The Fourth Amendment and Mass Demonstrations—Does the Dispersal of Protestors by Law Enforcement Constitute a "Seizure"?

by John A.Greco



Mass demonstrations can undoubtedly result in significant damage, either to property or as injury to persons in the vicinity.[1] The expectation of a mass protest may cause a governmental entity to develop and evaluate a plan for law enforcement to respond to any ensuing disorder or violence that has the potential for such damage.[2] Short of arrest or detention, there are several methods that law enforcement officers might use in responding to a violent mass demonstration. One is the use of verbal orders for the crowd to disperse; another may be the display of force by officers to mobilize demonstrators, without actual physical contact with the protestors. A further method could be the use of physical force, by officers, to disperse the participants of a violent demonstration.

When authorities respond to mass protests in an attempt to prevent or limit property damage and personal injuries, the collateral result is likely to be litigation by the protestors, alleging violations of their constitutional rights. The plaintiffs in such suits, in addition to claiming violations of the First Amendment, may allege an unreasonable seizure in violation of the Fourth Amendment. In this context, absent an arrest or detention, the defense of Fourth Amendment claims requires a threshold analysis of whether a plaintiff has been "seized" for purposes of triggering the Fourth Amendment.

Defining "Seizure"

The U.S. Supreme Court defined the parameters of the term "seizure" under the Fourth Amendment in *United States v. Mendenhall*.[3] In that case, non-uniformed federal agents approached Sylvia Mendenhall at an airport and asked to see her identification and ticket. The name on Mendenhall's ticket differed from the name on her driver's license, and the agents asked her to accompany them to their office at the airport for further questioning. Mendenhall agreed, and also consented to a search, which revealed heroin on her person. The issue was whether Mendenhall had been seized by the agents for purposes of the Fourth Amendment.

The Court held she had not, as she had "no objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way."[4] The purpose of the Fourth Amendment was not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals."[5] Provided that the person being questioned remained free to disregard the questions and walk away, there was "no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification."[6]

Addressing public policy, the Court noted that characterizing every street encounter between a citizen and the police as a "seizure" would impose wholly unrealistic restrictions upon a wide variety of legitimate law enforcement practices, without enhancing any interest secured by the Fourth Amendment.[7] Accordingly, it concluded that a "person ha[d] been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave."[8]

Following *Mendenhall*, the Supreme Court decided two cases pertaining to whether a pursuit of a suspect resulted in a Fourth Amendment seizure. In *Brower v. County of Inyo*,[9] a motorist fled from police. During the chase, the police set up a roadblock to stop him. It did: Brower crashed into the police barricade and was fatally injured. Holding that the use of a roadblock to stop the car constituted a seizure within the Fourth Amendment, the Court clarified that a seizure occurred "only when there [was] a governmental termination of freedom of movement through means intentionally applied."[10] Two years later, in *California v. Hodari D.*,[11] the Court considered whether a seizure occurred when a police officer tackled, then arrested, Hodari, a fleeing juvenile. Prior to being tackled, he had discarded a rock of cocaine. On a motion to suppress the evidence of the drugs, the issue was whether (or when) Hodari had been seized. The Supreme Court determined that a seizure had not occurred until Hodari was actually tackled and stopped: "The narrow question ... is whether, with respect to a show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not."[12]

Directing Dispersal

The Supreme Court has not addressed whether commanding a crowd of demonstrators to disperse constitutes a seizure.[13] However, the U.S. Court of Appeals for the Second Circuit has held that police did not effect a Fourth Amendment seizure by ordering an individual away from a particular site. The case, *Sheppard v. Beerman*, involved a law clerk who had been fired and was being escorted out of the courthouse where he worked.[14] He claimed there had been an unlawful seizure of his person when he was led out of the courthouse, but the Second Circuit disagreed: Sheppard was "free to go anywhere ... that he desired," with the exception of the judge's chambers and the courthouse.[15]

The district courts are generally in accord with this principle: a former tenant was not seized when he was forced to leave the leased premises after his lease expired;[16] a videographer, escorted from a courthouse, was not seized under the Fourth Amendment;[17] the ejection of a former employee from a hospital did not constitute a seizure because he was "free to leave to go anywhere but the hospital;"[18] and there was no seizure when an officer pointed a gun at a plaintiff and ordered him away from his dog.[19]

This reasoning is consistent with policy and common sense: otherwise, legitimate law enforcement practices exercised

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for the welfare of the community—detouring traffic, evacuating unsafe structures, moving an intoxicated person away from a vehicle, breaking up a fight, securing a crime scene, or escorting trespassers off private property — would be subjected to Fourth Amendment scrutiny. The dispersal of a crowd of disorderly protestors by a verbal command is comparable with these law enforcement practices, and, given the reasoning in the foregoing cases, would not implicate the Fourth Amendment.

