly trained, exemplary senior manager in Portland described what Portland and federal officers had to put up with: "After months of consecutive nights of violent protests where officers are working long hours, having bricks, Molotov cocktails, balloon filled with excrement thrown at

An apparent absence of an overall strategic plan and adequate preparation and training.

In the facts as described earlier, it appears that SPD commanders were largely reacting ad hoc to the different challenges it faced in dealing with a large and at times difficult crowd during the recent protests. Different roles and responsibilities up the chain of command had not been well defined with available resources in mind.

Captains, lieutenants, and sergeants did not appear to have a clear sense of what to do, and rank-and-file officers, it seemed, were left to their own devices to figure out ad hoc what to do. As will be demonstrated below, it also appears that rank-and-file officers were asked to use tear gas without having been trained on how to use it.¹⁶

To be sure, there was not a lot of time for preparation between the death of George Floyd and the beginning of the protests.

them, and having people threaten to kill them and do horrible things to their family, human nature is such that you are likely to have one or two officers who react out of fatigue, frustration, and injury." This is not to suggest that such officers, even under such circumstances, can lawfully use excessive force. But it is a mistake not to appreciate what some police officers have had to face. It also shows why properly employed less-lethal tools are preferable to guns and batons.

¹⁶ On the night of May 30, the SPD faced disruption and attempted to "disperse the crowd using less-lethal munitions on hand, including blast balls and OC spray. As a result of the magnitude of last night's event, both Patrol and SWAT are both now largely depleted of these less-lethal munitions." Memorandum of the Assistant Chief to Chief Carmen Best, May 31, 2020. In response, the Assistant Chief requested and received authority to permit patrol officers to use CS canisters and 40-mm launchers to deploy tear gas (CS) to disperse crowds. Under normal circumstances, only SWAT was permitted to do so. Id.

Nonetheless, from WTO through Occupy to several May Days and other protests in Seattle and elsewhere, the SPD has had opportunities to learn and formulate plans for a variety of scenarios, including ones in which there was significant property destruction, looting, breaking of storefront glass, and attacks on police officers. Likewise, there were instances where persons bent on violence came from elsewhere to Seattle to throw bricks and bottles and be confrontational and provocative. In other words, SPD had seen much of this before and at an earlier time was able to ably manage crowds.

In the last several years, those protests had been handled professionally by the SPD, largely because Deputy Chief Chris Fowler and Captain Steve Wilske had managed those events.¹⁷ But by the time of the events of the last few months, Chief Fowler was retired. SPD appears to have lacked the foresight to train individuals who could take over from Deputy Chief Fowler.

On the other hand, one must concede that the events of the last months have been different enough so that prior experience, although uncontestably helpful, may not have been enough to deal entirely with current circumstance. The top leadership within

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Chief Fowler had extensive experience in the crowd management area, as his resume indicates:

Incident Commander - I have commanded many unplanned critical incidents, planned events, as well as high risk and low risk demonstration events. These incidents required a strong knowledge in intelligence integration, deploying protective teams in a wide array of operational environments. I was responsible for planning, resourcing, and managing events from yearly festivals within a major metropolitan area, including responding to on-going tactical situations. I have commanded, events such as the yearly May Day riots, New Year's Eve celebrations, major parades, and unplanned demonstrations. I have responded and commanded active shooter incidents and multiple on going critical tactical events. Many of our tactics used in demonstration are currently being adopted by other Law Enforcement agencies with a strong transfer of knowledge in both public and private venues.

much of law enforcement has not experienced this kind of protest since the multi-city widespread civil disobedience of the 1960s or '70s. There has not been calculated, planned violence by organized ideologically driven groups, supported by apparently adequate financial resources, before. Nor has there been the degree of people affirmatively forcing confrontation on the police.

