

# Encircling protesters and targeting journalists undermine right to assemble

The right to assemble is as American as apple pie. It is written in the First Amendment – “the right of the people to peaceably assemble.” The American Revolution followed high-spirited protests in the colonies.

But legal experts say that police tactics at mass demonstrations are threatening the right to assemble. Kettling protesters, spraying them with chemicals, mass arrests, targeting journalists – all are tactics that have become commonplace.

They happened in St. Louis during the September, 2017 protests after a former police officer was acquitted of murder. They happened in the blocks around Lafayette Park across from the White House during the Black Lives Matter protests after the murder of George Floyd. They happened too in the Bronx, Brooklyn, Charlotte, Portland, Chicago and Dallas.

In 2002 D.C police used the kettling tactic on anti-war, anti-globalization protesters; in 2003 Chicago police kettled 800 anti-war protesters; in 2011 New York police surrounded Occupy Wall Street protesters; in 2017 and 2021 Portland police surrounded protesters and snapped photos of all of those trapped within the kettle. (Kettling is a police tactic for controlling large crowds in which a large formation of police contain a crowd in one area.)

Picture the scene of the typical big city protest: Hundreds of protesters march through the streets and shout, sometimes yelling obscenities at public officials and the police officers. Police officers, often from tactical units wearing militaristic uniforms, stand at the ready.



In this Aug. 9, 2020, photo, Portland, Oregon, police officers in riot gear advance on a group of protesters after a demonstration was declared an “unlawful assembly.” Despite passage of a 2020 Oregon law tracking decertified officers statewide, most complaints of misconduct remain closed. (Photo by Maranie Rae Staab/Associated Press.)

Then comes the moment when police decide to declare an illegal assembly – the moment at which a constitutionally protected right suddenly becomes a crime.

Police have the authority to declare an assembly illegal if there is lawbreaking – if the protesters are blocking highways, breaking windows, burning shops or cars, or throwing rocks and water bottles.

But police have to make sure the crowd hears the declaration of an illegal assembly and that people have a chance to leave before police close in.

Kettling tactics employed in big protests in St. Louis, Washington, D.C. and New York didn’t adequately inform

protesters or allow people to leave the area as police moved in, according to official reports and court documents.

## **Journalists targeted in Portland**

Over the past year, Maranie Staab has been repeatedly roughed up by specific officers who targeted her at Portland protests.

Over that time, the independent photo-journalist has seen some amazing things through her lens, such as a pro-Trump demonstrator pointing a gun at her from a passing car. She has been shot by rubber bullets and tear-gassed. And she was told by Jan. 6 insurrectionists in D.C. that she and other reporters were communists and scum.

When Staab arrived in Portland on July 26, 2020, she was a seasoned journalist. But her experience had not prepared her for this experience.

She went out on the streets the night she arrived. "I was tear gassed immediately...it's horrific," she said in an interview. "It acts as a chemical weapon. It is banned in international warfare. It is not a matter of toughness....I was rendered unable to function. I couldn't see or breathe. It was terrifying.

"I've been covering protests for years whether in Pittsburgh or Syracuse...Usually I would just dress normally. Now standard attire is a helmet, eye protection, long sleeves, a press vest so I'm clearly identified....Protesters carry umbrellas or home-made shields. Now I will not go to a protest without a gas mask....I didn't wear a press vest when I first came. It's now always on."

Staab's complaint that journalists and court observers have been targeted by law enforcement, has been confirmed in federal court. The 9th U.S. Circuit Court of Appeals last fall imposed an emergency order directing federal agents to stop retaliating against journalists exercising their First

Amendment rights.

The decision cited attacks by federal agents on three photojournalists – Jungho Kim, Amy Katz and Daniel Hollis. All wore large letters identifying them as press. Kim and Hollis were shot with less-lethal projectiles. Katz was shoved away by agents when she tried to photograph the arrest of a demonstrator who had been pushed down a flight of steps by agents.

A fourth journalist, Brian Conley, presented film footage showing federal agents spraying pepper spray into the faces of peaceful demonstrators at point-blank range.