A Display of Force

If commands to disperse are unheeded, law enforcement officers may resort to non-verbal methods. In the context of protests, several district courts have held that a display of force that terminates freedom of movement constitutes a seizure under the Fourth Amendment. In *Jennings v. City of Miami*,[20] protestors at the 2003 meeting of the Free Trade Area of the Americas sued local government entities and the supervising law enforcement officers, based on a "Joint Operational Security Plan" adopted by the municipalities and the law enforcement response to mass demonstrations. In particular, the plaintiffs alleged that the officers "herded" them away from the area of the demonstration.[21] The defendants moved to dismiss the Fourth Amendment claims on the basis that the plaintiffs failed to allege a seizure. The district court, relying on *Brower*, found that dismissal was unwarranted because the plaintiffs alleged a seizure by an "intentional governmental termination of their freedom of movement."[22] However, because this issue remains unsettled,[23] the district court acknowledged the lack of "clearly established" law in this area and, therefore, granted the individual officers qualified immunity.[24]

Despite the lack of clearly established law, there may be some guidance available based on existing rulings. For instance, in *Menuel v. City of Atlanta*, the Eleventh Circuit, applying *California v. Hodari D.,* held that a police "encirclement" of an individual did not amount to a seizure.[25] In *Menuel*, officers responded to a 911 call from a residence regarding an inhabitant, Menuel, who was acting "violently and erratically."[26] After Menuel retreated to a bedroom, the officers gathered outside to induce her to surrender. Ultimately, the officers stormed the bedroom and shot her to death. The dispositive issue was whether the shooting and death arose proximately from a seizure that impinged on Menuel's Fourth Amendment rights. The court noted "the sort of encircling and impenetrable deployment of police compulsion and authority utilized" in the case, adding that "the decedent was surrounded by overwhelming force and her capture was a mere eventuality, bound probably to occur only at a time and in a manner prescribed and implemented by the police. The decedent had neither the means nor the opportunity to escape."[27] It concluded that, "notwithstanding her confinement and encirclement," because Menuel neither yielded to physical force nor submitted to a display of authority, there had been no seizure. "[U]ntil she was shot to death, the decedent was not meaningfully or effectively seized either in the Fourth Amendment sense or in the everyday sense."[28]

Non-Lethal Force

Although some district courts have found seizures had occurred based on allegations of a forceful mobilization of protestors,[29] the U.S. Supreme Court has not yet decided whether police, moving a violent crowd of demonstrators away from a demonstration site, using non-deadly physical force and without the intention to detain or arrest the demonstrators, effect a seizure.[30]

The decisions from other federal courts again provide some guidance. The U.S. Court of Appeals for the Seventh Circuit addressed the issue in *Duran v. Sirgedas.*[31] Police responding to complaints about a large party found a group of unruly partygoers. Eventually, the entire on-duty police department was dispatched to the disturbance, and officers used pepper spray (some guests were sprayed while ordered to stay inside the house; others were sprayed outside). The guests sued, alleging Fourth Amendment violations. The Seventh Circuit held that those sprayed indoors had been seized,[32] while those outdoors failed to state a constitutional violation, as they were not seized within the meaning of the Fourth Amendment.[33]

Similarly, in *McCoy v. Harrison*,[34] an animal welfare investigator entered McCoy's property to investigate complaints about the condition of dogs on the property. After McCoy told the investigator to leave, he attempted to open the gate to one of the kennels. McCoy reached to shut the gate and the investigator allegedly "backhanded" McCoy, slamming her to the ground.[35] He stood over her with his fingernails dug into her arm, but let go and did not issue any citations. The Seventh Circuit upheld the district court's summary judgment finding that there had been no seizure. Immediately after the altercation, "McCoy got up and went into her home, and Harrison left the premises. He made no effort to direct or impede her movements.... He asserted no authority as to her person and she did not in any way submit to a show of authority."[36] The Sixth Circuit appears to have the same approach. In *Slocum v. Palinkas*,[37] the court ruled that Palinkas, a police officer, did not "seize" Slocum when trying to arrest Slocum's brother. Slocum alleged that he was pushed back to separate him from his brother; Palinkas said he did nothing more than raise his arm, which caused Slocum to step back and fall. The court found Slocum's injury did not occur during the course of being seized, as "[n]o effort was made to arrest or otherwise detain" him.[38]

