Travis Day vs. City of Baton Rouge et. al

Expert Analysis and Opinion

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On July 5, 2019 Baton Rouge police officers Blane Salamoni and Howie Lake killed Alton Sterling during a controversial police-initiated interaction. After a video of the incident circulated on the Internet, major protests erupted in Baton Rouge. The available evidence shows that these were peaceful demonstrations conducted predominantly by the citizens of Baton Rouge protesting this specific action over the course of multiple days. Citizens protested both the historical treatment of racial minorities by the Baton Rouge Police Department (BRPD), and the larger issue of police violence against racial minorities. Irrefutable video-evidence and testimony also shows the aggressive and intimidating display of police power the BRPD deployed against its own citizens who were exercising their First Amendment rights. This included multiple squads of Mobile Field Force (MFF) units clad in riot gear who were in formation in tight proximity across from peaceful protesters as well as numerous squads of police paramilitary units (SWAT teams) donned in full tactical gear and outfitted with heavy weaponry. Operationally, the BRPD enacted a "mass arrest" protocol as a part of their response. This ultimately resulted in the dismissal of almost all charges of those arrested. One of those arrested on the 9th of July was Travis Day.

As an expert witness in this case I have reviewed and analyzed all relevant documents, videos, and depositions for the purpose of rendering an analysis and opinion regarding Travis Day's legal complaint. This report exclusively addresses the actions of the Baton Rouge Police Department.

It is my opinion, to a reasonable degree of certainty based on my study of law enforcement practices in the US, that the following policy decisions, policy failures, and training failures resulted in the unlawful arrest and use of excessive force against Travis Day on June 9, 2016:

1.   BRPD's deployment of a decidedly confrontational and aggressive approach to overwhelmingly peaceful protests, including the widespread and fully embedded use of police paramilitary special operations units such as the Mobile Field Force and the Special Response Teams (BRPD's version of SWAT);

2.   BRPD's training of MFF and SWAT units in, and implementation of, the practice of mass arrest as a means of dispersing protesters by seizing and arresting selected protesters through the manipulative and inconsistent use of roadway obstruction laws, thereby causing non-arrested protesters to flee the scene for fear of arrest and assault;

3.   The use of an assembly-line mass-arrest protocol, in which arrests were made by one officer or set of officers and the arrestee transferred through multiple chains of custody to a processing area where pre-printed probable cause affidavits charged the arrestee with obstruction of a highway under La. R.S. 14:97, all of which ensured that a protester would be removed from the scene and detained without any realistic prospect of later prosecution;

4.   The targeting, seizing and removing of protesters demonstrating "contempt of cop" -- talking back to officers, recording public police activities, or zealously protesting perceived injustices – as a way of removing such protesters from the scene;

5.   The failure to properly train and/or communicate operational personnel on the proper categorization of a public assembly under the "Miami Model" or otherwise; and

6.   The suspension of BRPD's use of force policy in the field, such that protesters not showing resistance, such as Travis Day, were subjected to take-down and other uses of force, and such that uses of force were not documented or reviewed.

At the point when either Chief Dabadie, Incident Commander Leach or Incident Commander Martin gave the order to clear the street in front of the BRPD headquarters, these policies (whether unwritten or written) and failures of training and supervision resulted in a mass arrest which included the false arrest and use of excessive force against Travis Day. BRPD leadership, including the Chief of Police and the Incident Commanders to whom he delegated his full authority, gave directions that implemented these policy decisions and failures, which directly resulted in the arrest of and use of excessive force against Travis Day.

Mass Arrest via La.R.S. 14:97

Police scholars see the U.S. police as having an extremely difficult mandate to balance. The police institution is responsible for both trying to protect while at the same time control the citizenry it serves – rendering it susceptible to controversy and historically recurring crises in public trust and police legitimacy. Today is no different. The dramatic events that took place in Ferguson Missouri in August of 2014 were a tipping point in the public's frustration with the police institution. Since then various police departments around the country have gone through similar crises during which those agencies have been accused of misplaced aggression and wrong-doing with no legal consequences.