Unlike prior demonstrations that may have lasted at most three or four days, the current protests have gone on night after night for months, as, for example, in Portland. Nor has there been calculated attacks against government structures, such as courthouses and police precincts. Those differences call for different strategy and training and for senior executives who have had broad experience— either practical or theoretical— in contemporary crowd management.

It would be remiss not remark at this point on coronavirus. Among other factors, the onset of Covid corresponded with the start of the protests, severely prejudicing law enforcement agencies in their ability to plan and train while amplifying the risk of gas on persons susceptible to Covid.

Once there is new leadership in place in the SPD, it is incumbent upon the Chief of Police to establish the overall policy that will govern police response to the challenges presented. Leaders capable of managing large crowd events must be hired or trained. Policies will need to be developed to answer questions such as: Will officer dressed in hardened gear or will the officers most visible to the protesters be in soft uniforms? Should SWAT¹⁸ or other trained officers in hard gear remain off-site or out of view

¹⁸ Various experts in crowd control argue that SWAT should not have a role to play in protests because SWAT training is significantly different and in circumstances where First Amendment issues are not part of the mix.

until specifically needed? Will officers try to make arrests every time glass is shattered? Or will it take a police car set on fire or similar event to provoke an arrest?

Once those broader policies have been established, it will be important to devise strategies for the various scenarios that are envisioned. To that end, **a new Tactical Unit should be created.** The Unit should come up with strategies, educational and training materials, and levels of accountability up the chain of command in any instance. There should be tabletop exercises—virtual and computerized, if possible—running through different scenarios to get commanders and others with the education and experience needed for a massive event. Thus, for example, how many layers of command should be necessary before a given less lethal force tool is employed— in what circumstances will be enough to get approval of a sergeant? Or a lieutenant or a captain or higher?

The tactical unit will explore questions of scale: at what levels does the scale of the event overwhelm available resources? What resources in what capacities are necessary to isolate or contain violent individuals or groups acting illegally? If CS or tear gas is banned, what tactics and capabilities are necessary for crowd control?

It is also the case that future protests and demonstrations may encompass whole regions and not just certain cities. What is needed by way of legislation at the state or national level? Should CS be banned on a national scale? Should there be a national academy similar to the FBI National Academy to train and certify commanders in crowd control?

Turning again to the local scene, it is important to note that planning underpins every action and event. Accountability for the

organization can only be achieved through a structured planning process. Employing a viable crowd management procedure can only be effective if there is accountability from the chain of command for clear intent, goals, planning, and effective decision making. That does not mean always making the exactly right decisions, but analyzing a wrong decision using a structured process can enhance accountability and mitigate future liability.

A law enforcement organization, in totality should be held accountable to its policies and actions. Crowd control events required organizational responses by management. Officers should be held accountable for their own actions, but so too should the commanders who are leading the management of the event or else are charged with ensuring the organization is trained and equipped. Formal training should be mandatory for senior commanders in planning operations. They should face discipline if they put precious personnel and resources into dangerous situations where the commanders do not have the capacity to perform.

Thus, in each instance in which a rank-and-file officer has been found to have violated policy, the factfinder should also look at whether each individual up the chain of command had properly played his or her role vis-à-vis the police officer. Discipline should be meted out accordingly.

Inadequate sensitivity to First Amendment rights and the rights of those protesters injured or wounded.

The right to protest and seek redress of grievances is at the heart of American freedoms and why 18th century Americans sought to separate from Britain. Those rights take precedence. The role of the police is to see that First Amendment activity be protected.

Clouds of tear gas that cause individuals to flee in pain rather than continuing to protest is not protection. Of course, there are cynical and violent individuals in the crowd intermixed with legitimate protesters. The SPD did not seem to have an adequately developed plan to isolate those individuals.¹⁹

There likewise was inadequate sensitivity to the rights of journalists, whose First Amendment rights are no less than others. It was as if the rank-and-file of the SPD had not been taught that one never is to attack or prevent journalists from doing their job as long as it is possible to protect them and as long as they are not actually preventing the police to function.²⁰ By the same token, to prevent or frustrate medics from caring for the injured or wounded is inhumane. It is astonishing that any officer in the SPD would do that or allow their peers to do it.