Some district courts have followed these circuits in determining that the use of force, without any intention to arrest or detain, does not constitute a seizure. In *McKeown v. Hairston*,[39] a police officer, in the course of making an arrest, physically moved the plaintiff (not the arrestee) out of the way, and the plaintiff fell to the ground. The federal district court ruled that no seizure occurred as the "physical force was not accompanied by an effort to restrain or apprehend," and the plaintiff was "free to leave."[40] In *Gudino v. Town of Cicero*,[41] the Illinois federal court ruled that there had been no seizure where an officer pushed against a crowd, and the plaintiff fell down and injured herself. The plaintiff was "jostled by someone

else in her group and fell when the group was being pushed back toward the house by an officer. There is no evidence that the officer acquired physical control over [her] or that she submitted to the officer's authority."[42]

Recourse Outside the Fourth Amendment

Should a court in a given case find that the plaintiffs have not alleged a "seizure" under the Fourth Amendment, plaintiffs alleging excessive force might not be left without a remedy. The U.S. Supreme Court has indicated that excessive force claims may be redressed by the Fourteenth Amendment if the use of force "shocks the conscience,"[43] and, regardless of whether a remedy in federal court exists, plaintiffs can seek recovery in state courts to recover compensatory damages under common-law tort theories.

Conclusion

Municipalities considering and implementing a law enforcement plan of responding to violent mass demonstrations may wind up defending Fourth Amendment claims of excessive force, even where there are no arrests or detentions of the protestors. Much of the law in this area remains uncertain, and the outcome of a particular case will hinge on the interpretation of the Supreme Court's pronouncements in *Mendenhall, Brower,* and *Hodari D.* on whether a seizure requires the intent to terminate all freedom of movement, as opposed to the freedom to go in a particular direction or to a particular place. Sixth and Seventh Circuit rulings suggest that an intention to arrest or detain is a prerequisite to finding a seizure. If the higher courts ultimately follow the reasoning of these Courts of Appeal, plaintiffs alleging excessive force claims without arrest or detention may be limited to pleading their claim under the Fourteenth Amendment, or under a common-law tort theory.

