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The Hazy Border Between Excessive and Acceptable Force During a Demonstration

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The Hazy Border Between Excessive and Acceptable Force During a Demonstration

On September 20, 2016 at 3:54 hours, a Charlotte-Mecklenburg Police Department (CMPD) undercover officer shot and killed Keith Scott. Immediately, the shooting draws a large number of people out of their apartments and into the street. A live social media post from a young girl on the scene was quickly circulated. The message was forwarded by every conceivable electronic means and quickly spread throughout the community. Live media posts repeatedly "reported" that Mr. Scott, an African American, was unarmed and holding a book when he was shot by a white officer even though the objective evidence indicated that Mr. Scott was holding a firearm when he was shot by an African American police officer. In response to the social media posts, the crowd's numbers swells throughout the afternoon and into the evening. Around 5:00 p.m. additional uniformed officers, were assigned to traffic control posts and to provide crime scene security. Even more people arrive in response to the media posts. At 8:45 p.m. the crime scene is quickly shut down due to concerns for the safety of the detectives and crime scene technicians. At approximately 9:00 p.m. a sergeant is attempting to leave the scene in his vehicle but his car is encircled the crowd and persons attempt to tip the car over. Several more persons encircle the car preventing it from leaving and police from approaching the car. A short time later CMPD's Civil Emergency Unit (CEU) is activated and two squads gear up and immediately respond to the scene. CEU Officers began moving the crowd away from marked police cars so they can leave the area. In an attempt to de-escalate the situation, CMPD command decides to remove CEU officers. Once detectives and other police personnel leave the area, CEU pulls back and waits to board a bus to leave the scene. The crowd however continues to grow and surrounds the bus. At 10:00 p.m. several local news stations arrive and turn on their camera lights to go live. The crowd becomes even more agitated and within moments begins to hurl rocks and bottles at officers. A Captain of the CEU is struck with a rock and goes down. He requires 12 stitches and receives a concussion. Approximately 15 other officers are injured by projectiles that are hurled at them by an angry mob. The bus arrives to remove the officers, but the crowd encircles the bus preventing it from leaving. CEU officers exit the bus and form a protective circle around the bus. Using the bus's public address system CEU captain advises the crowd that they are participating in an unlawful assembly and to disperse. He also warns the crowd that chemical agents will be used along with other less lethal crowd control devices. The crowd responds with a barrage of projectiles. CMPD deploys a stinger grenade (rubber pellets and OC (oleoresin capsicum pepper)) immediately followed by a Triple Chaser CS (tear gas) canister to clear the crowd.

Thus began a week of sporadic demonstrations and violence that resulted in a state of emergency being declared wherein the National Guard was called to assist in quelling the violence. During this period stores were looted, police and private

citizens were assaulted, interstates were blocked, fires were set and one homicide occurred during a demonstration being held uptown. On the first two nights CMPD dispersed a wide variety of less lethal munitions including pepper spray, CS spray, stinger devices, and flash bang devices. Approximately 17 officers were injured the first two nights.

Prior to the widespread violence, Charlotte had successfully managed the 2012 Democratic National Convention. There were few arrests in part because CMPD actively and aggressively sought out leaders of the various protests to help facilitate demonstrations. Just prior to the convention Charlotte passed an "Extraordinary Event Ordinance" which in part provided leeway for the City to abandon rigid regulatory schemes related to festivals and parades. Due to the Occupy movement that settled in on our old City Hall lawn, Charlotte was able to identify several issues related to large scale events that needed to be reviewed with an eye towards revamping. Traditionally Charlotte had sought strict compliance with its basic regulatory schemes dealing with large scale festivals and protests. However, prior to the DNC, CMPD moved away from such an approach and incorporated flexibility into its operational plan that essentially evolved around an understanding that if the protestors didn't "break anything or hurt anyone" CMPD will provide you a meaningful route for your demonstration as close to the DNC as possible. (See Chart attached)

After the events of September 2016 CMPD reviewed its protocol concerning managing large scale events. One of the questions that came up was did CMPD wait too long before deploying less lethal options. Admittedly, command staff was confronted with several dilemmas: Do we hold off deploying munitions in hopes that the violence is sporadic? Or, do we deploy munitions against the most violent. If we do deploy, will bystanders and onlookers join the violent protest.