One result of this state of affairs has been large public protests. Some of these have been planned and well-organized. Others have arisen spontaneously with large groups of local citizens hitting the streets and other public areas in protest. Both are public expressions of grief and intense frustration, targeted at the police and arising from the well-founded perception that legal accountability is unlikely (Santa Clara Law, 2017). The police find themselves attempting to protect and serve the safety and civil rights of those protesting police wrong-doing. Such was the case of the Baton Rouge Police Department in July of 2016: within a day of Alton Sterling's death, at least a thousand residents left their homes and came into the streets in large peaceful demonstrations ("large" relative to the population of Baton Rouge; 225,000). By some accounts, the police responded initially with a measured and unprovocative presence. By the second day of peaceful demonstrations, however, BRPD pivoted and deployed a decidedly confrontational and aggressive approach. As other police departments arrived from the surrounding areas and deployed their SWAT teams and Mobile Field Force units to Baton Rouge, the strategies to police these protests became increasingly focused on restrictive crowd control measures. This led to an intimidating law enforcement presence and the suppression of dissent.

The most telling indicator of BRPD misplaced aggression was the widespread and fully embedded use of police paramilitary special operations units (SWAT, or what BRPD calls SRT – Special Response Teams). The video evidence depicts police in full riot gear (the Mobile Field Force units) and SWAT teams being deployed against peaceful protesters en masse. Moreover, the SWAT teams – oftentimes marching along and behind armored personnel carriers – were fully integrated into the hands-on activities of controlling protesters' movements and behavior. The resulting image of militarized police presence, much like during the disastrous response of the Ferguson Missouri PD in 2014, was intensely inflammatory, and a wholly inappropriate and unnecessary application of police power.

In fact, the police best-practices research and literature is clear and pointed: these police paramilitary teams, given that they are outfitted almost identical to U.S. Military special forces soldiers, should only be deployed in periphery locations away from direct contact with the protesters. The reasons for this are two-fold. The first is practical – this ostentatious display of police power can incite an otherwise peaceful crowd of protesters. The video evidence shows numerous instances of these paramilitary officers using their automatic heavy-grade military weaponry as a means to direct people's activities that are only a few feet from the end of the barrel. Given that Baton Rouge citizens were already quite upset with the BRPD, this sort of operation can rapidly escalate tensions, making crowd control more difficult, and do irreparable damage to police-community relations. The second is constitutional – this militaristic display of power targeted at peaceful citizens protesting the actions of their local government can be viewed as an intentional suppression of constitutionally protected expressions of dissent. It is critical to note that this practice remains problematic even if BRPD was attempting to respond to an active shooter threat – such as from the New Black Panthers. Police paramilitary squads were fully integrated into crowd control activities when they instead should have been operating only as periphery security.

Another way in which the police have historically acted to suppress dissent is through the practice of mass arrest. The use of mass arrests to suppress public protests has a long and troubled history (Peters 2019). As Peters (2019:236) notes, "Violent mass arrests of civil rights protesters were part of the impetus for sweeping civil rights legislation in the 1960s that began under President John F. Kennedy and was later enacted by President Lyndon B. Johnson." Its continued use by the police is indicative of its effectiveness in dispersing demonstrators from a particular location. However, as addressed by numerous court rulings denouncing its misuse, mass arrests can escalate tensions, ruin police-community relations, generate unlawful arrests, overload a police agency's abilities, and often leads to costly litigation (Lipp, 2014). It is unsurprising therefore that a consensus exists in the research and police professional literature that mass arrest practices during public protests should be avoided and resorted to in only the most extreme, exigent circumstances.

When Travis Day was arrested on July 9 he was only one of approximately 200 protesters and onlookers that were detained and placed into custody during the first few days of the protests. It is critical to clarify that while this number is small compared to the mass arrests that have been made in Washington D.C. or New York City, it is actually a significant number when compared to the number of protesters. Two hundred protesters arrested out of an assembly of 1000 (20%) is far more consequential than 500 arrests out of an assembly of 20,000 (2.5%). Over 100 arrests were made in only one day during one of the earliest assemblies. Even though the BRPD was concerned about "outsiders" – those that came from out of town and were affiliated with activist groups such as Black Lives Matter and the New Black Panthers – 91 percent of those arrested were residents of Baton Rouge. More than 99 percent were arrested, charged, processed, and put in jail for the misdemeanor crime referred to generically as "obstructing a roadway" (statute La.R.S.14:97). BRPD police officials instructed officers to "clear the roadway," "take back the roadway" and "take back the streets." The same statute and sentiment was used to arrest and incarcerate Travis Day. Remarkably there were no arrests for violence, disorder, or property destruction; additional evidence that those Baton Rouge citizens assembling to protest the actions of the BRPD were peaceful.