Too great a willingness to declare a riot.

Under Washington law, what formally was known as a “riot” was redefined as “criminal mischief,” and where three or more people are committing criminal mischief, the police are entitled to

¹⁹ Experts appear to agree that the preferred approach for public order policing is to focus on arresting agitators and extremists for the most serious crimes and to avoid making mass arrests for minor violations. The ability to do this depends in large part on how large and how violent the crowd is. The idea that one is going to send SWAT into a crowd in armored vehicles to arrest violent opportunists is unrealistic in most cases. This will be escalatory and create a flashpoint situation or one where otherwise non-violent protesters who will impede the vehicle while the violent individuals escape. The best options, according to one expert, are either to disperse the crowd and vector in arrest teams while they are in transit or to penetrate the crowd with bike teams.

²⁰ This discussion further assumes that all who have press insignia are bona fide journalists. This may not be the case, and at least in Portland, some individuals wearing press insignia attacked the police, according to an expert was there.

declare an order to disperse and proceed to disperse the crowd. Under SPD's definitions, it takes four or more people to justify an order to disperse:

"9. Crowd Dispersal

a. Upon Determining That There are Acts or Conduct Within a Group of Four or More Persons That Create a Substantial Risk of Causing Injury to Any Person or Substantial Harm to Property, the Incident Commander May Order That the Crowd Be Dispersed

Before ordering that the crowd be dispersed, the Incident Commander shall consider whether less restrictive means of crowd management are available. Such means may include strategies such as area denial and/or seeking voluntary compliance.

Upon determining that dispersal is appropriate, the Incident Commander shall ensure that there is an avenue of egress sufficient to allow the crowd to depart.

The Incident Commander or designee will issue the order to disperse prior to instructing officers to disperse the crowd, if feasible."²¹

Orders to disperse were used at least four times during the recent protests and demonstrations, according to the Seattle Times.²²

21 Seattle Police Manual **14.090 - POL-9**

22 Seattle Times, Mike Carter, "Seattle police have declared riots during recent protests. In legal terms, what does that mean?", September 7, 2020. The Plaintiffs, in a Motion for an Order to Show Cause at p.4, stated that: "On July 25, SPD suddenly and without warning divided the protesters into two groups and began an all-out assault. SPD officers lobbed flash-bang grenades, blast balls filled with pepper spray, and foam tipped bullets into the middle of retreating crowds."

The most serious occurred on July 25 when, in the words of the Seattle Times:

“after a morning of protests and marches that involve vandalism and arson by some in a large crowd of as many as 5000 protesters that settled on Capitol Hill near the SPD’s embattled East Precinct. At that point, according to witnesses and sworn statements filed in court, the SPD declared a riot and then moved aggressively into the mass of people, catching many in a pincer like trap where officers use crowd -controlled weapons indiscriminately.

People within the protests were setting fires, including burning several trailers at the construction site for the new youth jail. A number of businesses also were vandalized.

Armor-clad officers moved into the large crowd from at least two directions, ordering people to disperse while deploying pepper spray, blast balls and ‘Blue nose’ foam- tipped projectiles. According to witnesses, the officers targeted not just protesters but legal observers, civilian medics and journalists. At least 49 demonstrators were arrested, and others hurt. People said at least 59 officers were injured.”²³

There simply had to be better ways to handle the events of July 25 whether it was proper to characterize the situation as a riot or not. But even if it were proper to call those events of riot, a definition of a riot that requires only the presence of three or four protesters is too low a bar. I recommend therefore SPD should rewrite its crowd control policy so that use of non-lethal tools that carry a risk of serious injury or death be limited to violent and uncontrollable behavior by a substantial group or crowd of individuals. The declaration of an order to disperse in the circumstances may have violated SPD policy in that the “pincer

²³ Id.

like trap” may have blocked an avenue of egress sufficient to allow the crowd to depart.