The four were among 45 journalists who testified in federal court about the attacks by federal agents. The appeals court said their testimony was compelling proof of what it called a “shocking pattern of misconduct” retaliating against journalists exercising their First Amendment rights.

Here are the footnotes from the court’s opinion, which describe what happened to each of the journalists exercising their First Amendment free press right to cover the demonstrators who were exercising their First Amendment right to assemble. The descriptions are the court’s:

- On July 29, plaintiff Brian Conley was wearing a photographer’s vest marked “PRESS,” a helmet marked “PRESS,” and was carrying a large camera with an attached LED light and telephoto lens....Conley was filming a line of federal officers moving down the street pepper spraying peaceful protesters—including spraying a woman in the face at point blank range who was on her knees in the middle of the street with her hands up—when, without warning, a federal officer pepper sprayed Conley at point blank range.
- On the night of July 19, Jungho Kim, a photojournalist, was wearing a neon yellow vest marked “PRESS” and a

white helmet marked "PRESS" on the front and rear. The district court found that Kim was standing alone, about 30 feet from federal agents, taking photographs, when suddenly and without warning, Kim was shot in the chest, just below his heart with a less-lethal munition. A photograph submitted with Kim's declaration shows that he was shot where the word "PRESS" was printed on his vest.

- On the night of July 26, Daniel Hollis, a videographer, was wearing a press pass and a helmet marked "PRESS" in bright orange tape, and carrying a large, professional video-recording camera. Hollis was filming a group of federal agents massed outside the federal courthouse. "Almost immediately," the federal agents shot at him, striking him just left of his groin. He turned and began to run away, but was shot again in the lower back.
- On July 27, Amy Katz, a photojournalist, was wearing a hat and tank top marked "PRESS" and carrying a camera with a telephoto lens while covering the protests. Katz was photographing a federal agent who pushed a man down a flight of stairs while arresting him. Another federal agent physically blocked Katz and tried to stop her from photographing the arrest. Katz stepped to the side to continue photographing the arrest, and the federal agent physically shoved her away.

## **Ferguson: First Amendment applies at night, too**

John Inazu, a Washington University law professor, has written about the diminishing protection in America today for the freedom of assembly.

He argues that "contemporary understandings of unlawful assembly cede too much discretion to law enforcement" while ignoring the way the law traditionally treated assemblies.

Inazu cited the 2014 arrest of Antonio French on Aug. 13, 2014 as an example. French was a leading citizen journalist during Ferguson and one of the most active and accurate sources of news from the protest. One evening he joined a protest that soon faced police with armored vehicles, high-powered rifles and a helicopter flying overhead. (The St. Louis County police had bought its military equipment using money seized in asset-forfeiture stops, heavily criticized by civil libertarians.)

Missouri law, Inazu points out, states that a person commits unlawful assembly "if he knowingly assembles with six or more other persons and agrees . . . to violate . . . the criminal law. . . with force or violence." But police arrested French "without even bothering to specify what offense he had allegedly conspired to commit or the identities of his alleged co-conspirators.

"Nor did they suggest that French was planning to use force or violence to break the law," Inazu [wrote](#). "There was, in other words, little indication that police had sufficient evidence that French had met the material elements of unlawful assembly necessary to arrest him for that crime."

Inazu added that, "Antonio French is not the only casualty of these laws. In fact, unlawful assembly restrictions target citizens across the political spectrum, including civil rights workers, antiabortion demonstrators, labor organizers, environmental groups, Tea Party activists, Occupy protesters, and antiwar protesters."

During the Ferguson protests, police used an array of tactics that violated constitutional rights of protesters and journalists. They banned nighttime protests until a judge told them they couldn't. They required protesters to keep moving, until U.S. District Judge Catherine Perry said that wasn't constitutional. They set up a pen for journalists, far removed from the protests, and arrested a Getty photographer who strayed. They arrested two journalists in a McDonalds.

Lee Rowland, senior staff attorney for the ACLU, summarized it this way: “Tear gas, rubber bullets, and assault weapons; free speech zones, gags, and press pens... Some of these tactics are physical. The other ones—all the more pernicious for their quiet coercion—impose a veil of silence over the actions of law enforcement. And each of these weapons has been unleashed on the people of Ferguson, Missouri, since the killing of Michael Brown.”