There is no doubt that *Graham*[i] and its progeny provides the correct constitutional analysis in determining whether the traditional use of chemical and other less lethal munitions is excessive under the objective reasonableness standard of the Fourth Amendment. When a demonstration turns violent, less lethal force may be deployed under a variety of different circumstances. Clearly some level of force is permissible as a matter of law when officers confronted with projectiles being hurled at them. In such a situation, an officer or citizen's justification to use some level of force is primarily based on the fact that they are confronted with an imminent threat of physical injury and therefore have a right to defend themselves. Likewise, some level of force may be used to effect the arrest or detention of someone for a crime where the person is resisting arrest or attempting to evade custody. *Terry v Ohio*, 88 S. Ct 1868(1968). Arrest scenarios may range from a person who has committed a low level crime as a matter of civil disturbance to felonious assaultive behavior where the crime itself is serious and establishes that the person is an imminent threat

to police or bystanders. But what about the circumstance wherein police find themselves outnumbered by demonstrators, some who are violent and others who are simply onlookers? Can police use chemical agents and other less lethal options to disperse the entire large group? Is the Fourth Amendment's protection extended to persons who suffer a secondary effect of chemical or less lethal options such as a stinger round?

The Fourth Amendment only protects against unreasonable "searches" and "seizures." *County of Sacramento v. Lewis*, 523 U.S. 833, 843, 118 S.Ct. 1708, 1715, 140 L.Ed.2d 1043 (1998). Where no search has occurred, a person must assert that they were "seized" within the meaning of the Fourth Amendment in order to trigger its protection. "A seizure triggering the Fourth Amendment's protections occurs only when government actors have, by means of physical force or show of authority, in some way restrained the liberty of a citizen[.]" *Graham*, 490 U.S. at 395 n. 10, 109 S.Ct. at 1871 n. 10. "Violation of the Fourth Amendment requires an intentional acquisition of physical control." *Brower v. County of Inyo*, 489 U.S. 593, 596, 109 S.Ct. 1378, 1381, 103 L.Ed.2d 628 (1989). "[A] Fourth Amendment seizure does not occur whenever there is a governmentally caused termination of an individual's freedom of movement (the innocent passerby), nor even whenever there is a governmentally caused and governmentally desired termination of an individual's freedom of movement (the fleeing felon), but only when there is a governmental termination of freedom of movement through means intentionally applied." *Brower*, 489 U.S. at 596, 109 S.Ct. at 1381 (emphasis in original). To constitute a seizure, "the taking or detention itself must be willful. This is implicit in the word 'seizure,' which can hardly be applied to an unknowing act." *Id*. (internal quotations omitted). *Logan v. City of Pullman*, 392 F. Supp. 2d 1246 (E.D. Wash. 2005).

Deployment Over an Entire Group and Secondary Exposure

Interestingly, the United States Supreme Court in *Bray v. Alexandria Women's Health Clinic* noted as a matter of policy that a large group of persons committing low level crimes is distinguishable from the lawless acts of an individual.

> "Of course, the wholesale commission of common state-law crimes creates dangers that are far from ordinary. Even in the context of political protest, persistent, organized, premeditated lawlessness menaces in a unique way the capacity of a State to maintain order and preserve the rights of its citizens. Such actions are designed to inflame, not inform. They subvert the civility and mutual respect that are the essential preconditions for the orderly resolution of conflict in a free society."

Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 287 (U.S. 1993).

This distinction set out in *Bray*, however, has not been specifically adopted by Federal Appellate Courts. If it had, it certainly would add clarity when force could be deployed against a large unruly crowd. However, such a rule would certainly be controversial in the court of public opinion and run counter to the main theme within *Graham* that absent flight, force is appropriate when police or others are confronted with some objective threat of imminent harm.

The law in this area is still evolving. Initially, some courts treated secondary exposure as a non-seizure thereby denying a remedy under the Fourth Amendment. For example in *Logan v. City of Pullman,* 392 F. Supp. 2d 1246 (E.D. Wash. 2005), the Court treats secondary exposure as unintentional and therefore not a seizure under the Fourth Amendment. The undisputed facts in *Logan* are that after a large fight broke out a nightclub, the manager called 911, advised police that "mayhem" and "mass chaos" were occurring at the club and that innocent persons were being injured. Police responded and officers upon observing 20 -30 people fighting pepper sprayed the center of the group that was fighting. The pepper spray immediately diffused through the building, exposing persons on the second floor who were not involved in the fight. The Court found that officers did not intentionally disperse pepper spray on the second floor and as such a seizure did not occur. *Id.* at 1255-1256.