The evidence also shows that the Baton Rouge Police Department spent considerable effort and time organizing and designing a response to the protests that centered around mass

arrests using La. R.S. 14:97. BRPD created boilerplate probable cause affidavits that would be filled out at a processing station far removed from the protests themselves. In this way they created an assembly-line process as recommended by the Mobile Field Force (MFF) model.

The implementation of this assembly-line mass-arrest protocol involved MFF units dressed in full riot gear and batons confronting the protesters, standing just feet away from them in tight shoulder-to-shoulder formation. The MFF units were provided "cover" by roving SWAT team members interspersed and in proximity of the MFF team. If the MFF team received an order from the commander on the scene to begin making arrests, MFF and SWAT would single out select protesters to be arrested. Regular uniformed officers not in MFF or SWAT would wait on the periphery for the same order from a supervisor, move in quickly, detain, arrest, and move those arrested to a processing table. A different team of officers would then fill out a boilerplate probable cause affidavit and transport the arrestees to jail. Although this approach is recommended by the MFF model, it makes clear the criticality of police departments keeping in place and enforcing all normal departmental policies and procedures that relate to constitutional arrests and proper evidentiary procedures. The available evidence in the case of Travis Day demonstrate unequivocally that the BRPD did not follow their departmental policies and practices with regard to probable cause protocols (and use-of-force policies discussed in the next section). Best practices training, as guided by case law, mandates that all arrests must be supported by particularized probable cause. This assembly-line approach as implemented by BRPD made it possible for the probable cause affidavit to be written by anyone who directly observed the alleged offense. BRPD placed a higher priority on "clearing the street" than to make genuine arrestees that were intended to be prosecuted.

Travis Day was one of approximately 150 people peacefully protesting on July 9, 2016. There were at least 60 police officers present including MFF teams in full riot gear, SWAT team members in close proximity to the protesters, and regular uniformed officers on the periphery. Using the same strategy described above, Mr. Day was arrested and jailed during a surge of law enforcement conducting mass arrests. The nature of his specific arrest points to the misuse of La.R.S.14:97 and misapplication of the MFF training model. It is unlikely Travis Day was targeted and arrested for obstructing a roadway. The video evidence is not definitive but it does show that Mr. Day was standing next to the road, not in the road, during the protest and when his arrest was executed. Some discussion has taken place on depositions as to whether Mr. Day might have stepped into the roadway, or was pushed into the roadway, but even Chief Dabadie admitted that such a minor occurrence should not have been cause for arrest (p.149-156). It is important to note that most of the other people standing in the same area as Travis Day were not arrested.

There is clear evidence, however, that Mr. Day was an enthusiastic and vocal protester that included the unashamed video recording of the police. He "called out" African-American police officers for not supporting the protesters, and at one point right before his arrest he referred to one officer, in an understated tone, as a "punk-ass-bitch." Video recording police, and these types of verbal expressions, are protected under the First Amendment. However, they are often interpreted by police as "contempt of cop" and met with strong retaliation. The Department of Justice's scathing analysis of the Ferguson Police Department's reaction to protests in 2014 (p.26) found that:

> …officers frequently make enforcement decisions based on what subjects say, or how
> they say it. Just as officers reflexively resort to arrest immediately upon noncompliance
> with their orders, whether lawful or not, they are quick to overreact to challenges and

verbal slights. These incidents—sometimes called "contempt of cop" cases—are propelled by officers' belief that arrest is an appropriate response to disrespect.