## **Kettling and the acquittal of Jason Stockley**

Downtown St. Louis – within blocks of the Old Courthouse where slaves were sold and Dred and Harriet Scott sought their freedom and within sight of the place where Francis McIntosh was burned by a mob for killing a policeman – was the scene of vigorous Black Lives Matter protests in Sept., 2017 after former St. Louis Officer Jason Stockley was acquitted of murder in the killing of a fleeing suspect.

St. Louis Police kettled protesters in a city block and arrested them. Also a group of white officers beat an Black undercover colleague after exchanging texts expressing excitement about beating Blacks. The white officers had not realized they were beating a fellow officer.

Mario Ortega, who was a Washington University scientist at the time, was one of those arrested. He said he was watching the protest when he got caught in a “kettle” police used to trap protesters in a block near the intersection of Washington Ave. and Tucker Blvd. He said in a lawsuit that he was pepper sprayed, punched, kicked, dragged and slammed into a building.

A 2021 federal court decision in Ortega’s case graphically describes what happened. Here’s Ortega’s description of the scene.

“...a line of officers extended across the street and sidewalk

on Washington one block west of Tucker. Another line of officers extended across the street and sidewalk on Tucker one block north of Washington. A third line of officers extended across the street and sidewalk on Tucker one block south of Washington. All three lines of officers wore military-like tactical dress, including helmets. They carried long wooden batons and full-body riot shields. A fourth line of officers extended across the street and sidewalk on Washington one half block east of Tucker. The four lines began to approach Washington and Tucker.”

Ortega said that “without instruction or warning, officers surrounded residents, business patrons, protestors, observers, and members of the press, cutting off all exits, and preventing the people inside the area from leaving. As they approached, officers began banging batons against their riot shields and the street. Citizens approached officers and asked to be let past. Officers responded by screaming, “Get back!”

Magistrate David C. Noce, who was hearing Ortega’s case, continued the account in his opinion: “The officers trapped everyone who was within a one-block radius of Washington and Tucker. This is a tactic known as ‘kettling.’ Officers kettled a wide variety of innocent citizens, including self-admitted protestors, residents who live in the area, people visiting businesses, reporters, documentarians, and homeless persons. The officers even grabbed an African American male who was outside of the kettle and threw him into the kettle.

“Individuals in the kettle approached the line of bicycle officers with their hands up. The bicycle officers jabbed at the individuals, using their bicycles as battering rams. Some supervisors, including Sgt. (Matthew) Karnowski and Lt. (Bill) Kiphart, used pepper spray against peaceful citizens who were complying with police orders, to the extent any orders were given. Their actions caused plaintiff Ortega to be very fearful.



“At the start of the kettle, a few people in the crowd peacefully stood with their hands up in front of the officers. Sgt. Karnowski used pepper spray against them. At no time was Sgt. Karnowski in any danger because he was standing safely with a line of bicycle officers between him and the citizens. All of his actions were documented on a video camera strapped to his helmet. Sgt. Karnowski’s actions gave tacit approval to other officers to engage in the same behavior. This created a domino effect of the use of force on Ortega and others arrested that evening.

“Almost instantly after being pepper sprayed, individuals in the kettle put their hands in the air as a sign of peaceful surrender. Many laid prostrate on the ground. Others sat down. Those who could not sit down, because of how many people were inside the kettle, got as close to the ground as possible. Video evidence shows none of the individuals inside the kettle acted violently or aggressively, and yet, officers repeatedly doused them with chemical agents without warning.

“Lt. Kiphart attacked a journalist holding a camera with pepper spray from a ‘fogger’ which he also sprayed indiscriminately into the crowd. Moments later, Officer (Matthew) Burle deployed another fogger blast towards the same journalist and those sitting near him, hitting the journalist in the face with pepper spray.

“Sgts. (Randy) Jemerson and (Brian) Rossomanno, and other supervisors, were within arms-length of officers pepper spraying and beating peaceful and compliant citizens. Rather than instructing those officers to stop, they took control of the situation and directed the officers’ actions. Officers used hard, plastic zip ties to arrest all of the individuals. Months later, individuals continued to suffer from pain and numbness in their hands due to the tightness of the zip ties.