> Plaintiffs have not presented the Court with any evidence that the Defendant Officers intentionally dispersed O.C. on the second floor. Although the O.C. immediately diffused through the building, exposing those who were upstairs on the dance floor as well as those who remained on the first floor, Plaintiffs have not submitted any evidence showing the Defendant Officers intended to effect those individuals who were not sprayed directly. Therefore, since none of the Plaintiffs who suffered secondary exposure from the O.C. on the first or second floor were the deliberate and intended object of the Defendant Officers' use of O.C., they were not "seized" within the meaning of the Fourth Amendment. See *Brower,* 489 U.S. at 596, 109 S.Ct. at 1381. Therefore, the Plaintiffs who suffered secondary exposure may only pursue excessive force claims under the substantive due process clause of the Fourteenth Amendment. See *Lewis*, 533 U.S. 833, 118 S.Ct. 1708. However, the Plaintiffs on the first floor who were intentionally sprayed with O.C. were seized within the meaning of the Fourth Amendment because the Defendant Officers dispersed O.C. in an attempt to gain physical control over those individuals. Therefore, those Plaintiffs may pursue their excessive force claims under the Fourth Amendment.

Id. at 1259

However the majority of courts treat the dispersal of chemical munitions, even when the person dispersing the chemical agent did not intend to expose the entire crowd, as a seizure under the Fourth Amendment.

In *Dalrymple v. United States*, 460 F.3d 1318 (11th Cir. Fla. 2006) the 11th Circuit agreed with the lower court that police could disperse chemical agents against the entire crowd when a group demonstrators ran towards agents located behind barricades. As such, the use of a gas gun was reasonable under the Fourth Amendment. The Court further upheld a second discharge of gas when the demonstrators surged again towards a barricade while throwing rocks, bottles, a stool and coolers at the federal agents. The fact that not all demonstrators exposed to the gas were directly participating in the obstructive behavior did not seem to deter the Court from upholding the magistrates finding that the use of gas was reasonable under the circumstances.

> The magistrate judge found that the gas gun was used only in response to threats posed by the demonstrators. For example, the magistrate judge found that the demonstrators posed a threat when they ran towards the Gonzalez's property upon the agents' arrival and then refused to return to the opposite side of the street barricade upon the agents' requests. The magistrate judge further found that, as a result, an agent sprayed the Israeli gas gun in the direction of the demonstrators who were advancing on the property. The magistrate judge found that the gun was [*1328] used again when the demonstrators behind the barricade posed a threat by surging towards the front of the barricade while throwing objects including rocks, bottles, a stool, and coolers at the agents and refused to comply with the verbal and physical commands of the agents. Based on these undisputed findings of fact, we agree with the district court that such obstruction and interference posed [**24] by the demonstrators justified the use of either pepper spray or tear gas and was objectively reasonable under the circumstances.
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> *Id*. at 1327-1328

Likewise, in *Asociasion De Periodistas De Puerto Rico v. Mueller*, 680 F.3d 70 (1st Cir. P.R. 2012), federal agents executed a search warrant at an apartment complex and attempted to keep civilians outside a fence that in part blocked entrance into the complex. The journalists alleged that the agents used excessive force against them by deploying pepper spray, pushing them, punching them, and kicking them.

Furthermore, that they were in fact attempting to move back but could not because of the narrow opening in the gate. No rocks, bottles or missiles were hurled at the agents although it was clear from the videos that several persons in the crowd were agitated and directing violent taunts at the agents. *Id.* at 72-75.The Court noted that the use of pepper spray and physical contact with the journalist constituted a "non-arrest seizure" for purposes of the Fourth Amendment. The Court reasoned that crowd's non-compliance with the agents orders coupled with their verbal threats would lead a reasonable officer to believe the use of pepper spray and limited body strikes was reasonable. *Id.* at 83.

> Given the perceived noncompliance by the crowd inside the complex, the previous verbal threats, the presence of FBI personnel, civilians and evidence within the vicinity, and the serious concerns about maintaining control of the area, the agents reasonably could have concluded that the level of force that they used was appropriate. In calm retrospection, one may be tempted to question the necessity or wisdom of specific agents' actions against particular plaintiffs . . . but we cannot say with respect to any of the agents' conduct, in gross, that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Maldonado*, 568 F.3d at 269 (internal quotation marks omitted).

Id.

In *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. Cal. 2012), Officers were confronted with a large unruly mob and deployed pepper ball projectiles in the direction of the mob to disperse the crowd. One person was struck in the eye and suffered significant damage including temporary blindness and permanent loss of vision. Plaintiff sued under § 1983 asserting that the Police's decision to fire into the crowd was excessive. The Court found that the Plaintiff was indeed seized under the Fourth Amendment. The fact officers only wanted to move the crowd back and did not intend to hit Plaintiff was insignificant to the Court.