The DOJ investigation concluded that police violated protesters' First Amendment rights by arresting those who demonstrated a "contempt of cop'' – talking back to officers, recording public police activities, or for zealously protesting perceived injustices. The report also asserts that "FPD's suppression of speech reflects a police culture that relies on the exercise of police power — however unlawful — to stifle unwelcome criticism" (Department of Justice, 2015).

My conclusion is similar: Travis Day's arrest was not based on probable cause from observations of Mr. Day breaking the law. Instead, he was arrested for "contempt of cop" which involved perceived signs of disrespect by individual protesters and the Baton Rouge community. Travis Day's arrest was one action that was part of a series of actions, including the exploitation and misapplication of La.R.S.14:97, to execute a policy of mass arrest, to stifle unwanted criticism and the African-American community public dissent. Put differently, these arrests were not carried out in accordance with Louisiana law or the BRPD's own policies; they were instead used as a means to shut down peaceful protests and to retaliate against specific participants that violated the "contempt of cop" cultural norm. It is critical to recognize that this was not a matter of poor decision-making on the part of individual officers. Rather, the misuse of mass arrests through the manipulative use of La.R.S.14:97 was carefully planned, designed, and implemented and then later condoned by BRPD officials.

Training and Supervision Issues

Policing public protests is by all accounts a significant challenge. These challenges have led to numerous high-profile disastrous responses throughout the United States. However, these mistakes have led to a large and fairly consistent set of best practices and training programs. It appears that Baton Rouge Police Department's knowledge, preparation, and policies related to policing demonstrations comes from a "Mobile Field Force" (MFF) training program based in Texas.

One fundamental problem uncovered in the review of materials is that those designing and organizing the protest response did not properly train and/or communicate operational personnel on the proper categorization of a public assembly. For example, was a particular assembly unlawful or lawful, peaceful or disruptive, a mere gathering or a mob? And while BRPD and Baton Rouge officials admitted that they only encountered peaceful demonstrations, the actions of BRPD did not coincide with this assessment. It is based on the "Miami Model" of crowd control and includes four categories of public assemblies: casual, cohesive, expressive, and aggressive. However, the BRPD written policies do not use this typology and in fact, no clear guidance is provided supervisors or line personnel about what constitutes an unlawful assembly, a lawful assembly, civil disorder, or a riot. The application of aggressive tactics and excessive force beyond what the situation required was a foreseeable consequence of the application of the "Miami Model" or crowd control which is espoused in the Texas Mobile Field Force training manual used by BRPD.

As noted, administrative officials did state publicly that the demonstrations were peaceful and lawful events. However, the commanders of the actual operations treated several protest venues as being so volatile and threatening that they deployed riot police with full armor, shields, and large batons, hundreds of SWAT officers donning their full paramilitary garb along with heavy weaponry, armored personnel vehicles, and executed over 200 arrests in an attempt to shut down the protests. I found no evidence that would lead BRPD to categorize these demonstrations

as "aggressive" or unlawful. The reason for BRPD mis-categorizing these events is simply poor policy, preparation, and training.

How and when to properly use force, and document its use, was another failure in training and supervision. This failure was not due to a lack of solid existing policy with the BRPD. In fact, BRPD's use of force policies are comprehensive and adequate. The issue is the way in which this policy was overridden during these public assemblies. One of the first basic principles of policing any type of protest is that arrest and use of force policies are not to be suspended or modified. All police training emphasizes that police personnel must abide by the same use-of-force protocols and procedures found in departmental handbooks. The BRPD did not follow this fundamental principle when arresting Travis Day. Furthermore, the available evidence indicates that this same neglect of duty occurred with all arrested protesters that experienced a police use-of-force incident.

Specifically, the BRPD officers who arrested Mr. Day violated several of their agency's purported policies. Jared Neyland was the BRPD officer that approached Mr. Day from behind, provided no warning that he was going to be arrested, wrapped an arm around his neck, pulled him to the ground violently, and then four other officers (including James Thomas) joined in a "scrum" where a knee was pressed into Day's neck. Other possible use-of-force tactics could have been used given Mr. Day's injuries but were not captured on the video. These actions violated nearly all major aspects of BRPD's own use-of-force policies:

- force can only be used to compel compliance from an unwilling subject;
- Mr. Day's behavior/situation does not conform to any of the categories of "subject resistance" – psychological, verbal, passive, defensive, active, or deadly;
- the arresting officers did not employ the mandated use-of-force continuum;
- no use of force report was completed;
- no investigation of that incident was completed.