The most serious consequence of an order to disperse is that it permits less-lethal weaponry to be used, including tear gas, blast balls, and rubber bullets, but only as permitted by Judge Jones in his Order. It is thus useful at this point to turn to certain of those less-lethal tools and consider whether the Order goes far enough in regulating their use— Tear gas,²⁴ rubber bullets, and blast balls.

Tear gas

It is not possible at this point to quantify the amount of tear gas that was deployed before or immediately after the Order. The Seattle Times reported on June 7 that Washington State Troopers, between May 30 and June 4, assisted SPD, “tossing about 25 tear gas canisters and launching about 35 CS gas projectiles during that time.” I do not know if other mutual aid partners deployed CS. OIG reports that between May 30, 2020 and June 11, 2020, there were 48 reported uses of CS gas. OIG notes that this number is preliminary and should not be considered complete until SPD completes its force review processes.

Tear gas produces some of the same effects as pepper spray (severe pain in the eyes, and pain in the mouth, throat, and skin; and coughing and difficulty breathing) but it is also clear that CS works very differently chemically and presents more danger of serious injury. The CDC (Center for Disease Control) warns that long-term exposure or exposure to a large dose of CS, especially in a closed setting, may cause blindness, glaucoma, and respiratory failure.²⁵ When studied at length in JAMA (the Journal

²⁴ Tear gas and CS gas are terms which are used interchangeably in this memorandum.

²⁵ CDC, April 4, 2018

of American Medical Association) in 1989, the researchers concluded “that the evidence already assembled regarding the pattern of use of tear gas, as well as its toxicology, raises the question of whether its further use can be condoned under any conditions.”

The Seattle Times characterized the possible harm of CS stating:

At low concentrations in an open environment, CS and CN gasses can be nonlethal. But large doses released in confined spaces or in close proximity can severely damage respiratory and digestive tissues, increase heart rate and blood pressure and cause cardiac problems. Canisters could cause blunt-trauma injuries if they are not properly fired over crowds.²⁶

OPA along with others have noted that tear gas, also known as CS gas, raises serious concerns:

As the Council recognized and the accountability system partners noted in a June 5, 2020, letter, CS gas is banned in warfare by the Chemical Weapons Convention of 1993, and the use of indiscriminate respiratory irritants also exacerbates the risk of COVID-19 transmission among those exposed. Community members have repeatedly expressed concerns about tear gas seeping into structures and residences near a protest zone, and OPA is aware that CS gas often causes extensive property damage when deployed inside a structure. OPA also believes that the deployment of tear gas cannisters may precipitate other uses of force as officers fire other less-lethal weapons at individuals who are attempting to pick up, disable, or throw them back.²⁷

²⁶ Seattle Times, "Tear gas, flash-bang grenades and pepper spray: A breakdown of the devices police used to disperse crowds," Mark Nowlin, July 1, 2020 ("Nowlin").

²⁷ OPA Response to Council, August 15, 2020, p.4.

OIG expressed similar concerns about CS. Apparently, SWAT was the only SPD unit trained and authorized to use CS. CS gas was first used by patrol with the authorization of the Chief of Police when the SPD ran out of OC and blast balls.²⁸ OIG noted at page 18 that officers “not formally trained in the use of CS may be unfamiliar with dispersal patterns as well as proper first-aid or decontamination.”

Approximately a month earlier, OIG had warned that “CS may be more difficult to remove or otherwise decontaminate than OC, depending on how it was before. Deployment of CS powder in particular may require extensive cleaning procedures.” OIG Memo Less lethal Weapons Usage in Protests, June 12, 2020, page 16. The OIG did not specifically call for a ban of CS gas, although it seems to be doing so obliquely when it states at OIG p.1 that it “remains concerned about use of CS (tear) gas against protesters and continues to recommend against general use in a protest setting.”