> The officers also argue that their actions could not constitute a seizure because their intent was to disperse the crowd. The Supreme Court has repeatedly held that the Fourth Amendment analysis is not a subjective one. *See, e.g., Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080, 179 L. Ed. 2d 1149 (2011); *Brendlin*, 551 U.S. at 261; *Whren v. United States*, 517 U.S. 806, 813, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). The intent that counts under the Fourth Amendment is the intent [that] has been conveyed to the person confronted, and the criterion of willful restriction on freedom of movement is no invitation to look to subjective intent when determining who is seized." *Brendlin*, 551 U.S. at 260-61

> (alterations in original) (internal quotation marks and citation omitted). Recently, the Court again emphasized that "the Fourth Amendment regulates conduct rather than thoughts." *al-Kidd*, 131 S.Ct. at 2080. Whether the officers intended to encourage the partygoers to disperse is of no importance when determining whether a seizure occurred. The officers took aim and fired their weapons towards Nelson and his associates. Regardless of their motives, their application of force was a knowing and willful act that terminated Nelson's freedom of movement. It unquestionably constituted a seizure under the Fourth Amendment.

Id. at 876-877

Generally speaking, the use of pepper spray and other irritants that incapacitates an individual(s) even temporarily will rise to the level of a seizure and fulfill the requirements for an excessive force claim. Because the infliction of pepper spray and other chemical munitions on an arrestee has a variety of incapacitating and painful effects, its use should be considered a significant degree of force. Accordingly, it should not be used lightly or gratuitously against an arrestee or persons in a crowd who are complying with police commands or otherwise poses no immediate threat to the arresting officer. *Tracy v. Freshwater*, 623 F.3d 90 (2d Cir. N.Y. 2010) See also *Henderson v. Munn*, 439 F.3d 497, 502-03 (8th Cir. 2006); *Vinyard v. Wilson*, 311 F.3d 1340, 1348-49 (11th Cir. 2002); *Headwaters Forest Def. v. County of Humboldt*, 276 F.3d 1125, 1128-30 (9th Cir. 2002); and *Adams v. Metiva*, 31 F.3d 375, 386 (6th Cir. 1994).

Moreover, due to concerns of secondary exposure to bystanders and on-lookers, wholesale dispersal simply to move a crowd back may be deemed objectively unreasonable under the Fourth Amendment. However, the failure of the crowd to follow lawful commands or surge towards a police barricade coupled with fighting words may establish a sufficient threat level to permit targeted dispersal at those exhibiting assaultive behavior. Officers should issue warnings before and during deployment repeatedly over a long range audio device. The warning should be consistent, recorded and preserved.

Deployment of Impact Projectiles

The constitutional issue is not whether striking someone with a projectile is a seizure but at what threat level should an impact projectile be deployed from a gun or a launcher. All impact projectiles potentially inflict pain and may cause temporary incapacitation when the device strikes an individual. Deploying such devices against a passive resister who has not committed a serious crime or who is not presenting an

active threat of violent physical concussive aggression (punching, kicking throwing objects etc.) will in all likelihood be deemed excessive. "Force that imposes serious consequences requires significant circumscription." Estate of Armstrong v. Village of Pinehurst, 810 F.3d 892, 903 (4th Cir. 2016) "The police arsenal includes many different types of force, which intrude upon the Fourth Amendment rights of the individual to varying degrees. We have recognized that "physical blows or cuts" often constitute a more substantial application of force than categories of force that do not involve a physical impact to the body." *Nelson v. City of Davis*, 685 F.3d 867 (9th Cir. Cal. 2012); See also *Forrester v. City of San Diego*, 25 F.3d 804, 807 (9th Cir. 1994).

Lessons Learned

Legal counsel for a municipality may want to conduct a civil disturbance "audit" well before an event occurs that could trigger civil disobedience. The following is a list of recommended topics to review:

1. Do you have a regional mutual aid agreement in place just in case your Department needs additional officers to respond to a civil disturbance?

2. Does your Department place its civil disturbance unit on alert when there has been a critical police incident such as an officer involved shooting?

3. Do your police commanders understand your state laws on lawful dispersal of a crowd and is it incorporated in their training. Mock or practical exercises are a must.

4. Is the chain of command clear on who declares a state of emergency? During of civil disturbance it is recommended that the request be made by the Department that is dealing with the emergency. For example, a police chief should have direct contact with the person that declares the state of emergency rather than having to filter this request through another emergency management team or entity.

5. Do you know what type of less lethal devices your Department has in its possession and have they crafted a SOP that addresses the appropriate threat level be present before those devices are deployed?

6. If time permits have a decontamination site ready for on-lookers and secondary exposure for not only the police but also the public.