Notes

1. The damages caused during the protests in Seattle before the World Trade Organization meeting in 1999 – resulting in millions of dollars in property damage– were widely publicized.
2. The various cities and counties in South Florida engaged in a joint law enforcement plan to prevent violent protests during the 2003 Free Trade Area of the Americas meetings in Miami, Florida. *See* Amnesty Int'l, USA v. Battle, 559 F.3d 1170, 1175-76 (11th Cir. 2009).
3. 446 U.S. 544 (1980).
4. *Id.* at 555.
5. Quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).
6. *Id.*
7. *Id.*
8. *Id. See also* I.N.S. v. Delgado, 466 U.S. 210 (1984) (actions of INS agents in questioning workers at factory was not a seizure, as workers had no reason to believe they would be detained if they gave truthful answers or refused to answer).
9. 489 U.S. 593 (1989).
10. *Id.* at 596-97.
11. 499 U.S. 621 (1991).
12. *Id.* at 626; *see also* County of Sacramento v. Lewis, 523 U.S. 833 (1998) (in a high-speed police pursuit of a motorcyclist, the police vehicle collided with and killed the motorcyclist; the Supreme Court held that a seizure under the Fourth Amendment had not occurred).
13. *But see Hodari D.*, 499 U.S. at 626 ("The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. ['She seized the purse-snatcher, but he broke out of her grasp.'] It does not remotely apply, however, to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee. That is no seizure.").
14. Sheppard v. Beerman, 18 F.3d 147 (2d Cir. 1994).
15. *Id.* at 153.
16. Gale v. Storti, 608 F. Supp.2d 629 (E.D. Pa. 2009) (restricting person's access to a particular areas is not a "seizure"); *see also* Anderson v. New York City Housing Auth., No. 91 Civ. 2584 (JSM), 1995 WL 571375, *6 (S.D. N.Y. Sept. 28, 1995) (officers' lawful entry to remove unlawful occupant of apartment was not a seizure under Fourth Amendment; with the exception of the apartment, the plaintiff was "free to go wherever [s]he desired.").
17. Posr v. Killackey, No. 01Civ.2320LTSGWG, 2003 WL 22962191, *7 (S.D.N.Y. Dec. 17, 2003) ("Once Posr was escorted outside of the courthouse, he was released and was not prevented from going anywhere he wanted—except back into the courthouse.").
18. Campbell v. Westchester County, No. 96 Civ. 0467(JSM), 1997 WL 773702, *4 (S.D. N.Y. Dec. 11, 1997).
19. Brooks v. United States, No. C-94-0714-DLJ, 1995 U.S. Dist. LEXIS 22021 (N.D. Cal. May 16, 1995).
20. No. 07-23008-CIV, 2009 WL 413110 (S.D. Fla. Jan. 27, 2009).
21. The plaintiffs alleged that police officers marched shoulder-to-shoulder to force demonstrators in a desired direction, and that they used physical force, such as deployment of pepper spray and firing of non-lethal projectiles.
22. *Id.* at *9. The same result has been reached in *Rauen v. City of Miami,* No. 06-21182-CIV, 2007 WL 686609 (S.D. Fla. Mar. 02, 2007) and *Keating v. City of Miami,* 598 F.Supp.2d 1315 (S.D. Fla. 2009), *rev'd in part of other grounds*, 598 F.3d 753 (11th Cir. 2010). *See also*, Marbet v. City of Portland, No. CV 02-1448-HA, 2003 WL 23540258 (D. Or. Sept. 08, 2003).
23. City of Miami supervisory officers sought review of this issue, but review was denied on jurisdictional grounds. *See* Keating v. City of Miami, 598 F. 3d 753 (11th Cir. 2010) (dismissing interlocutory appeal from order finding Fourth Amendment violation, but granting qualified immunity because law was not clearly established).
24. 598 F. Supp.2d at 1334. The district judge in *Rauen* had also granted qualified immunity on this issue.
25. 25 F.3d 990, 995 (11th Cir. 1994).
26. *Id.* at 991.
27. *Id.* at 995.
28. *Id. See also* United States v. $32,400.00 in United States Currency, 82 F.3d 135 (7th Cir. 1996) (applying *Hodari D.* and holding that surrounding plaintiff's vehicle at close quarters and ordering plaintiff to stop was not a seizure).
29. *See supra*, note 22.

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14. Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Serv., Inc. 351 F. 3d 1229, 1236 (D.C. Cir. 2003); Perfect 10, Inc. v. CCBill, LLC, 488 F. 3d 1102, 1112 (9th Cir. 2007).
15. *See* Rossi v. Motion Picture Ass'n of Am., Inc., 391 F. 3d 1000, 1004 (9th Cir. 2004).
16. *See* Lenz v. Universal Music Corp., 572 F. Supp. 2d 1150 (N.D. Cal. 2008) (copyright owner is required to consider any fair use doctrine defenses prior to issuing DMCA notice).
17. Io Group , Inc. v. Veoh Networks, Inc., 586 F. Supp. 2d 1132, 1150 (N.D. Cal. 2008) (company's policy of removing content within days of receiving DMCA complaint protected it from liability for publishing copyrighted material).
18. 17 U.S.C. § 512(g) (West 2009).
19. 521 U.S. 844 (1997).
20. Until recently, immunity was thought to be limited to torts, specifically defamation and libel, but the Ninth Circuit, in *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921 (9th Cir. 2007) *aff'd en banc,* 521 F. 3d 1157 (9th Cir 2008), closely examined the language of the statue and determined that immunity was absolute.
21. 47 U.S.C. §§ 230 (c)(1) - (2) (West 2009).
22. 47 U.S.C. § 230(e)(3).
23. 502 F. Supp. 2d 719 (N.D. Ohio 2007).
24. *Id.* at 723-24 (plaintiff alleged 14 claims in tort and contract).
25. *Id.* at 725, quoting *Anthony v. Yahoo! Inc.*, 421 F. Supp.2d 1257 (N.D. Cal. 2006).
26. *Id.* at 727-285.
27. 570 F.3d 1096 (9th Cir. 2009).
28. This occurred just before a local news program was to broadcast a report on the incident. The posts were not removed until after Barnes had filed her lawsuit. *Id.* at 1098-99.
29. *Id.* at 1102-03.
30. *Id.* at 1103 ("the duty that Barnes claims Yahoo violated derives from Yahoo's conduct as a publisher—the steps it allegedly took, but later supposedly abandoned, to de-publish the offensive profiles").
31. *Id.* at 1109. Because that issue had not been fully considered by the district court, the Ninth Circuit remanded.
32. 18 U.S.C. §§ 2701-2711 (1986).
33. 560 F. 3d 199 (4th Cir. 2009).
34. U.S. v. Steiger, 318 F.3d 1039, 1049 (11th Cir. 2003).
35. 18 U.S.C. § 2707.
36. 560 F. 3d at 208.
37. *Id.* at 209.
38. 42 U.S.C. § 12101 *et seq*. (1990).
39. 29 U.S.C.A. § 794d (electronic and information technology accessibility guidelines).
40. 28 C.F.R. § 36.104. This defines "undue burden" in part, as meaning "significant difficulty or expense."
41. U.S. Dept. of Justice, Civil Rights Division, *Accessibility of State and Local Government Websites to People with Disabilities* (June 2003) at http://www.ada.gov/websites2.htm (providing local government IT specialists with information about making government Web sites comply with the ADA). *See* the website for information on the DOJ's toll-free ADA Information Line that provides access to ADA specialists during business hours. ML