OPA concludes in its recommendations that SPD should not be reauthorized to use CS gas. I agree. CS is incompatible with the First Amendment because it cannot be particularized to a given individual or group of individuals. Accordingly, when it is used, protests stop because the protesters must flee to avoid pain and injury. That is not the case with OC, which can be particularized and does not bring the entire protest to a halt.

There is no legitimate use of CS gas that could not be accomplished with other less potentially injurious tools. It has been suggested that more than 99% of events such as occurred in Seattle could be appropriately handled without CS (or even OC) if there were an adequate cadre of highly trained individuals with

28 Review of the SPD Crowd Dispersal Policy and Last Lethal Weapons, August 14, 2020, Office of Inspector General (OIG) p.5, 18. See also the text at footnote 13

expertise in crowd control. Whether that is the case or not, it is clear that CS gas should stay banned.

Rubber bullets

The British Medical Journal (BMJ) studied rubber bullets in 2017 and concluded:

Kinetic impact projectiles (KIPs), often called rubber or plastic bullets, are used commonly in crowd-control settings. We find that these projectiles have caused significant morbidity and mortality during the past 27 years, much of it from penetrative injuries and head, neck and torso trauma. Given their inherent inaccuracy, potential for misuse and associated health consequences of severe injury, disability and death, KIPs do not appear to be appropriate weapons for use in crowd-control settings. There is an urgent need to establish international guidelines on the use of crowd-control weapons to prevent unnecessary injuries and deaths.²⁹

The BMJ further notes that many rubber bullets “have muzzle velocities equal to those of live ammunition. Most KIPs are designed with a large surface area to produce a rapid loss of speed during flight and reduce the chance of skin penetration, but this also results in unpredictable flight paths and reduced accuracy.”³⁰

James Rainey, a journalist at The Los Angeles Times, wrote an article on rubber bullets and found that “the so-called sponge

²⁹ British Medical Journal, Volume 7, Issue 12 (BMJ).

³⁰ BMJ at text accompanying footnote 16.

rounds fired by the 40-millimeter launcher had not reduced problems” in Seattle’s protests in July.

‘Because these sponge rounds are used so pervasively, we see a ton of injuries from them,’ said Haar, a public health lecturer at UC Berkeley. She said there had been a “false narrative” that “less-lethal” weapons were less problematic, resulting in little rigorous review of their impact.”³¹

Unlike live ammunition, sponge rounds of the type used by the SPD should not be aimed at the center of mass of the torso. Rather, like beanbags, they should be aimed at the lower abdomen, buttocks, arms below the elbow, thighs, and legs below the knee.

Judge Jones conditioned the use of such projectiles stating “they shall not be deployed indiscriminately into a crowd and to the extent reasonably possible, they should be targeted at the specific imminent threat of physical harm to themselves or identifiable others or to respond to specific acts of violence or destruction of property.” I tentatively agree, at least so long as the bullets can be precisely aimed as described in the paragraph above.³²

Blast Balls

In December 2015, Pierce Murphy, then head of the OPA, wrote to Chief O’Toole about blast balls:

³¹ Los Angeles Times, James Rainey, " Police say projectile launchers are safer than other ‘less lethal’ alternatives. Injured protesters disagree," June 12, 2020.

³² One expert is of the view that the devices used to launch the rubber bullets are too imprecise and are unable to be fixed, thereby leading to a conclusion that the rubber bullets and similar tool should not be used. The bullets can hit the wrong persons, or the wrong parts of the person's body, or both.