This is alarming given that one of the officers involved in the take-down of Travis Day has a disciplinary record that includes kicking a handcuffed arrestee in the head and lying about it. Moreover, BRPD administrators did not follow up on the disciplinary measures he received which involved enhanced training in use-of-force protocols. The depositions also revealed a serious breakdown in communication with regard to when a use-of-force report should be filled out. Sgt. Doug Baron's understanding was that it was only required when an officer used "hard empty-hand control or batter" and not required for "soft-empty-hand control, wrestling, handcuffing…." Lt. Leach (Incident Commander of the protest operation) contradicted this position saying that any use of force beyond compliant handcuffing requires a use of force report. He also admitted that the "take down" of Travis Day was problematic (p.170-171).

Another serious training/communication failure associated with Mr. Day's arrest was the use of a boiler-plate probable cause affidavit that was not filled out by the arresting officer – the actual witness to the alleged crime. Best practices manuals, including the gold-standard Department of Homeland Security's *Field Force Operations* student guide are clear on the point:

Remember that a law enforcement officer is arresting a person for committing a specific unlawful act. The officer must be able to testify that the individual arrested committed the unlawful act. A conviction cannot be obtained if the individual is not properly identified as the one committing the offense. Failure to provide due process leaves the officer and the department susceptible to civil litigation.

The failure to enact an intelligible and operational policy on conducting simple arrests during a protest indicates a failure in policy, training, and supervision. The arrest of Travis Day

without probable cause for violating Ls. R.S. 14:97 was a likely and predictable consequence of these failures. It is difficult to not attribute some of this neglect and confusion to what was likely the true goal of employing this law – the suppression of dissent and the disruption of peaceful law-abiding assemblies of Baton Rouge citizens.

Other fundamental elements were not addressed or handled appropriately including little to no administrative guidance on how to interpret and implement La. R.S. 14:97. This is significant because BRPD's own policy guide and training manual includes substantive discussions on using roadway obstruction laws to enact mass arrests, but the statutes discussed are only applicable to the State of Texas and Dallas. After reviewing the differing sets of State laws, there are important differences. Moreover, it does not reflect well on BRPD's administrative staff – particularly those supervising the planning and training of policing protests – that due diligence was not exercised in simply finding and replacing applicable Louisiana laws with Texas laws. It appears that no effort was made to modify the Mobile Field Force model training program – which was developed for Miami Police Department.

Finally, there was an obvious failure to appreciate the importance of a local police department – one that espouses publicly their deep commitment to community policing, to approach peaceful Baton Rouge citizens in the least provocative or offensive way possible. The best practices research and literature is unanimous in directing police departments to avoid assuming an aggressive posture in appearance. All experts, including seasoned police executives, instruct police departments to reserve their SRTs, SWAT, and ERUs for only the most serious situations. And if there is a threat of an active shooter, even the MFF model of crowd control instructs police departments to use these police paramilitary teams on the extreme periphery of protest activity, at the ready, and out of sight to the greatest extent possible. What the BRPD did instead was fully integrate these teams with the mobile field force units. Instead of only providing cover, video evidence shows these military-style officers moving protesters, singling out individuals for arrest, and directing protester behavior by using the end of the military-grade weapon as a pointer. This provocative presence and set of practices could have been avoided with clear policy based in quality training and effective communication throughout the chain of command.

Conclusion

This analysis began with acknowledging how difficult it is to police protests, especially when those protests target the police. The level of difficulty, though, is matched with the importance of this function. The police must be held accountable when they meet words with weapons and peace with force. Protecting and serving those exercising their constitutional right to dissent is fundamental to basic standards of a democracy and Americans' civil rights. The police should be seen, and should see themselves, as the frontline in protecting these standards. The Baton Rouge Police Department clearly made mistakes in policy, practice, and supervision. Being held responsible for, and learning from these mistakes, is the first step toward meaningful change that will benefit both BRPD and the community it serves.

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