“Over 100 people were arrested that night. During and after the arrests, officers were observed high-fiving each other,

smoking celebratory cigars, taking selfies on their personal phones with arrestees against the arrestees' wills, and chanting, 'Whose Streets? Our Streets!' An anonymous person posted a celebratory photo of police officers on Twitter that night.

"...The next day, Lt. Col. O'Toole, the SLMPD Acting Chief, reinforced the City's ratification of the defendants' actions when he said, 'I'm proud to say the City of St. Louis and the police owned the night,' while standing next to St. Louis Mayor Lyda Krewson. Mayor Krewson further validated the defendants' actions when she thanked the officers 'for the outstanding job they have been doing over the last three days.' She added that she fully supported the actions of the officers."

## **New York investigation criticizes 2021 kettling**

The New York Police Department was not prepared for the widespread protests that occurred in multiple parts of the city after the murder of George Floyd, according to an after-action report by the independent Department of Investigation.

Partly as a result, the department relied on mass arrests often following kettling tactics – or encirclement tactics as the NYPD prefers to call them.

The report concluded: NYPD's use of force on protesters—encirclement (commonly called "kettling"), mass arrests, baton and pepper spray use, and other tactics—reflected a failure to calibrate an appropriate balance between valid public safety or officer safety interests and the rights of protesters to assemble and express their views. The inconsistent application of the curfew similarly generated legitimate public concerns about selective enforcement. NYPD use of force and crowd control tactics often failed to discriminate between lawful, peaceful protesters and

unlawful actors, and contributed to the perception that officers were exercising force in some cases beyond what was necessary under the circumstances.”

The report said that rather than concentrate on facilitating First Amendment expression, the department focused on managing crowds and fell back on mass arrests to do it.

The report pointed out that the department relied on its Strategic Response Group team, which is composed of 700 highly trained officers designed as a counterterrorism squad.

The after-action report said that when the SRG was created in 2015, there was “internal discussion within NYPD as to the propriety of using SRG, a unit specially trained for serious disorder and counterterrorism, to respond to First Amendment activity such as protests. Nonetheless, the SRG has since been a primary resource for the NYPD’s response to large-scale protests.”

The New York Civil Liberties Union leaves no doubt about what it thinks about using the SRG on First Amendment protests. It wants to disband the group, saying: “The SRG is a notoriously violent rapid response unit. Despite promises from the department that the unit would not be deployed at protests, the SRG has consistently threatened, attacked, and arrested protesters. Time and time again, when SRG arrives on the scene, officers escalate situations and injure New Yorkers who are exercising their First Amendment rights.”

That’s what happened on June 4, 2020 when SRG strictly enforced the 8 p.m. curfew in the Bronx, even though it had not been enforced strictly in other parts of the city. Here is how the report describes what happened.

“Shortly before the 8:00 p.m. curfew took effect, NYPD Strategic Response Group (SRG) bicycle squad officers blocked the path of the protest group at Brook Avenue and East 136th Street. Simultaneously, another group of NYPD personnel

approached from behind the protest group to enclose a larger portion of the group on a block with parked cars lining either side. Many protesters at the scene reported that officers blocked their movements leaving no opportunity to exit or disperse voluntarily. At around 8:00 p.m., officers began executing mass arrests for curfew violations, which were accomplished in part by using physical force against protesters, including striking them with batons. Among those arrested were identified legal observers, mainly from the National Lawyers Guild, and identified “medical volunteers.”

The report expressed surprise that top brass in the department had not learned lessons from the protests. “When DOI asked NYPD officials whether, in retrospect, the Department could have done anything else differently and made any further changes to improve its response to the protests, with few exceptions, officials offered none. While some difference in views is to be expected, the wide gap between the apparent views of the Department’s most senior officials and the views of members of the public who participated in the protests is troubling.”

*William H. Freivogel is publisher of GJR, a professor of media law at Southern Illinois University Carbondale and a member of the Missouri Bar.*

**Editor’s Note: This article was first published Dec. 22, 2021, in the print edition of GJR.**