“Use of Blast Ball Grenades (blast-balls) OPA recommends that SPD re-evaluate how and under what circumstances officers use blast-balls as a means of moving or dispersing crowds of people. The evidence from May Day 2015 indicates that, while highly effective in getting people to move, the ball-blasts create fear and panic when detonated.³³ Additionally, blast-balls deployed by SPD officers exploded in extremely close proximity to people, not all of whom were engaged in destruction of property or posed a threat to public safety. This is contrary to our understanding of how officers have been trained to deploy blast-balls, specifically so that they detonate in open areas to create greater distance between the police and a crowd. Of particular concern, some SPD officers tossed blast-balls over the heads of those immediately in front of them so the explosive devices landed in the middle of a crowd. Because the initial detonation of a blast-ball separates a hard metal fuse device from its rubber base, there is a possibility of the metal fuse acting as shrapnel and causing serious injury to someone in close proximity when it separates. In addition, deployment of blast-balls at the feet of people or into a crowd can cause burns from the second and larger detonation, as well as blunt force trauma from the rubber base as the flash powder inside explodes and the two halves of the base fly apart. The product safety warning included in the literature provided by the manufacturer: ‘may cause serious injury or death to you or others.’ We particularly encourage SPD to ensure that its officers' use of blast-balls is consistent with the care due explosive devices.”

33 Causing fear, although not nice, is a less harmful means of moving crowd than actual force. If the threat of a reasonable response by police, couple with the belief that the police can respond with an appropriately higher level of force, or the fear of the response, is what motivates people (especial with crowd contagion) to respond to lawful commands, then that is better than actually using force.

The OIG noted that “blast balls have the potential to inflict serious injury or even death if detonated too close to a person.”³⁴ “SPD policy requires personnel to issue a verbal warning, if feasible, before deploying OC spray or the 40 mm launcher, but does not include any warning requirement for blast balls.”³⁵ I agree that a warning should be given prior to using blast balls.

Current SPD policy on blast balls, SPD Manual §8.300-POL-10 Use of Force-Blast Balls, fails to address the consequences and injuries noted by Pierce Murphy in 2015. Chief O’Toole apparently engaged independent experts to review its policies on less than lethal tools, including blast balls. One of the experts, Steve Ijames, produced a report which, according to the publication *The Stranger*, never was published, and *The Stranger* quoted from what it said was a draft of the report that was highly critical of the SPD’s use of blast balls.³⁶

I recommend an immediate moratorium by SPD on the use of blast balls until such time as the SPD amends its policies to provide that the intentional deployment of blast balls at or close to any person is prohibited unless the officer is facing the immediate threat of death or serious physical injury. Furthermore, the tossing of blast balls overhead should be prohibited. A warning should be given prior to the deployment of a blast ball. Moreover, SPD policy should provide that unless there are sufficient exits to permit any person to quickly leave after a dispersal order, a blast ball cannot be used.

³⁴ OIG, p.5

³⁵ OIG, p.13

³⁶ *The Stranger*, Sydney Brownstone, " Lawsuit: Seattle Police Knew Dangers of Blast Balls Before Using Them on May Day 2016," April 30, 2018.

Conclusion

I join in the recommendation of OPA Director Andrew Myerberg that the SPD should not be reauthorized to use CS gas. I tentatively support the reauthorization of rubber bullets, so long as it can be shown that they can be properly aimed, and SPD's policies permanently mirror the provisions of the Preliminary Injunction issued by Judge Richard Jones for the use of less-lethal projectiles. I recommend a moratorium on the use of blast balls until such time as the SPD adopts policies as I have described them in the last paragraph of my discussion of blast balls.

I further recommend the creation of a new Tactical Unit. The Unit should come up with strategies, educational and training materials, and levels of accountability up the chain of command in any instance. There should be tabletop exercises—virtual and computerized, if possible— running through different scenarios to get commanders and others with the education and experience needed for a massive event.

I recommend also that SPD should rewrite its crowd control policy so that use of non-lethal tools that carry a risk of serious injury or death be limited to violent and uncontrollable behavior by a substantial group or crowd of individuals.

M.JB

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