7. Train your officers identifying Reactive Airway Dysfunction Syndrome. See *Nasseri v. City of Athens*, #09-11473, 2010 U.S. App. Lexis 7297 (Unpub. 11th Cir.) wherein the 11th Circuit held plaintiff established a

claim for deliberate indifference to know medical need under the Fourteenth Amendment.

8. Do you have a mobile mass arrest protocol that takes in consideration your booking, bail and first appearances?

9. Finally, don't forget to stand upwind.

[i] In reviewing whether force is excessive, the Supreme Court in *Graham v. Connor*, 490 U.S. 386, 394, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) first requires us to balance the nature and quality of the intrusion on the individual's rights against the "countervailing governmental interests at stake." Factors to consider in making a determination of whether the amount of force used to effectuate a seizure is reasonable include the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he actively is resisting arrest or attempting to evade arrest by flight. Other Federal Appellate Courts have added additional or corollary factors that include whether the individual was under arrest or suspected of committing a crime, was armed, or was interfering or attempting to interfere with the officer's execution of his or her duties. In the end, the excessive force inquiry "looks to whether the force used to seize the suspect was excessive in relation to the danger he posed--to the community or to the arresting officers--if left unattended." *Estate of Starks v. Enyart*, 5 F. 3d 230, 234 (7th Cir. 1993) (finding that the amount of force that is constitutionally permitted to execute a seizure decreases with the threat of danger posed by the individual being seized).

Crowd Management, Intervention & Control Strategies

SITUATION	**Lawful Assembly** Lawful First Amendment Activity held on property that is traditionally used for demonstrations such as Public Parks, Sidewalks and Public Streets. It includes such activity as: • Speeches • Picketing • Marches • Assemblies • Protests	**Non- Violent Civil Disobedience** Traditional non-violent activity where some or all participants violate regulatory ordinances or statutes and participate in such activities as: • Sit-ins or Sit-downs, • Blocking traffic, • Blocking entrance and exits to selected buildings or property, • Spontaneous marching in Street w/o permit.	**Isolated Violent Behavior** Isolated physical violence against persons or property committed by a small group of persons that may be associated with a lawful assembly or non-violent civil disobedience such as : • Throwing objects like rocks and bottles, • Smashing windows or destroying property, • Does not include verbal taunting or the use of offensive speech in and of itself.	**Unlawful Assembly** Widespread physical violence against persons and/or property or the imminent threat of widespread physical violence against persons and/or property committed by an identifiable large group of people.
	Police Presence Monitoring	**Police Presence Limited Intervention**	**Limited Intervention Isolated Arrests**	**Crowd Control Arrest and Dispersal**

RESPONSE	• Ensure that persons are allowed to peacefully exercise their rights.
	  ○ Establish and maintain communication with event holder via liaison.
	  ○ Monitor and assess crowd behavior without interfering with the Activity.
	  ○ Maintain neutrality and focus on potential criminal behavior and public safety concerns .
	  ○ Maintain tolerance even if taunted or baited. Don't overreact, but maintain readiness to respond to violent behavior.
	• Do not interfere with media or recording of event by spectators or participants.
		• Monitor and assess crowd behavior without interfering with lawful Activity.
		• Record and document acts of civil disobedience.
		• Establish and maintain communication with event holder via liaison.
		• Seek voluntary compliance or time table for compliance.
		• Do not lock into one position or stance but remain fluid ready to respond.
		• Re-route traffic if feasible.
		• Issue warnings before any police action with emphasis on waiting out disobedience.
		• If police action (arrest/ removal) necessary, instruct on arrest process and seek compliance.
		• Limit force option to commands and soft empty hands. Higher level of control must be approved by supervisor.
		• Do not interfere with media or recording unless presence physically interferes w/arrest.
			• Use organizers and monitors to gain voluntary compliance if feasible.
			• Identify and track key suspects.
			• Video recording of suspects and police action.
			• Re-route traffic.
			• Crowd Control.
			• If possible, arrest suspects away from group and immediately remove from area.
			• Document and collect evidence for prosecution.
			• Do not interfere with media or recording unless presence physically interferes with arrest.
				• Identify and isolate key offenders
				• Video recording of suspects and police action
				• Quickly Extract and arrest key offenders if tactically feasible.
				• If feasible issue dispersal order to persons associated with group committing violent crimes.
				  ○ Repeated bi lingual amplified commands.
				  ○ Advise dispersal route
				  ○ Allow reasonable time to disperse
				  ○ Record dispersal order
				  ○ Position UC's throughout crowd including back of crowd to document order could be heard.
				• Evidence collection