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30. By contrast, apprehension by the use of deadly force would constitute a seizure, as established by *Tennessee v. Garner,* 471 U.S. 1, 7 (1985) ("[A] pprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment"). *See also* Carr v. Tatangelo, 338 F.3d 1259, 1268 (11th Cir. 2003) ("Officer Fortson had shot to kill to save the life of Officer Tatangelo, and it is his intent and the physical contact of the bullet from his gun that governs our Fourth Amendment, seizure analysis. Although Carr was not immediately stopped ... by the bullet from Officer Fortson's gun, he nevertheless was seized within the meaning of the Fourth Amendment when the bullet struck or contacted him").
31. 240 Fed. Appx. 104 (7th Cir. 2007).
32. *Id.* at 111.
33. *Id.* at 127.
34. 341 F.3d 600 (7th Cir. 2003).
35. *Id.* at 603.
36. *Id.* at 605. In *Croal v. United HealthCare of Wisconsin, Inc.*, No. 07-CV-837, 2009 WL 913641, *15 (E.D. Wis. Mar. 31, 2009), police responding to a domestic violence complaint used a taser on a family member. Other relatives came outside to protest, and were knocked down by the officers trying to arrest a different individual. The court ruled that the alleged intentional conduct of a police officer arresting a different individual was not a seizure of the plaintiffs under the Fourth Amendment. *Compare Acevedo v. Canterbury*, 457 F.3d 721, 725 (7th Cir. 2006) (distinguishing *McCoy* where officer responded to call of a disturbance and punched plaintiff in the face, causing him to fall to the ground; after plaintiff was treated at hospital, he was brought to police station where he was arrested for assault. "Not only did [the officer] knock him to the ground in a location far away from his home under the general control of the police (the auto pound); the force of that blow caused Acevedo to black out momentarily. Even after he regained consciousness, he claims that he remained in a daze for a time[.]").
37. 50 Fed. Appx. 300 (6th Cir. 2002).
38. *Id.* at 302.
39. No. 05-73244, 2007 WL 1768767, *3 (E.D. Mich. June 15, 2007).
40. *Id.*
41. No. 02 C 6248, 2005 WL 3359124, *3 (N.D. Ill. Dec. 08, 2005).
42. *Id.*
43. *See* County of Sacramento v. Lewis, 523 U.S. 833, 843 (1998) (where there is no search or seizure, the use of force is unconstitutional only if it shocks the conscience under the Fourteenth Amendment). Excessive force claims under the Fourth Amendment are analyzed under a "reasonableness" standard. *See* Graham v. Connor, 490 U.S. 386, 395 (1989). ML

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rights-of-way are reserved.
15. 28 C.F.R. § 35.151.
16. Kinney v. Yerusalim, 9 F.3d 1067, 1073 (3d Cir. 1993). *See also* Reichenbach v. City of Columbus, No. 2:03-CV-1132,